Neutral Citation Number: [2008] IEHC 467

THE HIGH COURT

2008 3521 P

BETWEEN

MARTIN DONNELLAN

PLAINTIFF

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
THE COMMISSIONER OF AN GARDA SÍOCHÁNA,
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice William M. McKechnie delivered on the 25th day of July 2008

Background

1. This case raises an important point for the management and senior ranks of An Garda Síochána. On the 7th June 2008, the plaintiff, who then held the commission rank of Assistant Commissioner in An Garda Síochána, was retired from the force by reason of having reached his 60th birthday. In these proceedings he challenges the underlying statutory basis, which makes provision for this compulsory retirement, on age grounds. He does so by asserting, firstly, that the governing statutory instrument, namely the Garda Síochána (Retirement) Regulations 1996 (S.I. No. 16/1996), is *ultra vires* the Police Forces Amalgamation Act 1925, which is the parent Act, and secondly, that its provisions are incompatible with Council Directive 2000/78/EC, of 27th November 2000, 'establishing a general framework for equal treatment in employment and occupation'.

2. The plaintiff is a married man with a family and up to the date last mentioned had spent 40 years with the force. His ultimate superior was the Commissioner who is the second named defendant herein. The Minster for Justice, Equality and Law Reform ("The Minister") is sued as being the person ultimately responsible for An Garda Síochána and also as the "corporation sole" who made the relevant statutory provisions specifying the retirement age for members of the force. Ireland and the Attorney General are joined as being vicariously liable for any "wrongs" that may have been committed by the other defendants named herein.

3. In these proceedings, which were commenced by way of a Plenary Summons, the plaintiff seeks a variety of declarations to the effect (i) that S.I. No. 16/1996 ("the 1996 Regulations") firstly is *ultra vires* the powers contained in s. 14 of the Police Forces Amalgamation Act 1925 ("the 1925 Act" or "the Act of 1925") (see paras. 6 and 19 *infra*.), and secondly is incompatible with Council Directive 2000/78/EC, ("the Directive") and (ii) that if successful he is entitled to serve as an Assistant Commissioner until age 65 as originally provided for by S.I. No. 335/1951. In this regard, although included in the Statement of Claim, he does not now formally seek either injunctive relief or damages.

4. Accordingly there are two issues in this case, namely the *ultra vires* or administrative law issue and the directive issue. In this context and before I deal with the grounds of challenge, it is worth noting that no relief is sought on the basis of any alleged breach of employment contract or on the basis of legitimate expectation. Moreover, whilst the plaintiff has lodged a claim with the Equality Tribunal under the Employment Equality Act 1998, as amended by the Equality Act 2004, that in itself has no direct bearing on this case. Furthermore no question turns on *locus standi* or on the issue of acquiescence by the plaintiff.

5. The defendants in their defence assert that the 1996 Regulations are *intra vires* s. 14 of the 1925 Act, that the plaintiff's terms of employment, provided, *inter alia*, that his retirement age could be changed by Statutory Instrument and that when appointed Assistant Commissioner, he knew that 60 years of age was the appropriate retirement age for that rank. In addition they plead that as a matter of administrative law and also for the purposes of the framework Directive, the making of the 1996 Regulations was objectively and reasonably justified by a legitimate legislative aim, namely the maintenance of an effective and efficient police force, with the means being proportionate to that aim. In the premise, they say that the plaintiff is not entitled to the relief claimed or any relief.

Domestic Legislative Provisions:

6. As the challenge in this case is focused exclusively on the validity of the 1996 Regulations it would be useful at the outset to outline the relevant provisions thereof to include the provisions dealing with other members of the force. As this will show, the Minister, from time to time, has exercised the powers contained in s. 14(1)(b) of the Act of 1925, allowing him/her to make regulations relating to "*the promotion, retirement, degradation, dismissal and punishment of members of the amalgamated forces*". The following such Regulations are of relevance to this case:-

(1) Garda Síochána (Retirement)(No.2) Regulations 1951 – S.I. No. 335/1951 ("The 1951 Regulations"):

Regulation 6

"The following provisions shall apply to future members of An Garda Síochána in lieu of the existing provisions:

(a) subject to subparagraph (b) of this para., every such member shall retire from the Garda Síochána on attaining the age which is applicable to the rank in the Garda Síochána for the time being held by such member, that is to say:

(i) in the case of a member holding any rank higher than the rank of Chief Superintendent – on attaining the age of sixty-five years, and

(ii) in the case of a member holding the rank of Chief Superintendent or of Superintendent – on attaining the age of sixty years, and

(iii) in the case of a member below the rank of Superintendent – on attaining the age of fifty-seven years,

(b) Notwithstanding subparagraph (a) of this paragraph, if, but only if, the Commissioner is satisfied that it is in the interests of the efficiency of the Garda Síochána that the age at which any such member would retire under the said subparagraph should be extended because of the possession by that member of some special qualification or experience, the Commissioner may, with the consent of the Minister, extend that age in the case of that member by such period, not exceeding five years, as the Commissioner shall determine."

(2) Garda Síochána (Retirement) Regulations 1990 – S.I. No. 318/1990 ("The 1990 Regulation"):

Regulation 3

"Notwithstanding anything in the Garda Síochána (Retirement) Regulations…, as amended, a member of the Garda Síochána appointed to the rank of Commissioner after the commencement of these regulations shall retire-

(a) on completion of 7 years service in that rank, or

(b) on attaining the age of 60 years,

whichever is the earlier:

Provided however that if the member is aged 55 years or more on such commencement, he shall retire –

(a) on completion of 5 years service in that rank, or

(b) on attaining the age of 65 years,

whichever is the earlier"

(3) Garda Síochána (Retirement) Regulations 1996 – S.I. No. 16/1996 ("The 1996 Regulation"):

Regulation 3

"Notwithstanding anything in the Garda Síochána (Retirement) Regulations…, as amended… a member of the Garda Síochána appointed to the rank of Assistant Commissioner or Deputy Commissioner after the commencement of these regulations shall retire on attaining the age of 60.

Regulation 4

"These regulations shall not apply to a member of the Garda Síochána appointed to the rank of Deputy Commissioner who at the time of coming into operation of these Regulations holds the rank of Assistant Commissioner."

(4) An Garda Síochána (Retirement) (No.2) Regulations 2006 – S.I. No. 686/2006 ("The 2006 (No. 2) Regulations"):

Regulation 2

"Paragraph 6(a)(iii) of the Garda Síochána (Retirement) (No.2) Regulations 1951… is amended by the substitution of 'sixty years' for 'fifty seven years'"

(5) An Garda Síochána (Reserve Members) Regulations 2006 – S.I. No. 413/2006 – ("The 2006 (Reserve Members) Regulations"):

Regulation 10

"(1) A reserve member's service shall end when he or she reaches the age of 65."

In addition to these general regulations the Minister has occasionally also made comparable regulations relative to particular persons or their circumstances or classes of persons or their circumstances. However, as these were particular in application they are not relevant to this case.

7. As can therefore be seen, the retiring position of members of the force can be summarised as follows:-

(1) *Re: Commissioner*: By virtue of the 1951 Regulations the retiring age of an appointee to this rank was sixty five. That was changed in 1990, when the Commissioner was obliged to retire, on completing a period of seven years in that rank, or on attaining the age of sixty whichever was the earlier. An exception was made for those who were aged 55 in 1990, but that has no application to the facts of this case. This remains the current situation.

(2) *Re: Deputy Commissioners/Assistant Commissioners*: The retiring age of sixty five, specified in the 1951 Regulations for the holders of these ranks, was reduced to sixty by the 1996 Regulations, the subject matter of these proceedings. This remains the current situation.

(3) *Re: Chief Superintendents/Superintendents*: The 1951 Regulations continue to apply with the relevant retiring age being sixty.

(4) *Re: All ranks below that of Superintendent*: The retiring age of fifty seven, which had been set by the 1951 Regulations, was increased for such members to age sixty, by the 2006 (No. 2) Regulations.

(5) *Re: Garda Reserve*: The retiring age of such members was fixed, in the 2006 Garda Reserve Regulations, at sixty-five.

The above summary represents the immediate statutory position in which the following events and circumstances should be viewed.

The Plaintiff's Case
8. Since joining the force in March 1968, the plaintiff has held the following ranks and posts within the service:-

(a) Between July 1968 and December 1973, he was stationed at Chapelizod/Ballyfermot Garda Station.

(b) In December 1973, he was appointed to the Detective Branch Crime Ordinary, Central Detective Unit, Dublin Castle.

(c) In June 1981, he was promoted to Detective Sergeant assigned to the Bridewell Garda Station.

(d) In April 1990, he was promoted to Inspector and appointed as Detective Inspector to Donnybrook Garda Station.

(e) In 1996, he was promoted to Detective Superintendent and assigned to Letterkenny Garda Station.

(f) In May 2000, he was promoted to Detective Chief Superintendent in charge of the Garda National Immigration Bureau.

(g) In April 2004, he was transferred, with that rank, to the National Bureau of Criminal Investigation.

(h) On the 31st August 2005, he was promoted to Assistant Commissioner.

(i) In May 2007, with that rank, he was transferred to the National Support Services and from that date to his retirement he was in charge of the following eight national garda units:-

(i) National Drugs Units,

(ii) National Bureau of Fraud Investigation,

(iii) National Bureau of Criminal Investigation,

(iv) Garda National Immigration Bureau,

(v) Criminal Assets Bureau,

(vi) Garda Technical Bureau and Forensic Science Department including Fingerprints, Ballistics and Handwriting sections,

(vii) Garda Reserve Unit,

(viii) Operational Support Unit including Helicopter, Water and Horse Units.

9. As can therefore be seen, by June of this year the plaintiff had completed 40 years service in An Garda Síochána and during that time he was awarded the Scott Medal for valour, he received special commendations for outstanding bravery and professionalism and at no stage was he ever the subject of any disciplinary inquiry or proceedings. His professionalism and level of commitment have always been of the highest level. None of these facts have been put in issue by the defendants. His general health, both physical and mental, is good and he is both anxious and capable of continuing in his present post. To that end, by letter dated the 28th February 2008 he requested an extension of his tenure under Regulation 6(b) of the 1951 Regulations. The Commissioner declined to invoke this provision, and accordingly his request was refused. He was therefore compulsorily retired, by operation of law, on the 7th June 2008, with an entitlement to a tax free lump sum of €210,332 (being 1½ times his retiring salary) and an annual pension of €70,110, which is linked to salary scales of serving members into the future.

Composition/Structure of An Garda Síochána
10. The force of which the plaintiff was a member has an unusual structure to it, in that the number of members within the Commissioner ranks equal 15 to include one vacancy which has yet to be filled. At Chief Superintendent and Superintendent level there are 239 posts, all out of a total force of 13,874. This funnel or narrowing effect at the top and its consequences are matters relied upon by the defendants in their justification of the 1996 Regulations. Whilst no breakdown is available for that year, the following would appear to be the current position:

Rank	**Number**	**Proportion%**
Commissioner	1	<0.01
Deputy Commissioner	1*	<0.01
Assistant Commissioner	12	0.09
Chief Superintendent	52	0.38
Superintendent	187	1.35
Inspector	317	2.28
Sergeant	2,164	15.6
Garda	11,140	80.29
Total	**13,874**	**100**

*A Recent retirement has resulted in a vacancy for one Deputy Commissioner

4.1% of membership is above the rank of Sergeant

1.83% of membership is above the rank of Inspector

11. As of March/April 2008, the following additional information is available about the force:-

(1) The age-profile of the Force
Figures as of the 15th March 2008 Years Service

			Years Service					
Age	**Total**	%	Under 5	5 to 10	10 to 15	15 to 20	20 to 30	Over 30
Under 25	**1,312**	9.6	1,312					
25 to 30	**2,931**	21.4	2,058	873				
30 to 35	**2,137**	15.6	377	1,760				
35 to 40	**967**	7.1	53	357	216	341		
40 to 45	**2,215**	16.2		7	1,068	523	617	
45 to 50	**2,352**	17.1		2	211	127	2,012	
Over 50	**1,778**	13			4	4	896	874
		100%	27.80%	21.90%	10.90%	7.30%	25.70%	6.40%
Total	**13,692**		**3,800**	**2,999**	**1,499**	**955**	**3,525**	**874**

53.7% of sworn members are under the age of 40

(2) The Average Retirement Age of Members of Commissioner Rank
Figures as of end of April 2008

Number of Voluntary and Compulsory Retirements - **Commissioner Ranks**							
Retirement Status	2003	2004	2005	2006	2007	End April 2008	Total
Compulsory Retirements	2	0	5	1	2	0	10
Voluntary Retirements	0	0	0	0	0	1	1
Total	2	0	5	1	5	1	11
***Breakdown of Age on Voluntary Retirement**							
64 years of Age	0	0	0	0	0	1	1

(3) The Average Retirement Age of Members of Chief Superintendent Rank

Number of Voluntary and Compulsory Retirements - **Chief Superintendent Rank**							
Retirement Status	2003	2004	2005	2006	2007	End April 2008	Total
Compulsory Retirements	4	5	6	4	3	1	23
Voluntary Retirements	0	2	2	3	0	0	7
Total	4	7	8	7	3	1	30
***Breakdown of Age on Voluntary Retirement**							
59 years of Age		1	1	2			4
58 years of Age			1				1
57 years of Age				1			1
56 years of Age							
55 years of Age							
54 years of Age							
53 years of Age							
52 years of Age							
51 years of Age		1					1
50 years of Age							
Total		2	2	3			7

(4) The Average Retirement Age of Members of Superintendent Rank

Number of Voluntary and Compulsory Retirements - **Superintendent Rank**							
Retirement Status	2003	2004	2005	2006	2007	End April 2008	Total
Compulsory Retirements	7	9	13	7	2	5	43
Voluntary Retirements	1	4	8	8	7	2	30
Total	8	13	21	15	9	7	73
***Breakdown of Age on Voluntary Retirement**							
59 years of Age	1	3	2		3	1	10
58 years of Age			1		1		2
57 years of Age			2	3			5
56 years of Age		1					1
55 years of Age			1				
54 years of Age				2			2
53 years of Age			1	1	3	1	6
52 years of Age			1	1			2
51 years of Age							
50 years of Age				1			1
Total	1	4	8	8	7	2	30

12. In a memo dated the 18th of April 2007, Assistant Commissioner Clancy, gives some statistics regarding Chief Superintendents:

- Average age on promotion to that rank: 51.9, with the youngest being 42 and the oldest 58 years of age.
- Average length of service before reaching that rank: 30.51 years, with the shortest being 22 and the longest 38 years.
- Average length of service at that rank: 8.81 years, with the shortest being 2 and the longest 18 years.

13. With regards to Assistant and Deputy Commissioners, it would appear that under the 1996 Regulations there have been 19 appointments to these ranks, to date. Within this period the youngest age of appointment was 47 years and 10 months with the oldest being 57 years and 8 months. The average age of appointment was 53.26 and the average duration of service 6.74 years. These figures do not take into account the three appointments of Noreen O'Sullivan (at age 47), Derek Byrne (at age 47) and Louis Harkins (at age 56). In the last five years (2003-2007) 10 have retired at age 60, with no early retirements in this category. In the next 5 years, 2 will have reached retiring age in 2008, 3 in 2009, 2 in 2010, with none in 2011 or in 2012. Over the 12 year period since 1996 there have been 22 appointments (including the three named in this paragraph), with no increase in the number of posts. Thus, assuming all incumbents would stay until retirement age, a further 7 would be appointed over the next 4 years.

14. Had the retiring age been 65 instead of 60 for the Commissioner ranks, the average length of service since 1996 would have been 12.58 years. The number of persons who would have retired in the last five years would have been 1. In the next five years; there would be no retirements in 2008 or 2009, there would be 5 in 2010, 1 in 2011 and none in 2012. Over the 12 year period since 1996 there would have been 14 appointments and with no increase in posts, but assuming all incumbents would have stayed until retirement, a further 6 would be appointed over the next 4 years.

15. The information, outlined and tabulated above, is not seriously in dispute between the parties, but some controversy exists about an observation in a report produced by the Organisational Development Unit (ODU) of An Garda Síochána, headed "Review of Retirement Age for Officers in An Garda Síochána" (February 2007). On p. 10 it is stated that for the six year period up to September 2006, 72% of Chief Superintendents and 68% of Superintendents served until their mandatory retirement age of 60. This means that on average 30% of those holding such ranks left the force before the due date. Whether these figures are entirely accurate is not quite clear, but in any event, they are not as critical as those within the Commissioner ranks. This is partly because of the numbers involved (52 Chief Superintendents and 187 Superintendents) and partly because of the importance of having a competitive pool of Assistant/Deputy Commissioners who might ordinarily be first considered for the post of Commissioner. In addition, in the context of early retirement, what is of particular relevance is the age at which such members leave the force. In the Chief Superintendent rank, it can be seen (para. 11(3) *supra*.) that out of the 7 who retired early, 5 served until at least age 58, with only one retiring much earlier at age 51. At Superintendent level (para 11(4) *supra*.) the figures are more mixed, but out of 30 early retirees in this category, 17 served at least until aged 57.

16. There is one other observation in the ODU report which should be referred to, and it is one which the plaintiff takes strong issue with. It is that if the retirement age of all officers (from Superintendent to Assistant Commissioner level) should be increased from 60 to 63, and assuming that all such persons would serve until reaching that age, such an adjustment would result in 49 officers remaining in the organisation in the period 2007 and 2009, who otherwise would not so remain if the existing *status quo* was maintained.

17. Finally, for the sake of completeness I should mention the representative structures of the Gardaí which are provided for by statute and regulated by statutory instrument; these are as follows:-

(1) The Police Forces Amalgamation Act 1925 provided for the establishment of representative bodies for all or any one of the ranks of the Garda Síochána.

(2) The Garda Síochána (Representative Bodies) Regulations 1927 (Unnumbered, 29th December 1927) established the Representative Body for Gardaí (RBG), the Representative Body for Inspectors, Station Sergeants and Sergeants (RBISS) and the Representative Body for Chief Superintendents and Superintendents (RBCSS).

(3) The Garda Síochána (Associations) Regulations 1978, S.I. No. 135/1978, provided for the establishment of the Garda Representative Association (GRA) and the Association of Garda Sergeants and Inspectors (AGSI).

(4) The Garda Síochána (Associations) (Superintendents and Chief Superintendent) Regulations 1987, S.I. No. 200 of 1987, provided for the establishment of the Association of Garda Superintendents and the Association of Chief Superintendents.

Issue No. 1 – The *Ultra Vires* / Administrative Law Issue:
18. It is submitted on behalf of the plaintiff that the 1996 Regulations (S.I. No. 16/1996) are *ultra vires* s. 14 of the Police Forces Amalgamation Act 1925, as being irrational, unreasonable, unjustified and, almost as a discreet point, that the same were made without engaging in any due consultative process. This ground of challenge is made by reference to the time period at which the Regulations were made. It is also claimed that in light of the changed circumstances which have occurred in the intervening period, a similar evaluation should be made as of today's date. These circumstances relate to life expectancy, changes in An Garda Síochána, changes in legislation and the emerging trends across some European States, wherein retirement at a specific age is not applied, or if it is, the specified age is much later than 60. Therefore the Court is invited to examine the legality of these Regulations both as of 1996 and as of 2008.

19. At the outset, it should be understood that the phrase "*ultra vires*" is not used in its narrow, traditional or historic sense as indicating that the maker of the statutory instrument exceeded express powers conferred by the parent legislation. It is conceded, as it had to be, that by the plain and unambiguous wording of s. 14(1)(b) of the 1925 Act, (see para. 6 *supra*.) the Minister had the statutory power to make such Regulations. Therefore the "principles and policies" line of authority (*Cityview Press v. An Chomhairle Oilúna* [1980] IR 381), has no reference to this case. Rather the term is used to found a submission that the Minister, when making the S.I. exceeded her implied

obligation or duty to act both reasonably and rationally. It is in this sense that the phrase ultra vires is relied upon.

20. There is no dispute about the general principles of law which govern challenges of this nature. These have been set down by the Supreme Court in *Cassidy v. Minister for Industry and Commerce* [1978] IR 297. Henchy J., at pp. 310 – 311, said:-

> *"The general rule of law is that where Parliament has by statute delegated a power of subordinate legislation, the power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation. Otherwise it will be held to have been invalidly exercised for being ultra vires. And it is a necessary implication in such a statutory delegation that the power to issue subordinate legislation should be exercised reasonably. Diplock L.J. has stated in Mixnam's Properties Limited v. Chertsey Urban District Council, at p. 237 of the report:-*
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> > *'Thus, the kind of unreasonableness which invalids a bye-law [or, I would add, any other form of subordinate legislation] [sic.] is not the antonym of 'reasonableness' in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say 'Parliament never intended to give authority to make such rules'; they are unreasonable and ultra vires'.*
>
> *I consider that this to be the correct test."* (Emphasis added)

Cassidy was a case where a maximum prices order made no distinction between prices charged in public bars and lounge bars (notwithstanding obvious differences in costs etc.), with the result that, by reference to the legal principles outlined, the court was compelled to conclude:

> *"…that Parliament could not have intended that licences of lounge bars should be treated so oppressively and unfairly by the maximum- price orders." (Henchy J. at 311).*

21. Nothing of substance has been added to these principles by cases such as *State (Kenny) v. Minister for Social Welfare* [1986] 1 IR 693, *Philips v. The Medical Council* [1991] 2 IR 115, and *Purcell v. A.G.* [1995] 3 IR 287. There is however a brief observation from the judgment of McCarthy J. in *McHugh v. Minister for Social Welfare* [1994] 2 IR 139 which I wish to quote, where the learned judge at 156 said:-

> *"…If a regulation is demonstrably lacking in logic and unfair it cannot be sustainable within the framework of the scheme; it cannot be a proper application of the statutory power to make regulations."*

From the above I would therefore summarise the position as follows:-

> (a) Delegated legislation must be made within and for the purposes authorised by the parent Act.
>
> (b) This means (i) that the legislation must strictly comply with the express and implied limitations of the conferring provision and (ii) that the exerciser of the power must act reasonably.
>
> (c) This requirement can be tested by asking whether the instrument made suffers from arbitrariness, injustice, unfairness or whether it is manifestly illogical; because if it is,
>
> (d) The affected legislation is tainted and therefore unlawful, as the Oireachtas could never have intended such results.

Accordingly, it can be said that the test is one of manifest arbitrariness, or demonstrable illogicality, or gross unfairness or injustice.

22. Quite frequently one finds that when a challenge is based on unreasonableness, submissions are made which inextricably link what was said in Cassidy to what the Supreme Court decided in the *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] 1 IR 642, a case involving a judicial review challenge to an administrative decision. Having considered the "Wednesbury" principles (from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223), and having rejected the logic or moral standing test as propounded by Lord Diplock in *Council of Civil Service Union v. Minister for the Civil Service* [1985] AC 374 at 410, Henchy J. said at 658:

> *"I would myself consider the test of unreasonableness or irrationality in judicial review lies in considering whether or not the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense."*

In other passages contained in the judgment the learned judge used slightly different language in describing when a court could intervene. He gave examples, including, when the decision was:

> (a) fundamentally at variance with reason and common sense,
>
> (b) indefensible for being in the teeth of plain reason and common sense, and
>
> (c) made in flagrant disregard of fundamental reason or common sense.

It has long been accepted that these different methods of expression have like meaning and all are conveniently captured in the direct quote from his judgment. It is also interesting to note that even though he had given the judgment in *Cassidy*, Henchy J. made no reference to that case in *the State (Keegan)*; neither did O'Higgins C.J.

23. In deciding that the issue under review in *O'Keeffe v. An Bord Pleanala* [1993] 1 IR 39, fell "to be decided in accordance with the principles laid down" in *the State (Keegan)* (*ibid*. at 70), Finlay C.J., having quoted extensively from the judgment of Henchy J. in that case, and having rejected court intervention (i) simply because different inferences or conclusions could be reached, or (ii) because the case against the decision was stronger than the case for it, continued:

> *"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant materials which would support its decision." (ibid*. at 72)

In *Aer Rianta v. Commission for Aviation Regulation* (Unreported, High Court, 16th January 2003), O'Sullivan J., on first reading, appears to set an even higher threshold and an even more restrictive test, than the Chief Justice did in *O'Keeffe*. However, when viewed as a whole, his judgment, which was heavily influenced by court deference to specialised bodies, is less daunting than at first sight. Furthermore, at a time when *O'Keeffe* was under active, if not intense, scrutiny it is unlikely that the learned judge intended to raise the threshold even higher than the one propounded in that case. In any event, there has been a tendency for some time towards the virtual free interchange of the *Cassidy* principles with the *Keegan* principles.

24. In my view unless a high level of awareness accompanies such an approach, confusion is bound to follow. There are obvious and significant differences between the court's jurisdiction when testing the validity of delegated legislation and when determining a judicial review application. Evidently judicial review is not concerned with the decision, but rather with the process of decision making. Secondly, in cases such as *the State (Keegan), O'Keeffe*, and indeed others to include *Aer Rianta*, the decisions under review were administrative ones which by their nature are quite dissimilar from the exercise of legislative function. Thirdly the circumstances in which a court can intervene in judicial review are "limited and rare" *(O'Keeffe)*. Fourthly, the principle of "curial deference" applies; so that courts afford considerable respect and latitude to the skill, competence and experience which underlay the establishment and functioning of specialised bodies; this concept has no standing with secondary legislation. Fifthly, there can be no question of the court's power, when dealing with the validity of secondary legislation, being in any way bound by the principle established in *O'Keeffe*, namely, that no intervention will occur unless there is "no relevant material" before the decision making body. Other points of distinction also exist. I can therefore see a very clear distinction between unreasonableness in the context of this case and unreasonableness as a ground for judicial review.

The Factual Basis of Challenge: The Evidence:
25. The evidence tendered on the administrative law point was based partly on affidavit, partly on oral evidence and partly on a number of documents, which I will firstly refer to. Perhaps almost unique to a challenge at this time remove, there are available three documents created by the Minister for Justice, or her Department, which outline the reasons for the making of the 1996 Regulations. These were obtained by the plaintiff through voluntary discovery and, without objection, have been produced and used by both parties in this case.

26. The documents consist of a "Note for Minister's Information", the author of which was a Mr. Folan, secondly, a document headed "Memorandum for The Government" dated the 15th January 1996, and thirdly a note by the then Minister for Justice, Ms. Nora Owens T.D., to the then Taoiseach, Mr. John Bruton T.D., dated the 17th January 1996. All of these documents dealt in a contextual way with the reasons for the then proposal to make the 1996 Regulations and can be summarised as follows:-

> (i) In 1990 the Government took a decision to place the Commissioner's tenure of office on the same footing as a Secretary to a Government department which had been changed in 1987. It was essential to retain this new retiring age (60) so as to keep parity with these office holders, and also because it was "imperative to the maintenance of motivation within the senior ranks of the force". To revert to a retiring age of 65 would mean that potential incumbents could be *in situ* for 10 or 15 years. This could de-motivate the lower Commissioner ranks and could also negatively impact on the dynamism required to lead the force.
>
> (ii) That being so, if one had a situation of Deputy/Assistant Commissioners retiring at age 65, whilst the Commissioner retired at age 60, this would render a great number from within the Deputy/Assistant Commissioner ranks ineligible for appointment to lead the force on the grounds of age; this would heavily impact on the following two appointments.
>
> (iii) The most effective solution therefore would be to reduce the retiring age from 65 to 60 for all Commissioner ranks and thus bring them in line with

Superintendents and Chief Superintendents. This would have the effect of creating a competitive pool of candidates who would be available for Government consideration in the appointment of any future Commissioner. It would also avoid potential blockage at the lower Commissioner rank levels; whereas, with a retiring age of 65, persons could serve for ten or more years. Such a change would have a positive motivating effect on relevant members who could then have more realistic prospects of promotion. Otherwise, if the *status quo* was retained, motivation and dynamism within the force would be seriously affected.

(iv) The implementation of a new regional command structure would see a switch to greater operational focus in terms of garda leadership. Once again, to make this significant change effective, a high degree of dynamism and motivation was required.

(v) Therefore, accordingly, the Regulation should be made.

27. This summary is taken from Mr. Folan's note but it is also largely reflective of the Memorandum for Government as well as the Minister's note to An Taoiseach. There were, however, three further points raised in the latter documents which should be mentioned. In the Memorandum, it is stated, at para. 3, that:

"[T]he Garda Commissioner has recently raised a concern that a situation could develop where all members of the Assistant and Deputy Commissioner ranks could be aged 60 and above when the post of Garda Commissioner fell to be filled. In such a situation all of the Assistant and Deputy Commissioners would be precluded on age grounds from being appointed Commissioner of An Garda Síochána."

Secondly, the memo also pointed out that members who had 30 years service and reached age 50 could retire on full pension. And thirdly, in the briefing document to An Taoiseach, the Minister, having noted that the age profile of Chief Superintendents who were then being considered for appointment to Assistant Commissioner rank, "presents a serious problem", stated:-

"The most serious aspect of the matter, however, is that the people promoted this time could 'block' Assistant Commissioner posts for ten years of more (instead of 5 years) which would mean that no younger members of the force, however suitable for the top job, could become an Assistant Commissioner (and gain experience at that level), thus restricting considerably the Government's option, later on, when it comes to appointments to the top job."

The Minister concluded by recording, that the Department of Finance did not have any objections and that she did not "expect garda opposition either".

28. The plaintiff in his oral evidence complained about the irrationality of the 1996 Regulations, on several grounds; these included:-

(i) Given the depth of skill, knowledge and experience which he had acquired in over 40 years of service, it makes no sense for this to be lost to the force and forever wasted.

(ii) The role of Assistant Commissioner involves almost exclusively managerial and executive tasks, rather than any front line involvement in operational matters. Accordingly, the physical demands involved are minimal.

(iii) Given the ever-increasing sophisticated methods of dealing with crime, it seems strange, that whereas in 1951 a member of the commission ranks could hold office for eight years longer than an ordinary member, the current position is that all members must now retire at age 60.

(iv) Given advancements in medical care and treatment, the life expectancy of persons has increased dramatically over the years.

(v) Apart from eye testing for the purposes of being a patrol driver, no member of An Garda Síochána is compulsorily obliged to undergo any regular or routine health checks.

(vi) Throughout his 40 years in the force, he had never considered promotional prospects to be a motivating factor: from his perspective the most effective motivation for any member, stemmed from having a force well organised, skilfully prepared and driven by committed leadership.

(vii) It would be quite wrong to believe that the Assistant Commissioner rank exists only for the purpose of creating a pool from which a future Commissioner could be appointed; Assistant Commissioners have vital tasks to perform in their own right.

(viii) The blockage concerns are overstated and indeed are inconsistently viewed by Garda management. Within the rank of Superintendent and Chief Superintendent there is high natural wastage through early retirement. Moreover the authorities are inconsistent in their views on blockage. Quite frequently Sergeants and Inspectors hold their respective ranks for periods well in excess of 10 to 15 years, and yet this practice seems to attract no Garda agitation; and finally

(xi) It should be noted that there is nothing preventing the Government from appointing a Commissioner from a rank lower than that of Assistant Commissioner.

29. The reference to life expectancy was expanded upon by reference to the following information extracted from the C.S.I. Office in its Irish Life Tables No 14:

	1950	2006	Percentage Increase
Life expectancy of Male	64.5	76.1	18%
Life expectancy of Female	67.1	81.1	21%
Life expectancy of male aged 60	5.49	20.9	29.80%
Life expectancy of female	16.8	23.6	40.70%

30. Evidence was also given on behalf of the plaintiff by Mr. Thomas Monaghan, who retired in May 2005, after being a Chief Superintendent for twelve years. During this time he became Chairman of the Chief Superintendent's Association, whose function was to raise with management matters of welfare and efficiency on behalf of its members. This facility was provided for by the Garda Síochána Conciliation and Arbitration Scheme. In October 1990, a joint claim by this Association and a similar Association representing Superintendents, was placed before the negotiating forum at which an increase in the mandatory retiring age from 60 to 63 was sought. That claim was still in being when, in December 1995, the then Commissioner invited applications for the post of Assistant Commissioner, four of which were then available. This circular made no mention of the impending 1996 Regulations which only became public knowledge when the Commissioner re-advertised these posts in January 1996. According to the witness there had been no consultation with his organisation, either in the lead up to, or at the time of, the making of these Regulations.

31. This claim for an increase in the retirement age was re-agitated in 2004, when the Associations made a further submission to the then Minister on the issue. At that time the Associations also disputed the proffered "justification" underlying the 1996 Regulations. Despite presenting its case forcibly, the Minister was not receptive to making the changes sought, or any such change. Finally, Mr. Monaghan explained the inactivity of the Associations between 1996 and 2004 as being referable to the ongoing review of An Garda Síochána as ordered by the then Taoiseach. That review did not finalise until 2004.

32. The defendants called a number of witnesses, including Mr. Pat Folan (see paras. 26 – 27 *supra*.), who joined the Department of Justice in 1981. In September 1994 he moved to the Garda Division, as Principal Officer, where he remained until July 1997. That division was responsible for the garda budget, garda resources and garda policy, *inter alia*, in relation to promotion, retirement, resources etc. In July 1997 he moved to a new posting and since then has held a variety of other positions, mostly at Deputy Secretary level in the latter years. As a result of these postings, and in particular that occupied by him from 1994 to 1997, he was very familiar with the background circumstances leading up to the 1996 Regulations.

33. According to his evidence, the context in which these Regulations were conceived arose from two interconnected set of circumstances, namely the retirement of the first Commissioner appointed under the 1990 regime, and secondly the approval by the Government of the regionalisation of the force. In 1995 or early 1996, when the appointment of a successor to that Commissioner was being looked at, it became clear that significant numbers of those holding the rank of Assistant Commissioner, would be aged 60 or over when the next and follow-on appointments fell to be made. These individuals would be ineligible on age grounds, even for consideration. Side by side with this, the Government in late 1995 had approved a plan for the creation of a regional structure for An Garda Síochána, and as part of this move had also approved the appointment of three further Assistant Commissioners. In fact, coincidentally, a further such post became free at that time and accordingly there were four vacancies. In considering the potential candidates to fill these positions it became clear that if the retiring age of Assistant Commissioners remained at 65, this would significantly diminish the competitive pool available to the Government in its consideration of the new Commissioner. Secondly, those so appointed to the Assistant rank could hold their posts for anywhere between 10 to 15 years. Accordingly, to provide a choice for the Government and to avoid entrenchment through blockage for long periods, as well as facilitating a sense of renewal, dynamism and refreshment of thought, it was considered that the retirement age for Assistant/Deputy Commissioners should be reduced from 65 to 60. In addition, this change would impact positively on motivation within the force, and would facilitate greater movement and turnover at the highest level; those in the lower ranks would thus have a more realistic possibility of promotion. This was particularly critical given the very narrow pyramid or funnel effect at the top of the organisation. The other major consideration stemmed from the consequences of the regionalisation programme which was designed to have in place a strong operational focus within the regional structure. Once more that required a serious level of dynamism and motivation within the senior ranks. It was therefore essential that the change take place.

34. Deputy Commissioner Martin Callinan, who was appointed to his post in 2007, outlined some of the significant changes which have taken place within An Garda Síochána in the past number of years. In particular, there has been an ongoing process of efficiency review and modernisation which was formally recognised in the 2007 Policing Plan (see s. 22 of the Garda Síochána Act 2005). This plan was drawn up by reference to internal reviews; it was also influenced by external bodies such as the Garda Inspectorate (which was set up under the 2005 Act), which reported in August 2007, and an advisory group, which made a final report headed "Final Report to the Garda Commissioner: From the Advisory Group on Garda Management and Leadership Development" in May 2007 (the Hayes Report). In this plan there are six strategic imperatives set out, all of which are designed to modernise the force by way of training, development and motivation. This witness also described An Garda Síochána as a "*very flat organisation*" with about 1.35% of its members being Superintendents, 0.38% being Chief Superintendents and only 0.09% at the level of Assistant Commissioner. At Deputy Commissioner level it is less than 0.01%. Given these figures it was his opinion that if the age of retirement for Assistant Commissioner was increased to 65, this opportunity would benefit eight Assistant

Commissioners who could potentially remain on in the force for another five years. That of course would have the effect of either depriving or deferring a similar number of Chief Superintendents of promotion, and likewise with Superintendents and so on. This because any increase in age would have a domino effect within the organisation. As of now, the average age of appointment to Superintendent is 46 and on average three and a half years are served at that level. In his opinion any such alteration would create a serious potential for "exodus" amongst officers who otherwise might expect promotion in the near future. Moreover, if the plaintiff was successful in this case, it would most likely be that the Association of Superintendents and the Association of Chief Superintendents would also benefit from such judgment. This could have serious complications. At present almost 2,400 Gardaí have passed the Sergeant's promotion exams and almost 650 Sergeants have passed the Inspector's promotion exams. There are ten Inspectors and six Superintendents on their respective promotion lists, who have yet to be appointed. In summary, a return to the retiring age of 65 would have a serious detrimental effect on the force including the 2,000 odd members with third level qualifications who have joined An Garda Síochána since 2003.

Submissions
35. In both their opening and closing submissions, counsel on behalf of the plaintiff advanced the *ultra vires* point on a number of grounds. At the commencement it was said, by way of general observation, that the identification of 60 as a compulsory retiring age was illogical and had no rational connection to any fixed or determinate event or circumstance. Secondly, it was emphasised that this case was not about raising the retirement age, to whatever that might be; rather it was based on the principled objection to any age being assigned for compulsory retirement. It was said that some other threshold or test must be found for this purpose, such as, for example, competency. Moving to the particular, counsel submitted that the effect of the 1996 Regulations was to create the wholly irrational situation whereby, as of the 7th June 2008, the acknowledged skill, expertise, professionalism and competence which the plaintiff has accumulated in over 40 years of service must be entirely disregarded. Such a wasteful consequence could easily be remedied at virtually no financial cost; the net difference of allowing the Plaintiff to remain on, instead of getting his lump sum and pension entitlements, being only about €41,000 per year.

36. It was further claimed by the plaintiff that:-

> (a) It is inappropriate to link the retiring age of an Assistant Commissioner to that of the Commissioner, as the latter, who is comparable to the Secretary General of a Government department, holds office for a fixed tenure;
>
> (b) The long standing difference between the ranks of Chief Superintendent/Superintendent and Commissioner, should be maintained; and,
>
> (c) The equally long standing practice of retiring senior management later than those of the more junior ranks (including the Garda Reserve), such likewise be retained.

37. Reference was made to the documentation summarised above (see paras. 26 – 27 supra.). As well as criticising its content, it was also claimed that no reports or surveys, external or internal, were commissioned in order to independently verify its contents. For example, in the Minister's note to An Taoiseach, it is recited that the age profile of Chief Superintendents, currently available for promotion, "*presents a serious problem*". There is no evidence to support such a view. Likewise in the Memorandum for Government it is claimed that the Garda Commissioner had raised concerns about the matters which the memorandum speaks of. Once again there is no record of any such communications by him. Likewise there is no mention of the joint claim lodged in 1990 by the Associations of Superintendents and Chief Superintendents seeking an increase in their members retiring age to 63. The documentation is thus critically incomplete in several respects. Insofar as one can identify some rationale for the then proposed change, it can be observed that if motivation and morale within the organisation were of concern to the Government, then surely some consultative process with those directly affected should have been engaged in. Furthermore, the true motivating force within An Garda Síochána was leadership, in a structured and expert way, and it was never common practice to seek dynamism or drive commitment, through affording opportunity for promotion. In addition there were several ways of dealing with any concerns about blockage, including expanding the pool from which a Commissioner could be appointed and by offering fixed term contracts to the occupants of certain posts. So, taken either individually or cumulatively, the underlying justification for this statutory instrument, as outlined in the documentation as well as in the evidence of Mr. Folan, falls foul of the test enunciated in *the State (Keegan)* (see para. 22 *et seq. supra*.).

38. The submissions made on behalf of the defendants were detailed in nature and traversed all of the points raised on behalf of Mr. Donnellan. Many of the more central ones are evident from what next appears in this judgment.

Decision: The *Ultra Vires* Issue
39. As set out previously in this judgment, the test which I must apply is to decide whether the statutory instrument is manifestly arbitrary or unjust, or whether it demonstrably lacks logic; so that the Oireachtas could never have intended the consequences which now result from this S.I.; so that such an exercise of vested power could never have been envisaged. Thus, I must ask, was the decision of the Minister in 1996, to change the age of retirement for Assistant and Deputy Commissioners, irrational in the sense indicated? If the decision was rational, was it arrived at in a reasoned and logical way, having regard to the factors taken account of.

40. As stated above, (para. 19 *supra*.), Section 14(1)(b) of the 1925 Act, empowers the Minister, by its express wording, to make Regulations, *inter alia*, dealing with the promotion, retirement, degradation, dismissal, and punishment of members of the amalgamated forces. It is therefore beyond argument that under this section the Minister could regulate the retirement of members. This he did not once, but repeatedly so throughout the years. It was entirely within his competence to so do.

41. In meeting this, which is the first challenge to the Regulations, the Defendants deny that the same lack reason or logic and plead justification. Although set out in an earlier part of this judgment, the justification so offered was, firstly, to create a pool of suitable candidates at the Assistant / Deputy Commissioner level, from which follow-on Commissioners would be predominantly chosen; secondly, that people would serve within the higher ranks for shorter periods than previously, thus allowing appointment at an earlier age; this would facilitate a greater turnover of people, thereby preventing "blockage"; thirdly, that such changes would increase motivation and dynamism within all ranks of the force; fourthly, that the same would preserve the alignment previously established between the Commissioner and the Assistant/Deputy Commissioner rank and finally, that such would assist in the implementation and success of the new regional command structure.

42. As above outlined, three documents were presented to the Court, in which the Minister advanced reasons for her decision, namely the "Note for Minister's Information", the "Memorandum for The Government" dated the 15th January 1996, and the note by the Minister to the Taoiseach, dated the 17th January 1996 (paras. 26 and 27 *supra*.). From these, as well as from the evidence (paras. 32 – 34 *supra*.), a number of concerns were identified, which have been previously mentioned and which are further dealt with herein.

43. After 1990, the Commissioner's tenure was changed and aligned to that of a Secretary General of a Government Department. Thereafter, he held office for seven years or until he reached the age of 60, whichever first occurred. A particular exception was made relative to special circumstances, but that has no application to this case. Whilst it is a matter for Government as to whom it may appoint as a Commissioner, it seems that, as a matter of policy, it wanted to create and have in place, a pool of viable candidates, who predominantly would be the contenders for the next appointment. Such candidates would be expected to have some experience in the most senior ranks and, therefore, subject to limited disruption, would seamlessly fill the top spot. In any hierarchical structure it would be normal firstly to consider those closest in rank or service to the post requiring an appointee; without of course disregarding or ignoring 'outstanding candidates' at other levels. Moreover, those next in rank, to include Assistant/Deputy Commissioners, would have a real expectation of being in the frame for consideration. Some, even most, but perhaps not all at this rank, would feel that such a position is not in itself an end destination. That being so, it would be seriously debilitating, for both Government and such candidates if, as a result of some structural defect, this group was ineligible for the highest position at next appointment. This applies also to 'outstanding candidates', in the sense that I have mentioned; who would or should have been identified earlier via the promotional process. Therefore the Government should have a choice and such persons should, at least, have the prospect of promotion. To seek this objective must surely be legitimate.

44. With a retirement age of 65, there was, after the 1990 change, a very real risk that many of the Assistant Commissioners would be too old for appointment to the post of Commissioner. This problem first arose when a successor for the second seven year period was being considered. Therefore some remedial steps were necessary if a pool of younger Assistant Commissioners was to be established. It seems, according to the Memorandum for Government (see para. 27 *supra*.) that the Commissioner himself raised concerns about the limited nature of the pool of Assistant/Deputy Commissioners who might be available for future promotion. That the Commissioner held this view has been questioned: it being said that if he did, it is, therefore, surprising that in his letter of invitation to the Chief Superintendent rank, issued in December 1995, he made no mention of his concerns in this regard. Whatever may be the explanation for this, the evidence so given verifies the position as asserted. In addition to the memorandum, this Court was given oral evidence outlining the regular discussions had between the Commissioner and the Minister and the almost daily contact between the former and the Secretary General of the department. Whilst it was not suggested that all of these communications dealt solely with the issue at hand, nevertheless I am satisfied that the problem was the subject of discussion, comment and even debate between the office holders herein mentioned.

45. In any event, if the Minister was within her power in refusing to alter the Commissioner's retiring age from the 1990 position of 60, as I believe she was, I cannot see how the above aim of establishing a competitive pool could be satisfied without affecting some change at Commissioner rank level: this simply because those supposedly within the pool would be ineligible because of age. Whilst perhaps some more innovative changes may have been considered, and I confess I cannot think what these might be, nevertheless I believe that the aim, indeed necessity of making this most significant post as meaningful as possible, inter alia, by having access to the most senior quota of people available, was a legitimate one for the Minister to have, and to pursue by way of regulation change.

46. Issue was taken with the suggestion that the change in retirement age would prevent blockage at the Assistant Commissioner level: such assertions are not entirely determinative. Reducing the retirement age alone would not permanently increase the movement, since it would have the effect of temporarily decapitating the organisation, allowing people to be brought up sooner than they would have been. However, after this initial movement, the situation would merely, or largely, revert to the previous situation. The change in retirement age would not, therefore have lasting effect. However it would have short/medium term effect which could not entirely be discounted. In 1996, with a retirement age of 65, some incumbents at the Commissioner Rank, could have held office for ten or fifteen years. As of now if a court declaration issued from this case, the default age would return to 65. Eight Assistant Commissioners could benefit. These are significant numbers out of such a small pool. Therefore an age change would inevitably have consequences, and would affect all ranks, but in particular those with limited numbers.

47. In the Note refereed to (para. 26 *supra*.), it was said that "it is imperative to the maintenance of motivation within the senior ranks" to have the changes effected. Criticism was made of such conclusion, it being pointed out that those with first hand knowledge, namely the Associations of Superintends/Chief Superintends were never consulted. It is thus said that the problem as identified was not borne out by the facts. Whilst it is true to say that no dialogue was exchanged between these parties, and in that way the opportunity for information gathering was missed, nonetheless it cannot be disputed or even challenged that motivation, energy, vigour and focus renewal, are all

essential efficiency drivers for any organisation and also for those who both lead and serve that organisation. This is particularly so for a body of such societal importance as An Garda Siochána. In this respect I cannot agree with what the plaintiff has said. Whilst not all persons are motivated by the prospect of promotion, many are and critically many of those, previously promoted several times, might well be suitable for the ultimate position .

48. Perhaps the real complaint is the lack of hard objective evidence to underpin this particular matter. In my view it was well within the competence of the Minister to have regard to such an obvious point, which incidentally would have a ripple downward effect within the entire organisation. Moreover it is to be doubted if engaging with those directly involved would have progressed matters further. Furthermore it is impossible to entirely separate this point from the 'pool' point. Therefore it could not be said that the motivation/dynamic driver point, was devoid of support or denuded of purpose at the relevant time. In addition it should noted that these objectives, do not relate solely to candidates who aspire to a No. 1 position; these are also critically important to those who held other positions, within the force. Consequently such matters are both relevant and valid.

49. Another step, taken by the Government at the time, was the significant structural change in having a strong operational force at regional level. This lead to three Assistant Commissioner posts being created, and with a further one vacant, four new appointments were required. As part of this innovative re-organisation, not just at personal level but also at operational level, it was imperative, for its initial success and thereafter for its continuation, to incentivise those within the senior ranks. A sense of renewal, of expectation, of ambition, all to a greater or lesser extent, was required. Of course other factors were also in play, but the importance of making this chance a major success cannot be underestimated.

50. Furthermore, critically looking at the structure of the force it becomes clear that it is indeed quite a "flat" organisation. As previously outlined, there are almost 13,900 members. The Commissioner himself represents 0.01% of that total, whereas at Garda rank the numbers represent 80.29%. There are two Deputy Commissioners, although one position is currently vacant, and there are 12 Assistant Commissioners. Thus when taken as a whole, the Commissioner ranks, in total 15 people, account for little more than 0.1% of the Force. If one adds those at Chief Superintendent level, being additional 52 persons, this increases the percentage by 0.38%. In total, even including those all those at Superintendent and Commissioner rank, the total is only about 1.8% of the total Force. As can therefore be seen, there is an extremely narrow funnel at the top of the organisation; with those in managerial roles constituting an extremely small percentage and being very confined in numbers. There is no suggestion that this structure is or will likely be changed in the future. Therefore it is obvious that those performing management roles in what has been described as a "flat organisation" are critical to the well being and efficiency of the Force. This is therefore a unique situation. This fact also weighs heavily when considering the justification required under Article 6.

51. A good deal of debate took place in this case towards identifying infirmities that might have existed in the documentation prepared in contemplation of the passing of the S.I. under consideration. For example, as previously indicated, it was asserted that no external reports from consultants were obtained and that no internal investigation, of any quality, was undertaken which would justify the impugned change. Moreover, it was said that there was no empirical evidence to justify concerns regarding the reference to age profile. Changes in the police force were ignored as were the increase in live expectancy and the proposal made by the Joint Association of Superintendents and Chief Superintendents to increase the retiring age of their members from 60 to 63. In essence, the 1996 proposal to change was *ad hoc* and ill thought out, with its consequences either not appreciated or ignored. In my opinion this type of forensic, historical examination is of little value. It is not necessary, although fortuitous as it is to have the material available, that such documentation should be thoroughly discursive, or shaped in the form of a reasoned opinion or supported by international data or practice. Its content does not have to pass the judgment bar of anxious scrutiny or forensic audit. It seems to me that if, on analysis, there are set forth the broad reasons which prompted the Minister into making an S.I., as I am satisfied there are here, that in my opinion is sufficient to prevent a plaintiff being successful in challenging the instrument on the grounds of reasonableness or unreasonableness, as the case may be, unless patently irrational or illogical.

52. A number of reports were also handed up during the course of the hearing. The Hayes Report, from May 2007, noted that a systematic approach is needed to "succession planning" to prevent too many senior officers retiring at the same time, and in order to ensure that, through training and development, there is a sufficient pool of able and experienced officers to provide continuity in management and direction, and competition for promotion. Succession did not simply involve the identification of a person for a particular post, but rather it should be structured; related to training and development. A Garda Inspectorate report, "*Policing in Ireland: Looking Forward*", dated August 2007 similarly reviewed the operational structure of the Force, noting and agreeing with the conclusions of the Hayes report.

53. Regardless of the justifications put forward by the Defendants, there are still questions as to the way in which the decision was reached, in the sense that it followed fair procedures (e.g. as enunciated in *Burke v. Minister for Labour* [1979] IR 354). The Plaintiff argued that the Minister, as a matter of law, was obliged to consult with those directly affected at the time, namely the Associations of Superintendents and Chief Superintendents, but had failed to do so. Whilst it may have been preferable or even desirable or, in the context of industrial relations, even helpful to so do, nonetheless, I cannot see anything in the 1925 Act, or in the Regulations providing for the establishment of the Associations, (para. 17 *supra*.), and I am not aware of any provision of general law, which obliges the maker of an S.I. to consult with members of the organisation which may be affected thereby or even with a certain cohort of those members. Accordingly there cannot be any invalidity resulting from a partial or even total lack of communication in this regard.

54. As noted by Carney J. in *Gorman v. Minister for the Environment* [2001] 2 IR 414 at 436 – 437:

> *"Whilst there can be no doubt as to the existence of a constitutionally protected right under Article 40.3 to fair procedures in decision-making, it has been recognised in the case-law that the principles of constitutional justice do not apply with equal force in every situation and indeed in some circumstances where decisions are taken by public bodies, such as a decision to enact a particular piece of legislation by the Oireachtas, the audi alteram partem rule or the duty to consult and hear submissions does not arise at all".*

Whether and to what extend, if at all, this is or is not an absolute position, in the absence of express provision does not arise in this case. See also *Cassidy v. Minister for Industry* [1978] IR 297 at 304 where the Court found that there was no duty to consult with the Vintner's Association before bringing into effect a statutory instrument fixing maximum process for the sale of intoxicating liquor. It is therefore clear that in the enactment of secondary or delegated legislation, there is no general requirement for consultation with the affected class. Such is necessary, for example under the Waste Management Acts / Regulations, where there is a requirement for consultation by the Council where, *inter alia*, there is a proposed change to a Waste Management Plan; that situation is entirely different: the duty is explicitly provided by law, which is not the situation here.

55. If any one or more of the above aims could be said to constitute the dominant or principal motive in the passing of these Regulations, then I would hold that the plaintiff's challenge to them must fall. As Henchy J. pointed out in *Cassidy*, if there is a legitimate aim for the making of an S.I., it being a dominant and purposeful aim, then even though there may also be secondary aims which may not be justified by the parent legislation, nonetheless once the former exists, the S.I. in question will not be declared invalid.

56. In any event, I do not think it is necessary to rely on that passage from his judgment: this in light of the justifying aims identified above, supported as they were by way of evidence, not only the documentary evidence which was current at the time, but also the evidence of Mr. Gavin who was, in fact, directly involved. I am satisfied that these were justifiable concerns which the Minister could have and were the influencing factors in her decision to change the retiring age which was then applicable to the rank of Assistant Commissioner in 1996. I, therefore, believe that the plaintiff's challenge on the *ultra vires* or the administrative law point fails.

57. Consequently, I am satisfied that the aims as specified and the justifications as offered by the Minister through the evidence adduced in this case, were such as could not possibly attract to the 1996 S.I., the invalidity principles as identified in *Cassidy* through the judgment of Henchy J. It could not be said that the actual decision on its face was necessarily unreasonable. Nor could the decision be said to be one which the Oireachtas could not have ever intended or foreseen under the 1925 Act. I thus feel that this justification passes the general test.

58. Another submission suggested that the S.I. should be reviewed as of today's date; in this context, not by reference to the Council Directive, but by reference to purely domestic law. In my opinion even if this were possible, the net question would be whether or not by applying the appropriate administrative law principles, the S.I. was or was not valid in 1996. In my view, there was no principle of law in existence, at that time, like that as later contained in the Directive, which means that the 1996 Regulations could not be measured against the principle to test for discrimination in employment and occupation on age grounds. The change in this regard was the most significant feature which has occurred in the previous twelve years but, it would be quite wrong to try and retrospectively apply that Directive or its provisions in a theoretical sense to the validity of the S.I. at the appropriate date, which is 1996. I, therefore, reject this submission of the plaintiff.

59. Finally, in this regard, I do not believe that the passage of either the Directive or the enactment of the 2004 Act, could in any way reflect unreasonableness in the thinking of the Minister at the time of the 1996 S.I.. Therefore, the challenge on the *ultra vires* point fails.

Issue No. 2: The Directive Challenge

60. The second major issue in this case arises from Council Directive 2000/78/EC of the 27th November 2000, 'establishing a general framework for equal treatment in employment and occupation'. This Directive was incorporated into domestic law by the Equality Act 2004. In short, it is submitted on behalf of the plaintiff that the 1996 Regulations are inherently incompatible with the Directive, a form of "*per se*" inconsistency, and accordingly cannot be relied upon to terminate his employment on his 60th birthday. In this context, though in precisely what way remains unclear, reference has also been made to the said Act of 2004 as being in itself an Act against which the Regulation should be measured. I will return to the point later in this judgment.

61. This Directive, adopted on the basis of Article 13 of the EC Treaty, contains the following recitals which should be outlined:-

> "(4) The right of all persons to equality before the law and protection against discrimination constitutes a [recognised] universal right …
>
> (6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination…
>
> (9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential. …
>
> (11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity,

and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community…

(14) This Directive shall be *without prejudice to national provisions laying down retirement ages*. …

(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*. …

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes *a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate*…

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between *differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited*." (Emphasis added)

62. The following Articles of the Directive must also be referred to:

i) Article 1 of the Directive states that its purpose is "*to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.*"

ii) Article 2, headed "Concept of Discrimination", provides:

> *"1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.*
>
> *2. For the purposes of paragraph 1:*
>
> (a) direct discrimination shall be taken to occur where *one person is treated less favourably than another* is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
>
> (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless… that provision, criterion or practice is *objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*…" (Emphasis added)

iii) Article 3, delineating the scope of the Directive, states that it "*shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to… (c) employment and working conditions, including dismissals and pay…*"

iv) Article 6, which is headed "Justification of differences of treatment on grounds of age", at sub-article (1), reads:

> "Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are *objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary*." (Emphasis added)

63. The Directive, by virtue of Article 20, became directly applicable in this jurisdiction on 2nd December 2003.

64. Before dealing substantively with the instrument, a preliminary issue which arises thereunder, must be resolved. As will be considered more thoroughly in the next part of the judgment, Recital 14 of the Directive reads "*this Directive shall be without prejudice to national provisions laying down retirement ages*". It is the plaintiff's case that, notwithstanding this recital, any relevant provision of national law must still be compatible with the Directive. On the other hand the defendants argue that by its plain meaning, once there is in existence such a national measure, it is immune from Directive compatibility.

65. In *Félix Palacios de la Villa v. Cortefiel Servicios SA*, (Case C-411/05) [2007] ECR I-08531 (16th October 2007), the European Court of Justice expressed a view on this Recital. In that case Spanish law, under certain conditions, permitted freely negotiated collective agreements between workers and employers to contain provisos dealing with compulsory retiring ages. On a challenge to the provisions contained within one such agreement, the Court at para. 44 of its judgment had this to say on Recital 14:

> *"It is true that, according to recital 14 in its preamble, Directive 2000/78 is to be without prejudice to national provisions laying down retirement ages. However, that Recital merely states that the Directive does not affect the competence of the member states to determine retiring age and does not in any way preclude the application of that Directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached."*

66. The defendants seek to distinguish that decision by pointing out that the retirement age was not "laid down" by any domestic law, and therefore there was no direct establishment on the part of the national authority. In addition, a lengthy passage from the opinion of Advocate General Mazak, delivered on 15th February 2007, was opened in which, at paras. 64 and 65, he opines that Recital 14 should be read in a manner which immunised from Directive scrutiny national measures containing retirement ages. It was thus urged upon this Court that effect should be given to the primacy of the plain and unambiguous language of Recital 14.

67. I am afraid that I cannot agree with this submission; even, if uninfluenced by case law, I would hold, relying upon first principles, that such a construction would be inherently incompatible with the whole purpose, thrust and tenor of the Directive. Given the significance of furthering the principle of equality and noting the steps taken at community level to implement this, it would seem almost self-defeating, to allow member states to disregard the Directive, by such simple means as fixing compulsory retiring ages. It would matter not at what particular age the threshold was set, or whether there was any or any legitimate justification therefor. Once on the statute books the effect would be to bypass the Directive. I could not hold that this was either the intention of the Directive or indeed its effect.

68. In addition, I entirely disagree that the *Palacios* decision can be distinguished in such a manner so as to neutralise the effect of para. 44 of the Court's judgment. In my view the real challenge in the case was to a compulsory retiring age which was both recognised and enforceable in the domestic laws of that state. The fact that its foundation lay directly within the collective agreement does not in any way take from the primacy of the point. I therefore believe that *Palacios* is a direct authority on Recital 14 and, since it accords with my own interpretation as to the placement of that Recital, I would respectfully follow it. Therefore, having regard also to the next succeeding paragraph, I am satisfied that the Directive applies to the Regulations under review in this action.

69. There can be no doubt in my view but that members of An Garda Síochána serving within that force are covered by the Directive (and the 2004 Act). That the Directive applies is, in my opinion, self-evident from the Employment Equality Act 1998, as amended by the 2004 Act; this because of the definitions given to "employee", and "contract of service", and because of the express provisions of s. 2(3) which specifically deem a member of An Garda Síochána to be an employee of the State under a contract of service. In addition it is significant to note that in its original form s. 37(4) of the 1998 Act applied its provisions to members of the Defence Forces, An Garda Síochána and the Prison Service. In its amended form, by virtue of s. 25 thereof, application of the Act is continued only in respect of members of the Defence Forces. These circumstances, as well as the provisions of s. 37(3) and (4), as amended, make it inescapably clear that the provisions of the Directive apply to the plaintiff in this case.

70. That being so, it inevitably must follow that the provision of the 1996 Regulations, which had the effect of terminating the plaintiff's employment at age 60, constitutes direct discrimination within the meaning of Article 2 of the Directive; in that the plaintiff is treated less favourably than another Assistant Commissioner who has not reached the age of 60. Therefore it falls squarely within the prohibition on direct discrimination. This conclusion of course equally applies to the Equality Act 2004. Consequently it is incumbent upon the member state to justify this difference of treatment on the grounds of age. It can do so under the provisions of Article 6 if it can establish that, within the context of national law, the differences in such treatment are "*objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour, market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary*" (see paras. 61 – 62 supra. for the relevant Directive provisions).

71. The effect of the Directive, in these circumstances, can thus be summarised:-

i) In pursuit of its purpose to implement the principle of equal treatment in employment and occupation, it prohibits direct and indirect discrimination on any of the discriminatory grounds which include age.

ii) "Direct discrimination" for this purpose occurs where by reason of age one person is treated less favourably than another in a comparable situation (Article 2).

iii) If a national law provides for differences in treatment between comparable persons on the grounds of age, such inequality will not necessarily be prohibited if the differences are objectively and reasonably justified, by reference to a legitimate aim such as legitimate employment policy, labour markets and vocational training objectives, and if the means used are appropriate and necessary (article 6).

iv) Member States have a broad discretion in their choice of identifying the aim(s) to be pursued and the means or measures to implement such (Recital 25). These can be identified by reference to political, economic, social, demographic and budgetary considerations, provided overall the effect of the Directive is not put in peril: *Mangold* [2005] ECR I-9981.

v) Member States shall, without prejudice to the Directive, have the power to fix retiring ages (Recital 14).

vi) Member States are not obliged under the provisions of the Directive to recruit, or maintain in employment, persons in the police, prison or emergency services who lack the capacity to perform the required service: this derogation supports the legitimate objective which a Member State may have in preserving the operational capacity of these services (Recital 18).

72. Having come to the conclusion that the Directive is applicable to the current situation, it must still be determined if and how the national laws relating to the compulsory retirement of Assistant Commissioners at age 60, fall foul of the Directive.

73. It is settled in the case law that in order to avail of the Directive's protection the complainant must show that he is being treated differently to someone who is in the same position as him, or that someone who is in a different position is being treated the same as him (see Article 2(2)(a)). This person, hypothetical or otherwise, is referred to as the "comparator".

74. In the context of age, it has been recognised that this comparator requirement may be difficult to define with specificity. Unlike other areas such as sex discrimination, where it can be readily apparent that two comparable people are being treated differently on that basis (as in *Lindorfer v. Council of the European Union Case* C-277/04: re: Community pension regulations, where in calculating pension amounts, account was taken of a person's sex on the basis that women lived longer: this was illegally discriminatory), age presents a particular problem. The European Commission paper on Employment & Social Affairs entitled "Age Discrimination and European Law", (Colm O'Cinneide, 2005), (hereinafter "the Commission paper") notes that the fluid nature of a person's age, and the uncertain and shifting nature of "age groups", as well as the changing expectations which accompany changes in age, even between persons of similar ages, made the application of the comparator test difficult in this context.

75. Reference was made to the decision of the Irish Equality Tribunal in Perry v. Garda Commissioner DEC-E2001-029. In that case the Equality Officer found that provisions governing voluntary retirement were discriminatory, since if the retirement scheme was considered by reference to two hypothetical employees, one aged 60 plus 1 day old, and another aged 60 minus 1 day, the result leads to a disparity between the resulting gratuity payments. This could not be explained with reference to "*clear actuarial or other evidence … presented by the respondent which would make such discrimination permissible in the context of the [Employment Equality Act 1998]*." However, the applicant ultimately lost because of transitional measures allowing for age-related pay to continue for three years after the entry into force of the Employment Equality Act 1998.

76. The difficulty of finding a suitable comparator in relation to age discrimination was also highlighted in the Opinion of the Advocate General in *Palacios*, where Advocate General Mazák felt that:

> *"So far as non-discrimination on grounds of age, especially, is concerned, it should be borne in mind that that prohibition is of a specific nature in that age as a criterion is a point on a scale and that, therefore, age discrimination may be graduated. It is therefore a much more difficult task to determine the existence of discrimination on grounds of age than for example in the case of discrimination on grounds of sex, where the comparators are more clearly defined."*

77. Once a difference in treatment is shown to exist with a relevant comparator, it is then necessary to show that such is due to age; or put another way, that age is a "material factor". Such discrimination may be obvious on its face, as was seemingly the case in Perry, or else it may be more covert; referring to factors that are essentially "age proxies", for example if an employee was dismissed for "being around too long" or was denied a promotion for being "overqualified", when the decision was essentially based on age. As the Commission paper states, such "age proxies" constitute direct discrimination "*as age will actually be a 'material factor' in the decision-making process*."

78. It is worth noting that under Article 10(1) of the Directive, if a claimant can establish a *prima facie* case that age was a material causal factor in the decision, then the burden of proof shifts to the respondent to show that age was not such a factor, or else that it was justified. The fact that one candidate is preferred over another of a different age will clearly not be enough to shift the burden. However, if, for example, a job was granted to a younger person who was less qualified than an older applicant then this could indicate the presence of age bias. The Commission Paper, p. 24, refers to a Slovakian District Court case (2003 No. 7C 190/02-309) where the court found discrimination on the basis that a research worker with more than 20 years experience, had been excluded from the position of coordinator (even though she had been involved in developing, and had been mentioned in, an initial project proposal), in favour of a younger less qualified researcher, where no justification could be established.

79. Nonetheless, as I have previously said, it is clear that the imposition of mandatory retirement age is discriminatory, per se, under the Directive, in that it places one person at a disadvantage to another, who would otherwise be in the same situation, on the grounds of age alone.

80. It must thus be determined whether such discrimination is saved by one or more of the justifications under the Directive. As enunciated, these justifications include:

i) That the measure is a "*genuine and determining occupational requirement*" ("GOR");

ii) That the measure is aimed at "*preserving the operational capacity*" of the Gardaí;

iii) That the measure is justified by a legitimate aim, in this case employment policy; or,

iv) That the measure is "*objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*" – the proportionality requirement.

81. Turning to the first potential justification, namely that of a GOR, Article 4 permits discrimination where age is "*a genuine and determining occupational requirement for the position in question, and it is proportionate to apply this requirement in the particular circumstances.*" This Article only applies where the characteristic of age itself, goes towards an applicant's ability to perform a particular job. The Commission paper states that "*it is difficult to see many circumstances where such a blunt characteristic such as age would be required as a 'genuine occupational requirement'*" and notes that the UK government's consultation paper on implementation of the Directive suggests that there will be "*very few cases where age is genuinely a requirement*." But there will be some, however few, such as acting, or modelling clothes aimed at a particular age group. As stated earlier, there may be cases where characteristics acting as proxies to age might be employed in relation to a genuine occupational requirement. The Commission however has serious reservations about the practical application of the saver, noting that age should not be used as a proxy for characteristics such as incapacity, ill-health or immaturity, since:

> *"[A]ge is not a sufficiently precise indicator for any of these characteristics for it to be possible to normally use it as a substitute for a 'real' GOR…"*

This would be so even if age could be statistically linked to trends in those characteristics. Nonetheless there may be circumstances where the assessment of individual work is impossible or excessively onerous, and where age can in some way be linked to the possession of a GOR. In those circumstances age discrimination may be a "necessary shorthand" to differentiate between different groups of works. However, in the opinion of the Commission:

> *"[T]he use of such age limits will have to be shown clearly necessary: even a pressing legitimate aim such as public safety cannot justify the sweeping use of age limits where individual assessment is possible."*

82. From the Canadian case of *Law v. Canada (Minister of Employment and Immigration)* [1989] 1 SCR 143 and the Australian case of *Qantas v. Christie* (1998) 152 ALR 1295 two questions can generally be asked in this context:

> *"a) are the characteristics that are cited to justify the act of discrimination legitimate and justifiable grounds for distinguishing between two people, b) is age an effective and reliable proxy for the relevant characteristics or a necessary differentiating tool for determining whether an individual possesses those characteristics."*

83. This test, which was applied in another Canadian case of *MacDonald v. Regional Administrative School Unit No. 1* (1992) 16 CHRR D/409, lead to the conclusion that a state-wide mandatory retirement age of 65 for school bus drivers was justifiable, given the number of drivers involved. In relation to protecting public safety, the Commission paper cites "the US Supreme Court case decision in *Western Airlines v. Criswell* No.83-1545, *where the Court emphasised that employers would have to demonstrate that the use of an age limit was 'necessary' and individual assessment was not possible, even where public safety was an issue."*

84. Recital 18 of the Directive which allows, in relation to the armed forces and the police, prison or emergency services, discrimination "*with regard to the legitimate objective of preserving the operational capacity of that service*" should be read in light of the exemption for genuine occupational requirements. Age in the context of such services would seem to be a form of genuine occupational requirement, since it is obvious that such services require a great degree of physicality and that the age of the people "on the ground", so to speak, would indeed inhibit their efficiency. However, where such a restriction is in place in relation to the armed forces or police services, there would still be a requirement that such is for the purpose of preserving the operational capacity of the force, and/or, as a genuine occupational requirement; any such measure should also be proportionate. Although in this regard the perils of using age as a proxy for other characteristics should of course be borne in mind.

85. What constitutes "*preserving the operational capacity*" of the Gardaí? One can readily understand why such a saver was placed in the Directive. Were this provision not in place, it would be open to a member of a police force, army or other such service, to claim that it was an illegitimate discrimination to have different retirement ages as between what one might call the "troops on the ground", or "bobbies on the beat", and those members of a force who have a more administrative, managerial or operational role. In the case of the Gardaí this was the situation until the most recent regulations which now bring in line the retirement ages of all members (excluding the Garda Reserves), irrespective of rank to aged 60. Prior to this there was a difference as between the lower ranks, who could be seen to be doing the more physical work, and the higher ranks, including the Commissioner ranks, who had a more operational role. That such a distinction should be allowed may well be justified, since it is obvious that a Garda on the beat will need to be more physically able than one behind a desk. Nevertheless, were the aforementioned saver not included, such discrimination might be open to

challenge given that the correlation between age and physical fitness for duty is not a given, and will inevitably vary as between individual members.

86. In any event I am satisfied that the Regulations under consideration herein, could not be said to be aimed at "*preserving the operational capacity*" of the force. Nor could it be said that the age of the Assistant Commissioner formed part of the "*occupational requirement*", of that position as it could be of a job like child modelling. There is nothing inherent about the age used in the Regulations which would mean that a person of a certain age was required for the job.

87. The above two potential justifications thus seem aimed at very specific circumstances which would otherwise be discriminatory. The following two are wider in their potential application and seek to regulate the use of age discrimination where it is required for broader social purposes and where it is proportionate.

88. An issue which arose during the trial was the question of whether, in looking at the reasons and justification offered, one should do so by reference to the context in which the Regulation was made, or in the context of changed circumstances since that time. Given my conclusions on this particular matter, it should be noted that the following comments strictly speaking are obiter. If I was deciding this matter solely on administrative law grounds I would feel bound, in general, only to consider the justification question in light of the situation at that time. It is at this time when the "reasonableness" of a decision should be tested. To otherwise review such matters would be to look towards the merits of the decision in light of changing circumstances; in the presenting situation this is not the purpose of judicial review. The question in judicial review is whether there was an error in the way in which a decision was arrived at. This question is fixed in time; either the matter was properly decided at the time, or it was not. Changing circumstances do not render a prior decision improper merely because, under new conditions, the legitimate justifications of the decision-maker no longer hold true.

89. However, in circumstances where the Court is reviewing a matter not purely as to the "reasonableness" of a decision, but in relation to whether its continued existence is in compliance with a Directive (especially in circumstances where the Directive post-dates the Regulation), I am satisfied that the Court may also inquire as to whether at the current date the Regulations in questions can be justified. This makes sense given that some measures may be temporally or circumstantially justified, but once the reason for their original inception has passed, they would clearly no longer be so. For example if movement restrictions were put in place to curb the spread of an infectious disease which had long since ceased, or if restrictions were placed on certain organisations because of their composition or aims, which had long since changed. In both situations the justifying purpose no longer exists and so the once legitimate aims were now moot, thereby no longer justifying their purported compliance with the Directive.

90. Much evidence was led by the Defendants in attempting to justify the 1996 Regulations. Such justifications, as outlined herein, it was contended, were as relevant today as when the Regulations were introduced. I would agree with this proposition, insofar as I agree that the particular justifications advanced by the Defendants, if they were legitimate at all, would be so regardless of whether they were judged at the time of the making of the 1996 Regulations or today. It is therefore unnecessary, and I do not propose, to distinguish between whether the justifications were or still are relevant. That is not to say that justifications may not cease to be legitimate with the passage of time, but in the present circumstances I can see no real difference as between then and now with regards to their legitimacy.

91. The next proposition to deal with is thus whether the justifications advanced by the Defendants relate to a "*legitimate aim*", in particular a "*legitimate employment policy*" or like aim; the list of examples given in the Directive is not an exhaustive one, given the use of the word "including"; nor should it be taken that where a justification falls under one of the headings in Article 6(1) that it will not be scrutinised as to whether the distinction in question is objectively justified. Such an interpretation is supported by the Opinion of Advocate General Sharpton in *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* (delivered on 22nd May 2008), para. 110. She states at para. 112 of her Opinion that:

> *"The only logical conclusion to be drawn is that Directive 2000/78 expressly permits particular kinds of differential treatment based directly on grounds of age, provided that they are 'objectively and reasonably justified by a legitimate aim … and if the means of achieving that aim are appropriate and necessary'. This analysis of the text is borne out by the Court's judgment in Palacios de la Villa…"*

92. In *Palacios* the ECJ considered whether the national law in that case had a "legitimate aim". The Court held, at para. 62, that:

> *"[P]laced in its context, the … provision was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment."*

The respondents argued in the circumstances that the legislation, which allowed for compulsory retirement ages in accordance with collective agreements, had the legitimate aim of "*regulating the national labour market, in particular, for the purposes of checking unemployment*". The court accepted this as a legitimate aim, stating that:

> *"64. The legitimacy of such an aim of public interest cannot reasonably be called into question, since unemployment policy and labour market trends are among the objectives expressly laid down in the first subparagraph of Article 6(1) of Directive 2000/78 and, in accordance with the first indent of the first paragraph of Article 2 EU and Article 2 EC, the promotion of a high level of employment is one of the ends pursued both by the European Union and the European Community.*
>
> *65. Furthermore, the Court has already held that encouragement of recruitment undoubtedly constitutes a legitimate aim of social policy (see, in particular, Case C-208/05 [2007] ECR I-181, paragraph 39) and that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers."*

93. The Commission paper, in considering what constitute legitimate aims, noted that concern had been expressed by Eurolink Age and other NGOs that the very broad and vague wording of the examples might encourage a loose approach. However, the Commission paper states that the examples should only be seen as broad guidelines; it then cites examples of legitimate aims considered in a UK Department of Trade and Industry Consultation Paper, "*Equality and Diversity: Age Matters*" (London: DTI, 2003). These included:

> *"a. health, welfare and safety – for example, for the protection of younger workers;*
>
> *b. facilitation of employment planning – for example, where a business has a number of people approaching retirement age at the same time;*
>
> *c. the particular training requirements of the post in question – for example, air traffic controllers…*
>
> *d. encouraging and rewarding loyalty;*
>
> *e. the need for a reasonable period of employment before retirement – for example, an employer who has exceptionally justified a retirement age of 65 might decline to employ someone a few months short of 65 if … the applicant would not be sufficiently productive in that time."*

94. In the context of considering the legitimate aims advanced, the paper further notes that it is obviously necessary for the person advancing that aim to have a subjective belief as to its validity. Furthermore:

> *"[T]he less pressing and immediate the legitimate aim concerned, the greater may be the degree of scrutiny of the objective justification of an age distinction: a discriminatory scheme justified on public safety grounds will generally require less clear-cut justification than one based on economic reasons."*

95. In this case the relevant justifications would be that the alteration in the retirement ages was required to:

> i) maintain motivation within the force and senior ranks, by preventing the blocking of the Commissioner ranks;
>
> ii) bring the retirement age of the Assistant / Deputy Commissioners in line with that of the Commissioner and the Superintendents ranks;
>
> iii) create a competitive pool of candidates from which the Commissioner might be chosen;
>
> iv) implement the new regional command structure, with a greater operational focus.

96. Before continuing I would note that it is firmly established that where justification is sought, and multiple reasons are given, it will be enough that one or more of the justifications advanced, amount to a legitimate aim.

97. The efficient and effective running of the Gardaí is certainly an "*aim of public interest*", as put in *Palacios*. It is likely that such an aim would fall under the heading of "employment policy". However the required extent that such a policy would need to become one of the inclusive examples under Article 6(1) is unclear. Nonetheless, I am content to conclude that the justifications advanced in this case constitute a *prima facie* legitimate aim, namely "employment policy" within the Gardaí.

98. As noted above, even where a measure is shown to have been enacted with a legitimate aim it must still show itself to be appropriate and necessary. This is the test of proportionality; the measure must go no further than is required to reach the legitimate aim and must do so in the least restrictive way.

99. The ECJ considered Article 6(1) in *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981. That case concerned a German law which permitted employers to conclude, without restriction, fixed-term contracts of employment with workers over the age of 52. The Court noted the purpose of the legislation as being to promote the vocational integration of unemployed older workers, insofar as they encounter considerable difficulty in finding work. Such public interest objectives could not be doubted; it was an objective and reasonable justification for different treatment on the ground of age. Nonetheless, it still fell to be considered whether the means to achieve that legitimate objective were appropriate and necessary, noting that Member States enjoy a broad discretion in this regard. The Court, taking a pragmatic view, stated that in reality the provision had lead to a situation in which all workers who had reached the age of 52, "*without distinction, whether they were employed before the contract concluded and whatever the duration of any period of unemployment*" would be offered fixed-term contracts, which could be renewed indefinitely. This meant that a significant body of workers, determined solely on the basis of age, were in danger of being excluded from the benefit of stable employment. The Court thus concluded that:

> *"In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has*

not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective … it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued (see, to that effect, Case C-476/99 Lommers [2002] ECR I-2891, paragraph 39). Such national legislation cannot, therefore, be justified under Article 6(1) of Directive 2000/78."

100. The question of whether a measure which was objectively justified was nevertheless implemented by means which were appropriate and necessary, that is proportionate, under Article 6(1), was also considered in a decision of the U.K. Employment Tribunal: *Hampton v. Lord Chancellor and Ministry of Justice* (Case No.: 2300835/2007). It that case the claimant held the judicial office of Recorder. Service as a Recorder is generally regarded as a prerequisite for appointment to a salaried position on the Circuit or High Court bench. In 1998 the retirement age for Recorders was reduced from 70 to 65. In 2000 a standard retirement age was introduced for all new judicial appointments, however in 2002 this was reversed and the age was increased back to 70 for all fee paid judicial office holders, except for Recorders and Deputy District and High Court Judges, since the lower retirement age had affected the operational viability of certain Tribunals. The applicant complained that the different retirement ages between Recorders and other judicial office holders was discriminatory, although he accepted that some retirement age needed to be set so as to ensure judicial independence. The Ministry having conceded that the applicant had been subjected to less favourable treatment on the ground of age, the sole issue was thus whether the policy of retiring all Recorders at 65 could be objectively justified.

101. The Ministry argued that the retention of Recorders from age 65 to 70, who would not be in the pool for appointment to full-time judicial office, prevented the recruitment of younger recorder who would be in such a pool. Furthermore it argued that the presence of Recorders over the age of 65 would reduce the availability of more challenging cases, and thus necessary experience, for those who would be in the pool for next appointment. The Tribunal, however, rejected these arguments. It found that there was no evidence to support the assumption that all Recorders over the age of 65 would remain in the post until 70. Nor did it consider that the reduction in the number of younger Recorders, which would result from increasing the retirement age to 70, would have any effect on the production of suitable candidates for judicial appointment. It also felt that, contrary to the submissions of the Ministry, a reduction in the number of vacancies would increase competition and in fact lead to an increase in the quality of those appointed. Further, it noted that steps could be taken to ensure that those who had the potential to be promoted to a judicial post were allocated the right types of cases so as to gain the appropriate experience. For these reasons, the Tribunal did not accept that the policy of retiring Records at 65 was a proportionate means of achieving the admittedly legitimate aim of ensuring a reasonable flow of new appointments into the judiciary.

102. Both *Mangold* and *Hampton* in my view are clearly distinguishable from the present case. In *Mangold* the provisions in question had a wide ranging reach, affecting every person over the age of 52. It was clear that in practice this was causing indirect discrimination against this age group. In contrast the provisions here are of a specific and defined character. *Hampton*, similarly, is distinguishable. It was clear in *Hampton* that there was a very large pool of Recorders, well over a thousand, from whom Judges could be appointed. The Tribunal thus felt that there was no real evidence that keeping the age at 65 could be justified on this ground. Nor could it be proportionate where, in the circumstances, all of the problems identified by the State could have been overcome by much less invasive methods than having a compulsory retirement age. Again in the instant case there are but a dozen persons in the Assistant and Deputy Commissioner ranks from whom a Commissioner might be chosen. Even if it was to be accepted, as was advanced by the Plaintiff, that a Commissioner could be appointed from the Chief Superintendent ranks, the pool would still not be anywhere near the size of the one considered in *Hampton*. These two cases are therefore readily distinguishable from the present situation. Finally I should say that the possibility of an appointment from the Chief Superintendent rank does not in any way diminish the importance of having a quota available at the higher rank. It is having a choice from the most senior group that is the point.

103. The means in this case were the introduction of a Regulation which reduced the age of retirement for Assistant Commissioners from 65 to 60. However this reduction is still subject to regulation 6(b) of the 1951 Regulations which allows the extension of a member's service for a period of up to five years where the Commissioner is satisfied that, because of some special qualification or experience, it is in the interests of the efficiency of An Garda Síochána to do so. Mr. Donnellan did in fact make such a request to the Commissioner for such an extension, but this in fact was refused.

104. The fact that individual assessment is possible is an important consideration. Where there are a large number of people involved and it would be impractical to test every person then it may be proportional to use some form of age-proxy. Conversely, where there are few people to assess and such could be done relatively easily it would not be proportionate to use blanket proxies so as to determine personal characteristics. As stated in the Commission paper:

"A person's health, maturity, ability to learn, experience, skill, willingness to work may often be ascertained by normal vetting procedures, individual assessments and good job specifications. A 50-year old secretary, for example, could be assumed to have certain types of experience not held by a 20-year old, but this alone should not justify automatic selection for the older applicant without an assessment of the merit of the 20-year old. The use of maximum entry ages for the police in many member states may for example be very questionable. In a Dutch case, a number of referees successfully challenged the age limits of 47 and 49 used by the Royal Dutch Football Association (KNVB) on the basis that individual assessment of each referee's capability for the job of referee was entirely possible, and it was a breach of proportionality to set a fixed age limit.

[Further,] [a]ge limits may be necessary in particular industries to ensure a 'turnover' of workers and to encourage recruits into a profession: the Dutch Supreme Court has upheld the imposition of a compulsory retirement age upon airline pilots for this reason… [H]owever, the use of age limits that intended to simply shift the age profile of the company or which unreasonably narrow the age spread of new recruits may face great difficulties in showing objective justification."

105. The Dutch Supreme Court case referred to as *16 pilots v. Martinaur Holland NV and the Association of Dutch Pilots*, Hoge Raad [Dutch Supreme Court] (8th October 2004 – Nr. C03/077HR) should be noted. That case was taken by 16 pilots against Martinair Holland NV and the VNV (Dutch Airlines Association). A compulsory retirement age of 56 had been set for pilots. The court noted that in the 1970s the original justification for this would have related to traffic safety and health, since in the past flying could take a high physical toll on pilots. However, nowadays the primary purpose of the measure was to facilitate and to enhance a regular and predictable flow of pilots within the corps. Both the Cantonal and Supreme Court ruled that this rationale formed an objective justification. It should be observed that this conclusion was influenced by the fact that a pilot's career was structured in such a manner that it was possible to reach the highest seniority before retirement.

International Jurisprudence

106. Some flavour of the international jurisprudence relative to the special position of age as a ground for discrimination was also offered.

107. Attention was drawn by the Supreme Court of the U.S. in *Massachusetts Board of Retirement et al. v. Murgia* 427 U.S. 307 (1975) to the fact that:

"While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."

Thus the U.S. Supreme Court felt that the aged did not constitute a "suspect class" for the purposes of equal protection. Nor did they constitute a:

"'discrete and insular' group… in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span."

108. The court, in that case, went on to consider the rational-basis of a mandatory retirement age of 50 for uniformed state police officers, whose functions were to protect persons and property and to maintain law and order. They were in effect the operational face of the force. The court felt that the mandatory retirement of officers rationally sought to protect the public by assuring "*physical preparedness*" of its uniformed officers. However, Marshall J. dissented from this position strongly criticising the "two-tier" test for equal protection which looked at law with "*strict scrutiny and mere rationality*" since it did not realistically represent the way the court did or should go about the consideration of equal protection. He contended that the use of "strict scrutiny" in relation to "suspect classes" results in almost all statutes subject to such scrutiny being struck down, and thus leads to a great reluctance on the part of the court to extend the categories of "suspect classes". However, he says, this results in too much legislation being dropped to the bottom tier and being measured by mere rationality, which leads to the opposite result of almost all legislation being upheld. He strongly dissented to the court's conclusion in the above case stating:

"There is simply no reason why a statute that tells able-bodied police officers, ready and willing to work, that they no longer have the right to earn a living in their chosen profession merely because they are 50 years old should be judged on the same minimal standards of rationality that we use to test economic legislation that discriminates against business interests."

109. The U.S. jurisprudence on issues of equality is, I feel, of limited persuasiveness. The courts in the U.S. are very slow to interfere with legislative intent. Further, their considerations are based on far broader, amorphous considerations of a general right to equality before the law, whereas in this case we are looking at a positive piece of law, Directive 2000/78/EC, which lays out specifically what is required of legislation which purports to treat specific groups of people in different ways; it must be objectively justified and proportionate. Such a proportionality argument is peculiarly European; no such consideration is given to the idea that legislation might achieve a similar objective in a different and less restrictive way in the U.S. case law.

110. In the more recent case of *Kimel et al. v. Florida Board of Regents et al*. 528 U.S. 62 (2000) the court held that:

"States may discriminate on the basis of age without offending the Federal Constitution's Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest; the rationality commanded by the Amendment's equal protection clause does not require states to match age distinctions and the legitimate interests they serve with razorlike precision; under the Amendment, a state may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the state's legitimate interest, as (1) the Constitution does not preclude reliance on such generalisations, and (2) that age proves to be an inaccurate proxy in any individual case is irrelevant…"

111. As discussed above, this is wholly inconsistent with the line taken by the ECJ. Reliance on age-proxies must be proportionate, and even where there are legitimate aims for differences in treatment, such aims must still be necessary and appropriate.

112. The U.S. treatment of legitimate aims would also not be sufficient under the Directive. The Court in *Kimel* also held that:

> *"When conducting rational basis review under the equal protection clause the Federal Constitution's Fourteenth Amendment, the United States Supreme Court will not overturn government actions unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the actions were irrational; in contrast, when a state discriminates on the basis of race or gender, the court requires a tighter fit between the discriminatory means and the legitimate ends they serve; because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker."*

113. Under the Directive, the burden of proof, once a *prima facie* case of direct discrimination is made out, is borne by the respondent who must justify the distinction. This burden equally applies to age discrimination as it does to race, gender and disability. Although there is a difference between different types of discrimination, such will go towards the justifiability of the discrimination; where it will be easier to justify differences in treatment on grounds of age, since these are inherently more likely to have a rational basis, compared, for example, to race. The Directive in no way states that discrimination on the ground of age is presumptively rational.

114. Although not as extreme as the U.S. case law, the jurisprudence from Canada and Australia are equally distinguishable on the ground that they are considering constitutional rights, rather than specific legislative protection, and thus the question of discrimination on the grounds of age is considered in a more generalised way.

115. Notwithstanding this however, it is worth noting in the Canadian context that s. 32(1) of the Canadian Charter of Rights and Freedoms confines the Charter's operation to government actions. The Canadian Supreme Court in *McKinney v. University of Guelph* [1990] 3 SCR 229 found that it is deliberately so confined, and its purpose is as a check against government powers over the individual, and not as a tool to be used against private individuals. This is not the case with equal treatment under the Directive; the private sector is specifically included under Article 3(1).

116. There are two decisions from the U.K. which should also be mentioned: *R (Carson) v. Work and Pensions Secretary* and *R (Reynolds) v. Work and Pensions Secretary*, both reported at [2006] 1 AC 173. The facts of Carson were that the applicant was a pensioner living in South Africa. She had paid all the necessary contributions, continuing to make voluntary payments after emigration. When she turned sixty, she started to receive the same pension she would have received if she had been living in the United Kingdom. On 9th April 2001 the basic pension for United Kingdom pensioners was increased to reflect the rise in the United Kingdom cost of living. However pensioners ordinarily resident abroad are not entitled to these annual increases. The applicant thus continued to receive the basic pension. Nonetheless, despite acknowledging that she was being treated in a different way to those ordinarily resident, the Court found that she was in a "*materially and relevantly*" different position to a person resident in the UK. Once such a difference was apparent Parliament were entitled to treat such a person differently; indeed the Court noted it could have legitimately refused to pay her any pension at all. This particular case is, however, of limited relevance. It is clear that Ms. Carson was not being discriminated against on the ground of age, rather because of her status as a non-resident, or expatriate.

117. The Second case is more on point. The applicant, Ms. Reynolds, complained that because she was under the age of 25, she was paid jobseeker's allowance and then income support at the reduced rate of £41.35 a week instead of the full rate of £52.20. She argued that Article 14 of the ECHR entitles her to be treated equally with people over the age of 25. Once again the Court found that since there were material differences between older and younger persons, in particular the expenses of older people were necessarily higher, that was sufficient to justify the difference in treatment.

118. In any event, the cases in *Carson* and *Reynolds* were not considered under the Directive, but under the UK Human Rights Act 1998. They are thus of limited persuasiveness. Before leaving them, however, I would like to comment on the following passages from the speech of Lord Walker. At p. 193 of the report he said:

> *"Age is a personal characteristic, but it is different in kind from other personal characteristics. Every human being starts life as a tiny infant, and none of us can do anything to stop the passage of the years. As the High Court of Australia said (in a different context) in Stingel v. The Queen (1990) 171 CLR 312, 330: 'the process of development from childhood to maturity is something which, being common to us all, is an aspect of ordinariness.'"*

This continues;

> *"There is nothing intrinsically demeaning about age. It may be disheartening for a man to be told that he cannot continue in his chosen job after 50 and it is certainly demeaning for a woman, air hostess, to be told that she cannot continue as a cabin crew member after the age of 40."*

119. There is no doubt but that age has been treated in a way different from other discriminatory grounds. This has been acknowledged in several Commission papers, as it has been in many judicial decisions. However I would be hesitant to come to the view that age, as a matter of policy or common acceptability, should be relegated to a form of doubtful importance within the overall family of discriminatory grounds. Whilst I acknowledge that the contrary view has strong support, nonetheless I think that context is critical when evaluating this issue. By context I mean the type of discrimination involved, the broad and historical societal background in which it takes place, the cultural and ethnic history of the relevant area, the protective provisions of, and access to, the legal system etc. As appears from para. 7 of the *Massachusetts* case, the reasons why certain discriminatory grounds have been elevated into a suspect class are because they were:

> *"Saddled with such disabilities or subjected to such a history of purposeful, unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the political process."*

If one was asked to provide a comparable context in this jurisdiction, I firmly believe that in respect of most if not all of the recognised discriminatory grounds, the resulting product in its composition would be very different to that which I have just quoted. So for my part, I would not be an enthusiast of compartmentalising grounds of discrimination, some of which may attract greater scrutiny than others. For all individuals who suffer discrimination, a thorough evaluation and, if necessary, a clear vindication, by appropriate measures is required.

120. Thus, for the above reasons, the international case law on age discrimination is of limited persuasiveness or application in the context of age discrimination in employment under the Directive.

Conclusions: The Directive

121. With regards to compliance with Directive 2000/78/EC, firstly although the Regulation, by setting up a system of mandatory retirement, is *prima facie* direct discrimination, it can be said that the overall aim of the scheme is a legitimate one. In particular, given the peculiar structure of An Garda Síochána (paras. 34, 50 and others *supra*.), the aims of ensuring motivation and dynamism through increased prospect of promotion, the creation of the most useful pool of candidates possible for appointment to the position of Commissioner, are both rational and legitimate. These rationales were considered and outlined in more detail in relation to reasonableness, but my comments in relation thereto apply equally to this aspect of the challenge, being whether or not they are rational and legitimate in the context of the Directive. I thus note that the justifications advanced are sufficient to overcome the rationality challenge.

122. Secondly, nonetheless, in the context of the Directive these aims must be proportionate. As stated an important consideration in considering whether a measure will be proportionate is whether individual assessment would be possible in a given case, such that using an age-proxy would not be legitimate. In this regard I would place particular emphasis on the ability of, *inter alia*, the Assistant Commissioner to request an extension of his tenure in office. Such a request under Regulation 6(b) of the 1951 Regulations must I feel be viewed as a form of individual assessment. It must be presumed that when considering such a request the Minister will take into account the individual circumstances of the petitioner, for example his/her service record and skill set, as well as the needs of the force as a whole. The retirement age of 60, set by the 1996 Regulations, may therefore be seen as an activator for such a request, and consequently this type of individual assessment; at age 60, a person may apply to the Commissioner for a continuance, and the Commissioner should consider each application on an individual and case-by-case basis. In effect, despite the Plaintiff's accumulated skill, his desire to continue and his grievance at the force losing his 40 years experience, the Commissioner did not consider these to be sufficient to ground an extension. Although a continuation was refused in this case, the procedure under Regulation 6(b) of the 1951 regulation serves to temper the severity of what would otherwise be an absolute retirement age; thereby rendering it, in my opinion, proportionate. It cannot therefore be entirely equated with a blanket policy type position.

123. Furthermore the structure of a Garda's career is such that he can attain the highest office within his term of service and hold that position for a reasonable period. Moreover, and I know of no other employment position where this is possible, a member can retire after 30 years of service with a full pension at age 50. Thus, in addition to the financial package, which in this case is significant (see para. 9 *supra*.), a member's age of retirement is such that the prospect of a second career is very much open.

124. Counsel for the Plaintiff put forward the suggestion that a fixed term contract might serve better for the rank of Assistant Commissioner, and that this would alleviate the problem of "blocking", caused by Assistant Commissioners holding their position for upwards of ten years. Although this might be a more preferable option it is not for this Court to determine the employment policy of the Government in this regard, and as such it is a matter for the Minister and An Garda Síochána to decide. I thus do not propose to otherwise comment in this regard. I have thus come to the conclusion that the 1996 Regulations are proportionate.

125. I should also say that although much reference was made to the position of the Equality Act 2004 and it was suggested, albeit somewhat indirectly or even opaquely, that that Act in itself should be a yardstick against which the Regulation should be measured, this point was never fully explored and its correct place in contextual terms was never finalised. I therefore do not intend to deal with this matter individually. Instead I would merely note that any conclusions in relation to the Directive apply *mutatis mutandis* to any question of whether the 1996 Regulations are also compatible with the 2004 Act.

126. Before finishing, I must say that comments as to the legitimacy of the measures utilised in this case, as is usual, turn wholly on the specific facts of the case and such comments should not be taken as supporting the general legitimacy of all mandatory retirement or appointment ages. As noted, national measures relating to compulsory retirement ages are not excluded from consideration under Directive 2000/78/EC. Any discrimination with regards to age must, as put by that Directive, serve a legitimate aim or purpose, and the means taken to achieve that purpose must be appropriate and should go no further than is necessary, i.e. they should be proportionate.

127. For the above-cited reasons I therefore dismiss the Plaintiff's case.