OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 16 May 1989 *

Mr President,
Members of the Court,

1. The case before the Court today following a request for a preliminary ruling submitted by the High Court, Dublin, relates to one of the most sensitive aspects of cultural identity. The importance of the Court's reply and its consequences for the Member States and for the diversity of the Community as a whole are so evident that I need not dwell upon them, for at issue here is the power of a State to protect and foster the use of a national language.

2. The facts are as follows. Mrs Groener, the applicant in the main proceedings, who is a Netherlands national, has, since September 1982, been working as a part-time teacher of art at the College of Marketing and Design, Dublin. That establishment comes under the authority of the City of Dublin Vocational Educational Committee, which is a public body responsible for the administration of vocational education subsidized by the State in the Dublin area. In July 1984, Mrs Groener entered a competition with a view to obtaining a permanent teaching post. She was successful in the competition but failed the special examination in Irish. Circular Letter 28/79 of the Irish Minister for Education requires candidates for permanent posts as assistant lecturer, lecturer or senior lecturer in the City of Dublin or any post subject to any other Vocational Educational Committee to demonstrate their knowledge of the Irish language. Such proof may be supplied either by production of a certificate (An Ceard-Teastas Gaeilge) or by passing a special examination in the Irish language. It is not disputed that the post in question fell within the scope of that circular letter.

3. Mrs Groener challenged the refusal to appoint her before the Irish courts. She argued that Circular Letter 28/79 was incompatible with Article 48 of the EEC Treaty and Article 3 of Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers within the Community (hereinafter referred to as 'the Regulation'),[1] which prohibit discrimination against Community nationals.

4. Consequently, the High Court, Dublin, submitted a number of questions which, in substance, request this Court to give a ruling on whether a national provision requiring knowledge of one of the official languages of a Member State for a permanent teaching post is compatible with Article 48 of the Treaty and Article 3 of the Regulation in circumstances where, according to the national court, knowledge of that language is not actually necessary to carry out the relevant duties.

5. The disputed administrative measure is applicable without distinction to Irish nationals and other Community nationals.

* Original language: French.

1 — OJ, English Special Edition 1968 (II), p. 475.

However, it should be recalled that, generally speaking, the Court not only takes into account direct discrimination but also endeavours to ascertain whether the legal appearance of a provision applicable without distinction conceals *de facto* discrimination due to the specific circumstances prevailing in the field in question.

6. For example, in the field of freedom of movement for workers, the Court held in a case concerning the interpretation of Regulation No 1408/71 of the Council [2] that conditions for the acquisition or retention of rights to benefits would be contrary to Community law if those conditions

'were defined in such a way that they could *in fact* be fulfilled only by nationals or if the conditions for loss or suspension of the right were defined in such a way that they would *in fact* more easily be satisfied by nationals of other Member States than by those of the State of the competent institution'. [3]

7. In the related field of the freedom to provide services, the Court has recalled that Article 59 and the third paragraph of Article 60 of the EEC Treaty

'prohibit not only overt discrimination based on the nationality of the person providing a service but also all forms of covert discrimination which, although based on criteria which appeared to be neutral, *in practice* lead to the same result'. [4]

8. In accordance with that general principle, the fifth recital of the preamble to the regulation states that equality of treatment must be ensured in fact and in law and the second indent of Article 3(1) of the regulation prohibits provisions which 'though applicable irrespective of nationality, (have as) their exclusive or principal aim or effect . . . to keep nationals of other Member States away from the employment offered'.

9. However, the following subparagraph provides that that provision is not to apply to 'conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'.

10. The concept of 'the nature of the post to be filled' appears to be fundamental here. It determines the scope of the exception thus created to the general principle of non-discrimination in Community law. Consequently, such a concept must be interpreted narrowly.

11. It appears that two factors must be present in order for this exception to operate. First, the language requirement must meet an aim and, secondly, it must be strictly necessary in order to achieve that aim. This will be recognized as the principle of proportionality that is generally applied by the Court where it is a question of allowing restrictions on the freedoms guaranteed by the Treaty. It is therefore in the light of that principle that the posts whose nature may justify a requirement of linguistic knowledge must be identified. If the matter were brought before the Court, the principle of proportionality might therefore lead it to hold that national measures introducing language requirements for posts for which they are not strictly necessary were incompatible with Community law.

2 — Regulation (EEC) No 1408/71 of the Council of 14 June 1987 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

3 — Judgment of 28 June 1978 in Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489, at p. 1478, paragraph 17, my emphasis; see also the judgment of 15 January 1986 in Case 41/84 *Pinna* v *Caisse d'allocations familiales de la Savoie* (1986) ECR 1, at p. 25, paragraph 23.

4 — Judgment of 3 February 1982 in Joined Cases 62 and 63/81 *Seco SA and Desquenne Giral SA* v *Etablissement d'assurance contre la vieillesse et l'invalidité* (1982) ECR 223, at p. 235, paragraph 8, my emphasis.

12. The order making the reference asks three questions which relate, first, to the possible existence of *de facto* discrimination, secondly to the concept of a post the nature of which requires linguistic knowledge and, finally, to the concept of public policy.

13. It appears logical to reply first to the second question on the point whether the post of art teacher is a post the nature of which requires linguistic knowledge since if the Court gives an affirmative answer to that question, the question of whether or not there is any *de facto* discrimination will then be irrelevant. More generally, as the Commission points out, if there is no discrimination, there is no need to invoke the concept of public policy.[5] This conclusion also follows if there is no *de facto* discrimination.

14. The Court has not yet considered those points. The only judgment given on the interpretation of Article 3 of the Regulation does not concern conditions relating to linguistic knowledge.[6] For the Court, therefore, the question is a novel one.

15. The circumstances of the present case are these. Irish is the national language and the first official language according to the Constitution of Ireland. English is recognized as the second official language. According to the order making the reference, 33.6% of the population of Ireland professes fluency in the Irish language. Since the 1950s the Irish Government has actively pursued the objectives of preserving and restoring the Irish language, as is attested to by the establishment in 1956 of a Department of State responsible for encouraging the extension of the use of Irish as a vernacular language and the 1979 ministerial circular letter which is at issue in this case. In its observations, the Irish Government fully sets out the details of the long-term plan undertaken to preserve the Irish language. However, it appears that at the Dublin College of Marketing and Design most of the teachers and students habitually express themselves in English. Mrs Groener submits that the full-time duties which she wishes to take up are not significantly different from the temporary duties which she is carrying out without any knowledge of the Irish language.

16. However, it does not seem to me necessary to embark upon a complex analysis to ascertain whether lack of knowledge of the Irish language may in fact create difficulties in the efficient teaching of the subject concerned, for — and we are now at the heart of the matter — it is a question of drawing a line between the powers of the Community and those of the Member States and of considering whether or not a policy of preserving and fostering a language may be pursued, having regard to the requirements of Community law. The Regulation attempted to reconcile those apparently conflicting requirements by excluding conditions relating to linguistic knowledge from the scope of the principle of non-discrimination when the nature of the post to be filled requires such knowledge. May the intention of a State to promote the use of one of its languages be taken into account in this respect?

17. That question has not escaped the attention of the Community institutions. On 16 October 1981, the European Parliament adopted a resolution on a Community charter of regional languages and cultures and on a charter of rights of ethnic minorities and, on 30 October 1987, it

5 — Commission's observations, paragraph 22 (p 17 of the French translation)

6 — Judgment of 7 May 1986 in Case 131/85 *Emir Gul* v *Regierungspräsident Düsseldorf* [1986] ECR 1573

adopted a resolution on the languages and cultures of regional and ethnic minorities in the European Commmunity, following the Kuijpers report. The first of those documents requests national governments to 'allow and provide for, in response to needs expressed by the population, teaching in schools of all level and grades to be carried out in regional languages'. Furthermore, in 1982, the Commission set up the European Office on Minority Languages, whose office is in Dublin. All this shows the extent to which it is recognized that it is essential to preserve Europe's cultural richness and to ensure the diversity of its linguistic heritage.

18. Certainly, Irish cannot be described as a regional language. Indeed, the Irish Constitution gives it the status of a national language. However, since it is a minority language, such a language cannot be preserved without the adoption of voluntary and obligatory measures. Any minority phenomenon, in whatever field, cannot usually survive if appropriate measures are not taken.

19. The preservation of languages is one of those questions of principle which one cannot dismiss without striking at the very heart of cultural identity. Is it therefore for the Community to decide whether or not a particular language should survive? Is the Community to set Europe's linguistic heritage in its present state for all time. Is it to fossilize it?

20. It seems to me that every State has the right to try to ensure the diversity of its cultural heritage and, consequently, to establish the means to carry out such a policy. Such means concern primarily public education. Likewise, every State has the right to determine the importance it wishes to attribute to its cultural heritage. The fact that Irish is recognized as an official language in the Constitution is evidence in this case of the desire of the Irish State to attribute major importance to the preservation of this heritage.

21. Once a constitution (that is to say, all the fundamental values to which a nation solemnly declares that it adheres) recognizes the existence of two official languages without limiting their use to specific parts of the national territory or to certain matters, each citizen has the right to be taught in those two languages. The fact that only 33.6% of Irish citizens use the Irish language is no justification for sweeping away that right altogether, for its importance is measured not only by its use but also by the possibility of preserving its use in the future.

22. Consequently, without contravening the principle of proportionality in any way, this linguistic requirement must be conceived as not being limited merely to posts involving the teaching of Irish literature or culture. At this point I would like to quote from *Le degré zéro de l'écriture* by Roland Barthes: 'il n'y a pas de pensée sans langage', he states after having written 'la langue . . . est l'aire d'une action, la définition et l'attente d'un possible'. To limit the requirement of a knowledge of Irish to posts involving the actual teaching of Irish would be to treat it as a dead language like ancient Greek or Latin, and as a language incapable of further development, or, at least, as a confidential language whose use is restricted to a small circle of initiates.

23. Every Irishman has the right — enshrined, as we have seen, in the Irish State's most fundamental legal instrument — to be taught any subject at all, including painting, in Irish, if he so desires. Whatever the official language used in an educational institution, a State is entitled to ensure that any citizen can express himself and be understood there in another language, which is also an official language and which is a respositary of and a means of transmitting a common cultural heritage.

24. Consequently, it seems to me that teaching posts fall by their nature within a field essential to the pursuit of a policy of preserving and fostering a language.

25. Finally it should be noted that derogations for full-time posts are possible where there is no other qualified candidate and that the level of knowledge required is not so high as to make it impossible for a foreigner to pass the examination. Provision is made for an intensive course lasting only one month as preparation for that examination. Out of six non-Irish candidates, four passed at the first attempt and one at the second. Finally, the documents annexed to the observations of the applicant in the main proceedings indicate that the oral examination which she took related to topical questions and was not particularly difficult. Consequently, the disputed measure, which is flexible in a number of ways, is, in my view, limited to what is strictly necessary.

26. The possibility of applying a less strict measure, consisting, for example, in requiring a teacher, once appointed, to take lessons in Irish does not seem to meet satisfactorily the aim in question. First, the learning of the language would not be immediate and, secondly, the teachers involved would undoubtedly be less conscious of the necessity of having a knowledge of the Irish language.

27. Consequently, it does not appear that the measure in question is contrary to the principle of proportionality.

28. I therefore suggest that the second question should be answered to the effect that teaching posts are by their nature amongst those posts in respect of which a Member State pursuing a policy of preserving and fostering a national language may require a sufficient knowledge of that language.

29. If that is also the Court's position, it seems to me, for the reasons set out above, that there is no need to reply either to the first or to the third question. However, if the Court does not accept my opinion, how should the second indent of Article 3(1) of the Regulation be interpreted for the purposes requested by the national court?

30. Is it the exclusive or principal aim or effect of the national provision in question to keep nationals of other Member States away from the employment offered? In other words, does it constitute indirect discrimination?

31. In my view, the reply to that question must be qualified. It is not alleged by anyone that the aim of the measure is to keep non-Irish nationals away from the posts in question. Although brought up to date in 1979, the policy followed by the Irish Government of preserving and fostering the Irish language is, as I have pointed out, quite old and in any event

dates from before Ireland's accession to the Community Treaties. It also seems that this policy has borne fruit since statistics drawn up following the 1981 census show an increase in the number of persons speaking the Irish language in certain regions between 1926 and 1981, namely from 9.4 to 28.2% in Leinster, from 21.6 to 34.6% in Munster and from 33.3 to 38.8% in Connaught.[7] There is, therefore, no question at all of a measure having as its aim to keep nationals of other Member States away from teaching posts.

32. As regards the exclusive or principal effect of the measure, it seems to be rather to require Irish nationals who wish to obtain a full-time teaching post to learn the Irish language than to keep away non-Irish nationals. Moreover, the Commission points out that Irish may be studied in Paris, Bonn, Rennes, Brest and Aberystwyth. It should also be noted that Mrs Groener is apparently the only non-Irish Community national to have failed the special examination in the Irish language. Finally, the proportion of teachers who are nationals of another Member State in relation to the number of teachers of Irish nationality (189 as against 1 723) does not, to my mind, indicate that a dissuasive effect has been exerted on non-Irish Community nationals; indeed, quite the reverse seems to be true.

33. However, the measure would be manifestly discriminatory if, in the case of recognized equivalence, the conditions for obtaining the certificate of knowledge of the Irish language differed according to the place where the Irish language studies were pursued. The replies which Ireland gave to the questions asked by the Court are not sufficiently explicit in this regard. Obtaining the certificate presupposes success in the written and oral examinations. Exemption from the written examination may be granted essentially to persons who have completed their studies and passed examinations in Irish, to persons who have studied Irish for at least three years and obtained the appropriate diploma and to graduates who have passed the Irish examination. Exemption from the oral examination may be granted to a person who has obtained a pass in the oral examination for registration as a secondary school teacher. It is true that many Irish people pursue their studies entirely in English and do not benefit from those derogations. Furthermore, a special examination in Irish such as that taken by Mrs Groener compensates for the absence of a certificate. However, the Irish Government stated at the hearing that Community nationals who have learned Irish outside Ireland in one of the towns where such a course is available, which I have already mentioned, are not granted the exemptions available to persons who have obtained the aforesaid diplomas in Ireland. However, since the judgment in *Thieffry* v *Conseil de l'Ordre des Avocats à la Cour de Paris*,[8] the Court has considered a refusal to take into account a diploma which has been recognized as equivalent to a national diploma to be an unjustified restriction. That case concerned freedom of establishment but the decision is also applicable to freedom of movement for workers.

34. Consequently, it seems to me that the Court could if necessary rule that diplomas obtained outside a Member State but recognized by that Member State as being equivalent should be taken into account for the purposes of exemptions granted in the procedure for obtaining a certificate of linguistic competence. It is in those terms

7 — Observations of Ireland, Annex No 1.

8 — Judgment of 28 April 1977 in Case 71/76 *Thieffry* v *Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765.

that I propose the first question should be answered if the Court does not adopt the interpretation of the last sentence of Article 3 which I have suggested.

35. As regards the third question, concerning the concept of public policy within the meaning of Article 48, I will confine myself to a few remarks. It seems to me that this exception cannot apply to access to employment. This proviso appears in paragraph (3) of Article 48 which in effect sets out workers' freedom to come and go within the Community and to stay there; in other words, it concerns the political aspect of freedom of movement. On the other hand, the public policy proviso is not mentioned in paragraph (2) of Article 48, which relates to the abolition of discrimination as regards employment, remuneration and other conditions of work and employment, that is to say the economic aspect of freedom of movement. Moreover, the Regulation, which was adopted to implement Article 48, lays down the exceptions to the principle of non-discrimination, essentially as regards languages, as we have seen, and this would seem to exclude the possibility of adding an exception based on public policy, which does not appear either in the Regulation or in the paragraph of Article 48 dealing with working conditions.

36. Finally, it should be recalled that in its judgment in *Johnston* v *Chief Constable of the Royal Ulster Constabulary* the Court stated that:

'. . . the only articles in which the Treaty provides for derogations applicable in situations which may involve public safety are Articles 36, 48, 56, 223 and 224 which deal with exceptional and clearly defined cases. Because of their limited character those articles do not lend themselves to a wide interpretation and it is not possible to infer from them that there is inherent in the Treaty a general proviso covering all measures taken for reasons of public safety'.[9]

37. Consequently, it seems to me for the same reasons that the public policy proviso is inapplicable in this case and that it is unnecessary to reply to the third question.

38. I would therefore propose that the Court should rule as follows:

'(1) The post of full-time teacher, whatever the subject taught, is one of the kind of posts referred to in the last sentence of Article 3(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

In order to foster one of its national languages, a Member State may therefore rely on that provision for the purpose of laying down the requirement that any candidate for such a post should possess a sufficient knowledge of the language concerned.

9 — Judgment of 15 May 1986 in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, at p 1684, paragraph 26

(2) In the alternative, the second indent of the first subparagraph of Article 3(1) of that regulation must be interpreted as not precluding national provisions making access to a post subject to the requirement that candidates should have a sufficient knowledge of one of the official languages of a Member State, provided that the conditions in which that requirement is declared satisfied are not more favourable to persons who have pursued their linguistic studies in the Member State concerned than to persons who possess diplomas recognized as equivalent by that State but who have pursued the same studies in another Member State.

(3) It is unnecessary to reply to the third question.'