Trinity Term
[2010] UKSC 34
On appeal from: [2008] EWCA Civ 1448

JUDGMENT

O'Brien (Appellant) *v* Ministry of Justice (Formerly the Department for Constitutional Affairs) (Respondents)

before

Lord Hope, Deputy President
Lord Walker
Lady Hale
Lord Clarke
Sir John Dyson SCJ

JUDGMENT GIVEN ON

28 July 2010

Heard on 14 and 15 June 2010

Appellant
Robin Allen QC
Rachel Crasnow

(Instructed by Browne Jacobson LLP)

Respondent
John Cavanagh QC
Sarah Moore
Holly Stout
(Instructed by Treasury Solicitor)

Intervener (Council of Immigration Judges)
Ian Rogers
(Instructed by Underwood Solicitors LLP)

LORD WALKER (delivering the judgment of the court)

Introductory

1. This appeal raises questions of EU law relating to Council Directive 97/81/EC of 15 December 1997 ("the PTWD") concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC ("the Framework Agreement") which the Court considers it necessary to refer to the Court of Justice under article 267 of the Treaty on the Functioning of the European Union. The appeal also raises questions of domestic law, as to the status and terms of service of judges in England and Wales (the term "judges" being here used as a compendious term so as to include, in general, chairmen and members of tribunals and others exercising judicial functions for remuneration, but not lay magistrates). The domestic law questions cannot easily be disentangled from the questions of EU law, partly because of the *Marleasing* principle (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* C-106/89 [1991] I-ECR 4135) and partly because Clause 2(1) of the Framework Agreement refers to "employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State".

2. This judgment is in five sections. The first section summarises the relevant parts of the PTWD, the Framework Agreement and the regulations transposing these EU measures into domestic law. The second and third sections set out the (largely undisputed) facts both as to the wider factual context (including the growing importance of part-time judges in the English legal system) and as to Mr O'Brien's claim against the Ministry of Justice. The fourth section considers and gives this Court's opinion on the relevant principles of domestic law, but with the important qualification that (because of their entanglement with EU issues) some of the Court's conclusions must be treated as provisional, and may have to be revisited in the light of the Court of Justice's preliminary ruling. The fifth and final section explains why a preliminary ruling is necessary, and sets out the questions referred to the Court of Justice.

I

The PTWD, the Framework Agreement and the domestic regulations

3. The PTWD contains in recital (11) a reference to the parties to the Framework Agreement wishing "…to establish a general framework for

eliminating discrimination against part-time workers and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike". Recital (16) is as follows:

> "Whereas, with regard to terms used in the Framework Agreement which are not specifically defined therein, this Directive leaves Member States free to define those terms in accordance with national law and practice, as is the case for other social policy Directives using similar terms, providing that the said definitions respect the content of the Framework Agreement."

Article 1 states that the purpose of the Directive is to implement the Framework Agreement. Article 2 requires Member States to transpose it into national law by 20 January 2000 at latest.

4. Clauses 1 and 2 of the Framework Agreement are as follows:

> "Clause 1: Purpose
>
> The purpose of this Framework Agreement is:
>
> (a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;
>
> (b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers.
>
> Clause 2: Scope
>
> 1. This Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.
>
> 2. Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with

national industrial relations practice may, for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis. Such exclusions should be reviewed periodically to establish

if the objective reasons for making them remain valid."

The Ministry of Justice does not place any reliance on Clause 2(2). Clause 3 contains definitions of "part-time worker" and "comparable full-time worker". Clause 4 sets out the principle of non-discrimination:

"Clause 4: Principle of non-discrimination

1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of *pro rata temporis* shall apply.

3. The arrangements for the application of this clause shall be defined by the Member States and/or social partners, having regard to European legislation, national law, collective agreements and practice.

4. Where justified by objective reasons, Member States after consultation of the social partners in accordance with national law, collective agreements or practice and/or social partners may, where appropriate, make access to particular conditions of employment subject to a period of service, time worked or earnings qualification. Qualifications relating to access by part-time workers to particular conditions of employment should be reviewed periodically having regard to the principle of non-discrimination as expressed in Clause 4.1."

5. The PTWD did not initially apply to the United Kingdom. But Council Directive 98/23/EC of 7 April 1998 provided for it to apply to the United Kingdom with 7 April 2000 being substituted for 20 January 2000 as the final date for transposition.

6. The United Kingdom gave effect to the PTWD and the Framework Agreement by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000 No.1551) ("the Regulations") which were made on 8 June 2000 and came into force on 1 July 2000. The Regulations were made under section 19 of the Employment Relations Act 1999.

7. Regulation 1(2) contains definitions, including:

> "contract of employment" means a contract of service or of apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;
>
> "worker" means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under –
>
> (a) a contract of employment; or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

There is no reference to "employment relationship."

Regulation 2 (as amended) contains definitions of a full-time worker, a part-time worker and a comparable full-time worker. It is common ground that if Mr O'Brien was a worker at all, he was a part-time worker.

8. Regulation 5 sets out the prohibition on unjustified less favourable treatment of part-time workers:

> "5. Less favourable treatment of part-time workers

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker –

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if –

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate."

9. Part IV of the Regulations is headed "Special Classes of Person" and contains six Regulations numbered 12 to 17. Regulation 12 (Crown employment) provides (so far as now material)

"(1) Subject to regulation 13, these Regulations have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees and workers.

(2) In paragraph (1) 'Crown employment' means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision."

Regulations 13 (Armed forces), 14 (House of Lords staff), 15 (House of Commons staff) and 16 (Police service) make similar provision for the classes of service personnel, office holders or employees to which they relate (but subject to an exception for certain types of military training under the Reserve Forces Acts).

Subject to that exception all these provisions include within the scope of the Regulations persons who would not or might not otherwise be included.

10. By contrast Regulation 17 (Holders of judicial offices) disapplies the Regulations in relation to fee-paid part-time judges:

> "These Regulations do not apply to any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis".

The parties take different views as to whether, in the absence of Regulation 17, fee-paid part-time judges would have been treated as part-time workers for the purposes of the Regulations.

II

The facts: the part-time judiciary

11. Until the 1970s the English judicial system had relatively few part-time judges, variously styled recorders, commissioners or chairmen of quarter sessions. All these part-time judges were remunerated by fees calculated on a daily basis ("fee-paid"). Professor Bell (Judiciaries in Europe (2006) p312) records that in 1970 full-time judges outnumbered part-time judges by about three to one. Many judicial officers who are now called judges were then designated by other terms such as registrars, stipendiary magistrates and social security or tax commissioners.

12. The Courts Act 1971 made major changes in the justice system and (as amended) conferred the powers under which all recorders are still appointed. Section 21 of the Courts Act 1971, as originally enacted, was in the following terms:

> "(1) Her Majesty may from time to time appoint qualified persons, to be known as Recorders, to act as part-time judges of the Crown Court and to carry out such other judicial functions as may be conferred on them under this or any other enactment.
>
> (2) Every appointment of a person to be a Recorder shall be of a person recommended to Her Majesty by the Lord Chancellor, and no

person shall be qualified to be appointed a Recorder unless he is a barrister or solicitor of at least ten years' standing.

(3) The appointment of a person as a Recorder shall specify the term for which he is appointed and the frequency and duration of the occasions during that term on which he will be required to be available to undertake the duties of a Recorder.

(4) Subject to subsection (5) below the Lord Chancellor may, with the agreement of the Recorder concerned, from time to time extend for such period as he thinks appropriate the term for which a Recorder is appointed.

(5) Neither the initial term for which a Recorder is appointed nor any extension of that term under subsection (4) above shall be such as to continue his appointment as a Recorder after the end of the completed year of service in which he attains the age of 72.

(6) The Lord Chancellor may if he thinks fit terminate the appointment of a Recorder on the ground of incapacity or mis-behaviour or of a failure to comply with any requirements specified under subsection (3) above in the terms of his appointment.

(7) There shall be paid to Recorders out of money provided by Parliament such remuneration and allowances as the Lord Chancellor may, with the approval of the Minister for the Civil Service, determine."

The section has been amended from time to time. The most significant amendment, influenced by the Human Rights Act 1998, was the introduction of safeguards limiting the Lord Chancellor's right to decline to extend, or to terminate, an appointment. This amendment gave effect to new terms and conditions of service promulgated by the Lord Chancellor's Department (the predecessor to the Ministry of Justice) in 2000.

13. Since the Courts Act 1971 there has been a remarkable growth in the number of part-time judges. Statistics in Professor Bell's chapter (table 6.1a) show that there were 2,041 part-time judges (recorders and deputy district judges) in 1993 and 2,414 in 2005 (including 200 female deputy district judges, up from 89 in 1993, indicating the success of the official policy of encouraging women to become part-time judges). There are now almost twice as many part-time judges

(recorders and deputy district judges) as full-time judges. These figures do not take account of remunerated chairmen and members of tribunals, the structure of which has been radically reformed by the Tribunals Courts and Enforcement Act 2007. Submissions from the Council of Immigration Judges show that in 2009 there were 145 full-time immigration judges and 440 part-time immigration judges (the latter group being divided between salaried part-time judges and fee-paid part-time judges as mentioned below).

14. For about thirty years after the Courts Act 1971 all part-time judges were remunerated on a fee-paid basis. That was not a statutory requirement (section 21(7) is in very general terms) but it was the administrative arrangement chosen by the Lord Chancellor's Department (later the Department of Constitutional Affairs, and now the Ministry of Justice). Since about 2000, however, there has been an increase in salaried part-time judges, especially among district judges and immigration judges.

15. The Lord Chancellor has from time to time issued and amended written memoranda as to the terms and conditions of service of recorders. The memorandum current in 1978 (when Mr O'Brien was appointed) contained fifteen paragraphs covering (among other things) the requirement for attendance at sentencing conferences, the frequency and duration of sittings (at least twenty days a year, which could be split into two periods of at least ten days) and fees (£60 a day). The version (issued in April 2000) current at his retirement is a more elaborate document of 49 paragraphs together with two appendices (on relations with the media). Most of the new material dealt with the renewal of appointments and judicial conduct. A recorder was entitled to be offered a minimum of fifteen sitting days a year and might be required to sit for up to thirty days. The daily fee was unspecified but in practice was (and still is) 1-220th of the salary of a full-time circuit judge. A fee at half the daily rate is paid for attending Judicial Studies Board residential conferences. The CIJ's submissions state that fee-paid part-time immigration judges' sittings should not normally exceed 105 days a year, and that for each day's sitting an immigration judge is credited a further day's work and pay for writing determinations and similar out-of-court duties.

16. All part-time judges are entitled (where appropriate) to sick pay, maternity or paternity pay, and similar benefits during service. Full-time judges and salaried part-time judges are entitled to pensions on retirement, subject to and in accordance with the provisions of the Judicial Pensions Act 1981 as amended and the Judicial Pensions and Retirement Act 1993 as amended. Fee-paid part-time judges have no entitlement to a judicial pension on retirement. That is what Mr O'Brien complains of in these proceedings. His complaint is founded on the PTWD and the Framework Agreement.

III

Facts relevant to Mr O'Brien's complaint

17. Mr O'Brien was born in 1939 and called to the bar in 1962. From about 1970 his practice was in civil (as opposed to criminal) work on the western circuit. He was appointed Queen's Counsel in 1983.

18. With the encouragement of the leader of the western circuit Mr O'Brien applied to become a recorder and was appointed as a recorder with effect from 1 March 1978. He then continued sitting as a recorder until 31 March 2005, with regular extensions, the last extension being in 1999. In 1986 and 1987 he was unable to comply with his sitting requirement because he was engaged in a heavy case in Hong Kong. For this he received what he called "a polite but firm reprimand" from the Lord Chancellor's Department. In 1998 the Department adopted the policy, set out in its memorandum of terms and conditions, of not renewing a recorder's appointment beyond the year in which he or she attained the age of 65. From 2000 the policy was for recorders' terms to be five years, automatically renewable except in the case of incapacity or misbehaviour.

19. Mr O'Brien started proceedings in the Employment Tribunal on 29 September 2005. Initially his claim was opposed by the Department of Constitutional Affairs (now the Ministry of Justice) unsuccessfully in the Employment Tribunal, but successfully on appeal to the Employment Appeal Tribunal, on the ground that it was out of time. But it was later ordered, by consent, that the substantive issue and the time limit issue should both be heard by the Court of Appeal as a test case. On 19 December 2008 the Court of Appeal (the Chancellor and Smith and Maurice Kay LJJ) [2008] EWCA Civ 1448, [2009] ICR 593 allowed Mr O'Brien's appeal on the time limit issue, but directed the Employment Tribunal to dismiss the claim on the issue of substance.

20. Mr O'Brien was given permission to appeal to the Supreme Court and this Court heard submissions on 14 and 15 June 2010. As often happens, each side's primary submission to the Court was that the matter was acte clair in its favour, and its secondary submission was that if the Court did not accept its primary submission, a reference under Article 267 was necessary. For the reasons set out at V below the Court accepts each side's secondary submission.

IV

Domestic law issues

21. Mr O'Brien makes two main alternative submissions, described by his counsel as his "high ground" and "low ground" positions. These submissions were developed at length but essentially both are founded on the contention that as a recorder appointed under section 21 of the Courts Act 1971 (as amended) Mr O'Brien *worked* for *remuneration* subject to *terms and conditions* akin to an employment contract. Either it was a contract, Mr O'Brien says, of a type falling within the definition of "worker" in Regulation 1(2) of the Regulations (his "high ground" position) or there was an "employment relationship" falling within Clause 2(1) of the Framework Agreement (his "low ground" position).

22. By contrast the position of the Ministry of Justice is that Mr O'Brien was not a person working under any sort of contract. He was, it is said, the holder of an office and (as the independence of the judiciary demands) was not subject to the direction of any employer. The fact that he was subject to income tax under Schedule E is of no assistance to him since income tax under Schedule E is charged on the earnings of an office or employment (Income Tax (Earnings and Pensions) Act 2003 section 5).

23. Both sides referred to numerous authorities, the most important being the decision of the House of Lords in *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73 [2006] 2 AC 28. That case concerned a claim for sex discrimination by a female associate minister of the Church of Scotland. Her claim was made under the Sex Discrimination Act 1975, section 82(1) of which contains a definition of "employment" substantially similar (in its requirement of a contract of service or a contract for personal execution of work or labour) to that in the Regulations. The House of Lords, by a majority of four (Lord Nicholls, Lord Hope, Lord Scott and Lady Hale) to one (Lord Hoffmann) allowed Ms Percy's appeal, holding that she was in employment and that the Employment Tribunal had jurisdiction to hear her claim.

24. In *Percy* the majority held that tenure of an office does not necessarily exclude employment, especially where there is a wide statutory definition of that term (see especially Lord Nicholls at paras 18-22, concurred in by Lord Scott and Lady Hale). Employment may extend beyond the traditional concept of a contract of service between "master and servant" (Lord Nicholls at para 13, Lord Hope at para 113, Lady Hale at para 141; compare Lord Hoffmann in dissent at para 66). The degree of control exercised over the employee is therefore less important, and in any case Ms Percy was, in that case, conducting her ministry under the control

of a senior minister (Lord Nicholls at para 13, Lord Hope at para 127, Lady Hale at paras 145-146 and 148).

25. Lord Hoffmann (at para 73) and Lady Hale (at para 145) referred to the principle laid down by the Court of Justice in *Lawrie-Blum v Land Baden-Wurttenberg* C66/85 [1986] ECR 2121, para 17:

> "That concept ['worker'] must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."

That was a case on free movement of workers under what was then article 48 of the Treaty. The claimant was a trainee teacher working in Germany. As the Court of Justice was concerned with a fundamental freedom, the term "worker" had to be given an autonomous Community meaning, and the concept was to be interpreted broadly (para 16).

26. Lady Hale, at paras 143-148, gave detailed consideration to the decision of the Court of Appeal of Northern Ireland in *Perceval-Price v Department of Economic Development* [2000] IRLR 380, a claim on sex discrimination grounds brought by three female holders of full-time judicial office (two were chairmen of tribunals and one was a social security commissioner). Their claims were made under statutory provisions which excluded the holder of a statutory office, but the Court of Appeal of Northern Ireland disregarded the exclusion as being inconsistent with the Equal Treatment Directive 76/207/EEC of 9 February 1976 (which had direct effect). Sir Robert Carswell LCJ, giving the judgment of the court, pointed out that the purpose of article 119 of the Treaty and the Equal Pay and Equal Treatment Directives was to protect against discrimination and continued (p384):

> "All judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the President of the Industrial Tribunals or the Court Service, or more loosely arranged in collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they

> be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment . . ."

The Supreme Court agrees with these observations.

27. A recorder appointed under section 21 of the Courts Act 1971 (as amended) undoubtedly holds an office. Judicial office is one of the oldest and most important offices known to English law. That office is marked by a high degree of independence of judgment, as it must be in order to satisfy the requirements of Article 6 of the European Convention on Human Rights for an "independent and impartial tribunal." A recorder, unlike the associate minister of religion in *Percy*, is not subject to the directions of any superior authority as to the way in which he or she performs the function of judging. Nevertheless recorders (and all judges at every level) are subject to terms of service of the sort referred to by Sir Robert Carswell LCJ. Indeed judicial office partakes of most of the characteristics of employment. However, because domestic law cannot readily be disentangled from EU law on this issue the Court prefers to express no concluded view, as to whether judges (as a general class) would qualify as "workers" under the Regulations, and as to whether Mr O'Brien would qualify as a worker if regulation 17 were to be disregarded (in the same way as part of a domestic measure was disregarded in *Perceval-Price v Department of Economic Development*).

V

The need for a reference to the Court of Justice

28. In approaching the EU issues this Court considers that three general points are clear. First, there is no single definition of "worker" which holds good for all the purposes of Community law: *Martinez Sala v Freistaat Bayern* C-85/96 [1998] ECR I – 2691 para 31; *Allonby v Accrington and Rossendale College* C-256/01 [2004] ICR 1328. Second, in contrast to the position under other Directives (where references to workers have an autonomous European meaning) the effect of Clause 2(1) of the Framework Agreement, read together with Recital (16) of the PTWD, is to make domestic law relevant to the interpretation of the expression "worker". Thirdly, however, domestic law is not to oust or "trump" the principles underlying the EU legislation in such a way as to frustrate them. Its underlying purposes must be (as Recital (16) puts it) respected.

29. The Court has heard sharply conflicting submissions as to how these general points, which are not in dispute, should be applied to the circumstances of Mr O'Brien's case. In particular the Court has heard detailed submissions on three comparatively recent decisions of the Court of Justice, that is *Landeshauptstadt Kiel v Jaeger* C-151/02 [2004] ICR 1528, *Wippel v Peek & Cloppenburg GmbH & Co KG* C-313/02 [2005] ICR 1604 and *Del Cerro Alonso v Osakidetza (Servicio Vasco de Salud)* C-307/05 [2008] ICR 145.

30. *Jaeger* was concerned with the application of the definition of working time in para 2(1) of the Working Time Directive 93/104/EC of 23 November 1993 to time spent on call by junior doctors in German hospitals:

> "'working time' shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice'".

The doctors had to be on call at the hospital, but when not actually working could sleep in accommodation provided for them at the hospital.

31. The Advocate General (Colomer) stated in para 36 of his opinion:

> "despite the fact that article 2(1) of Directive 93/104 provides that the three criteria used to define working time are to be specifically delimited in accordance with national laws and/or practice, that stipulation does not mean that member states may refrain from applying those criteria and rely on rules of national law . . . However a member state may not rely on its own legislation to support the view that a doctor who carries out periods of duty on call in a hospital is not at the employer's disposal at times when he is inactive but is waiting for his services to be called on again."

32. The Court of Justice stated (paras 58 and 59 of the judgment):

> "In any event the concepts of 'working time' and 'rest period' within the meaning of Directive 93/104 may not be interpreted in accordance with the requirements of the various legislations of the member states, but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that Directive as the Court did in *SIMAP*, at p1147, paras 48-50. Only such an autonomous

> interpretation is capable of securing for that Directive full efficacy and uniform application of those concepts in all the member states.
>
> Accordingly, the fact that the definition of the concept of working time refers to "national laws and/or practice" does not mean that the member states may unilaterally determine the scope of that concept. Thus, those states may not make subject to any condition the right of employees to have working periods and corresponding rest periods duly taken into account, since that right stems directly from the provisions of that Directive. Any other interpretation would frustrate the objective of Directive 93/104 of harmonising the protection of the safety and health of workers by means of minimum requirements: see *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* (Case C-84/94) [1999] ICR 443, 506, 510, paras 47 and 75."

That passage has been adopted in another case on the Working Time Directive, *Pfeiffer v Deutsches Rotes Kreuz* C-397-403/01 [2005] ICR 1307, para 99.

33. These decisions seem to show that the need to make some reference to domestic law cannot be permitted to frustrate the overriding Community purpose of safeguarding the health and safety of workers. The Ministry of Justice's written submissions (para 109) contend that a claim under the PTWD does not engage any fundamental Community right. But the aim of the PTWD and the Framework Agreement is to eliminate inequality and discrimination. As the Advocate General (Sharpston) stated in *Istituto Nazionale della Previdenza Sociale v Bruno & Pettini* C-395/08, para 119:

> "The prohibition on discrimination in Clause 4 of the Framework Agreement is a particular expression of the general principle of equality. It must therefore be interpreted in accordance with that principle. Any national implementing measures must likewise respect the general principles of Community law, including the principle of equal treatment."

The elimination of inequality and discrimination is at least as important a Community principle as the health and safety of workers.

34. *Wippel* was concerned with an Austrian part-time worker whose contract was of an exiguous character in that she was not entitled to be offered any minimum amount of work, nor was she bound to accept work if it was offered.

Nevertheless the Austrian Oberster Gerichtshof, in making its reference, stated that the claimant was recognised as a worker by domestic law. She was therefore within para 2(1) of the Framework Agreement.

35. In that case the Advocate General (Kokott) stated (para 45):

> "Consequently, for the purposes of the Framework Agreement, the term 'worker' is not a Community law concept. Indeed, the personal scope of application of the Framework Agreement is defined by reference to the national law applicable in each case. The term 'worker' therefore has to be defined in reliance on the law, collective agreements and practices in force in each member state. The member states have wide discretionary powers in this respect. Only the very broadest limits can be determined in this respect by reference to Community law. It could therefore constitute a breach of the duty of co-operation (article 10 EC) if a member state were to define the term 'worker' so narrowly under its national law that the Framework Agreement on part-time work were deprived of any validity in practice and achievement of its purpose, as stipulated in Clause 1, were greatly obstructed. However, there is no sign of that here."

The Ministry of Justice relies heavily on this passage, as did the Court of Appeal ([2008] EWCA Civ 1448, para 46) following Elias J in *Christie v Department of Constitutional Affairs* [2007] ICR 1553, para 40. The Court of Justice reached the same conclusion as the Advocate General, but its judgment on the first question (paras 35-40) appears to give no support to her statement that member states have "wide discretionary powers" or that "only the very broadest limits" can be set by reference to Community law.

36. *Del Cerro Alonso* was concerned with workers in the Basque health service who were initially classified as "temporary regulated staff" but were then regraded as permanent staff. They were refused length-of-service allowances in respect of their service in the temporary grade and made complaints under Council Directive 99/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work. Their claims were resisted by the health service on the ground of objective justification, but the Kingdom of Spain intervened to contend that the regulated staff, as public-sector workers, were completely outside the scope of the Directive (which contained a definition of "worker" in terms very similar to that in Clause 2(1) of the Framework Agreement under the PTWD).

37. The Advocate-General (Poiares Maduro) considered this point in a long passage in his opinion (paras 11-15). It is sufficient to cite the conclusion in para 15:

> "That conditional renvoi appears to me to be the process which is most faithful to both the letter and the spirit of the Community legislation. The effect of it is that the member state cannot merely rely on the formal or special nature of the rules applicable to certain employment relationships in order to exclude the latter from the benefit of the protection afforded by the Framework Agreement. If that were the case, there would be grounds for concern that the Framework Agreement could be rendered completely redundant. If it were the case, it would be open to any member state to make the contract staff of the public authorities subject to special rules in order to call in question the decisions adopted by the Court of Justice in *Adeneler v Ellinikos Organismos Galaktos (ELOG)* (Case C-212/04) [2006] ECR I-6057; *Marrosu v Azienda Ospedaliera Ospedale San Martino di . . . . Genova . . .* (Case C-53/04) [2006] ECR I-7213 and *Vassalo v Azienda Ospedaliera Ospedale San Martino di Genova . . .* (Case C-180/04) [2006] ECR I-7251. Consequently, the exclusion of public servants from the scope of Directive 99/70 cannot be accepted unless it is demonstrated that the nature of the employment relationship between them and the administration is *substantially* different from that between employees falling, according to national law, within the category of 'workers' and their employers."

38. The Court of Justice observed (para 29 of the judgment):

> "The mere fact that a post may be classified as 'regulated' under national law and has certain characteristics typical of the Civil Service in the member state in question is irrelevant in that regard. Otherwise, in reserving to member states the ability to remove at will certain categories of persons from the protection offered by Directive 99/70 and the Framework Agreement, the effectiveness of those Community instruments would be in jeopardy as would their uniform application in the member states: see, by analogy, *Landeshauptstadt Kiel v Jaeger* (Case C-151/02) [2004] ICR 1528, paras 58 and 59, and *Pfeiffer v Deutsches Rotes Kreuz* (Joined Cases C-397-403/01) [2005] ICR 1307, para 99. As is clear not only from the third paragraph of article 249 EC, but also from the first paragraph of article 2 of Directive 99/70, in light of recital (17) of the preamble to that Directive [which is identical to recital (16) of the PTWD] the member states are required to guarantee the result imposed by Community law: *Adeneler* [2006] ECR I-6057, para 68."

39. For the Ministry of Justice, the high point of these citations is the statement by Advocate-General Kokott in *Wippel* that member states have "wide discretionary powers" (a statement not endorsed by the Court of Justice). For Mr O'Brien the high point is the passage (set out in the last paragraph) from the judgment of the Court of Justice in *Del Cerro Alonso*. The jurisprudence of the Court of Justice appears to give little clear guidance as to what type of national deviation from the Community norm shows a lack of "respect" (Recital (16) of the PTWD), or is justified by the nature of the post or office being "*substantially* different" from that of normal workers (para 15 of the opinion of Advocate-General Poiares Maduro in *Del Cerro Alonso*).

40. Accordingly the Supreme Court of the United Kingdom seeks guidance as to whether the permissibility of a national deviation from the Community norm should be judged by some or all of the following considerations: (1) the number of persons affected (large numbers of doctors and healthcare workers must have been affected by the issues raised in *Jaeger* and *Del Cerro Alonso*); or (2) the special position of the judiciary, for whose work independence of judgment, is an essential feature; or (3) the degree to which a particular exclusion under national law appears to have been effected with a particular Community measure in mind. In connection with this last point it is a particular cause for concern that the exclusion of fee-paid part-time judges by Regulation 17 of the Regulations has some appearance of being a deliberate ad hoc exclusion of a particular category while their full-time or salaried part-time colleagues, doing the same or similar work, will be entitled to judicial pensions on retirement.

41. The Supreme Court has therefore concluded that it is necessary to refer the following questions to the Court of Justice:

> "(1) Is it for national law to determine whether or not judges as a whole are 'workers who have an employment contract or employment relationship' within the meaning of clause 2.1 of the Framework Agreement, or is there a Community norm by which this matter must be determined?
>
> (2) If judges as a whole are workers who have an employment contract or employment relationship within the meaning of clause 2.1 of the Framework Agreement, is it permissible for national law to discriminate (a) between full-time and part-time judges, or (b) between different kinds of part-time judges in the provision of pensions?"