Final but unapproved
No redactions needed

THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 19

RECORD NO: 2020/146

Faherty J

Collins J

Pilkington J

BETWEEN

IRISH PRISON SERVICE

Appellant

AND

ROBERT CUNNINGHM

Respondent

AND

THE LABOUR COURT

Notice Party

JUDGMENT of Mr Justice Maurice Collins delivered on 29 January 2021

BACKGROUND

1. Before the Court for determination is an issue arising from a preliminary objection made by the Respondent ("*Mr Cunningham*") to the effect that the Court has no jurisdiction to entertain the appeal brought by the Prison Service.

2. The substantive appeal is not before the Court but I must say something about the proceedings and the appeal in order to explain the context in which the issue of this Court's jurisdiction is in controversy.

3. Mr Cunningham is a prison officer. He suffered a number of back injuries in the course of his duties, causing damage to a disc and resulting in him having to undergo a number of operations, most recently in February 2015. It appears that, following that surgery, the Chief Medical Officer advised the Prison Service that Mr Cunningham was unlikely to be able to return to full duties, specifically restraint and control duties. In November 2015, Mr Cunningham was informed by the Prison Service that it would not

possible for him to return to duty as a prison officer and it appears that he was given the option of seeking to return as a Prison Administrative and Support Officer (PASO) or otherwise retiring on grounds of ill-health.

4. Mr Cunningham then brought a claim under the Employment Equality Act 1998 (as amended) *("the 1998 Act*"), asserting that the Prison Service were discriminating against him on grounds of disability and contending that the Prison Service was obliged to afford him reasonable accommodation by giving him duties which did not involve contact with prisoners.

5. Mr Cunningham was successful in that claim before an Adjudication Officer of the Workplace Relations Commission (WRC). That ruling (given on 2 February 2017) was then appealed by the Prison Service to the Labour Court. On 17 July 2018 the Labour Court issued its Determination, in which it allowed the appeal, ruling that section 37(3) of the 1998 Act provided a complete defence to Mr Cunningham's claim.[1]

[1] Section 37(3) (as amended by section 25 of the Equality Act 2004) provides that it is an occupational requirement for employment in (*inter alia*) the Prison Service *"that persons employed therein are fully competent and available to undertake, and fully capable of undertaking, the range of functions that they may be called upon to perform so that the operational capacity of ... the service ... may be preserved*."

6. Mr Cunningham appealed that Determination to the High Court. That appeal, on a point of law, was brought pursuant to section 90(1) of the 1998 Act. It will be necessary to refer further to that provision in due course. In any event, Mr Cunningham's appeal was determined by the High Court (Barr J) on 9 June 2020. For the reasons set out in his detailed judgment of that date,[2] Barr J allowed the appeal. The Judge concluded that the Labour Court had erred in its interpretation of section 37(3). Properly construed (so Barr J considered) section 37(3) did not relieve the Prison Service of its obligation under section 16(3) of the 1998 Act to afford reasonable accommodation to employees such as Mr Cunningham, provided that it was not unduly burdensome to do so and provided that the operational capacity of the Prison Service would not be adversely affected. Barr J ordered that the claim be remitted to the Labour Court to allow it to consider whether, on the evidence, the Prison Service could reasonably accommodate Mr Cunningham, thus allowing him to continue as a prison officer.

7. By Notice of Appeal of 23 July 2020, the Prison Service appealed against the judgment and order of Barr J. In his Respondent's Notice (dated 2

[2] [2020] IEHC 282, [2020] ELR 317

October 2020), Mr Cunningham took issue with the various grounds of appeal but also relied on an additional ground (*inter alia*) to the effect that the "*applicable legislation*" provides that there is no further appeal to the Court of Appeal.

8. In light of that contention, the Court directed that the issue of jurisdiction be heard as a preliminary issue and the parties were directed to deliver written submissions addressing that issue which they duly did. An expedited hearing date was given and the Court has now had the benefit of full oral submissions from Counsel for the parties at the hearing which took place earlier this month.

THE ARGUMENTS

9. Mr Cunningham makes a number of arguments. In summary (and I will refer in more detail to certain aspects of the arguments below), Mr Cunningham argues that the issue of whether or not an appeal lies to this Court falls to be determined by reference to section 46 of the Workplace Relations Act 2015 ("*the 2015 Act"*) and that section, it is said, clearly excludes any such appeal. As I shall explain, the point of conflict between

the parties here is not as to the effect of section 46 but as to whether it has any application to this appeal. On Mr Cunningham's own admission, the argument that section 46 applies follows *"a circuitous and complex route*". However, the ultimate end-point is said to be clear. Mr Cunningham also contends that section 90(1) of the 1998 Act – which on its face appears to be the governing provision – has become "*redundant*" and/or has been "*rendered obsolete*" as a result of subsequent statutory amendments.

10. Mr Cunningham also argues that to allow a further appeal from the High Court would be inconsistent with the procedural "*streamlining*" intended to be achieved by the 2015 Act and would result in further delay and expense such as would involve an infringement of Mr Cunningham's right to an effective remedy – protected, it is said, by the Constitution, the EU Charter of Fundamental Rights and the European Convention on Human Rights – and would breach his rights under Article 6(1) of the Convention. As initially presented, the argument made was that these were factors which the Court could and should take into account when approaching the interpretation of the 1998 and 2015 Acts and, it was said, strongly supported Mr Cunningham's position. In her reply, Counsel for Mr Cunningham went further, arguing that, if section 90(1) of the 1998 Act

had the effect contended for by the Prison Service, it would be incompatible with Article 6(1) of the Convention. The Court should therefore reject that interpretation on the basis of section 2 of the European Convention on Human Rights Act 2003 ("*the 2003 Act*"), failing which it should consider making a declaration of incompatibility under section 5 of that Act. These provisions were referred to for the first time in Counsel's reply.

11. I should make it clear that Mr Cunningham's position was that no appeal lies to this Court from a decision of the High Court in a claim under the 1998 Act. It was not suggested that, while there may be a general right to bring such an appeal, the Court had a discretion to decline to hear the appeal brought by the Prison Service here.

12. In response, the Prison Services relies on the Article 34.4.1 of the Constitution and refers to what it says is the well-established principle that any exception to the right of appeal conferred by Article 34.4.1 must be set out in clear and unambiguous terms, citing a number of decisions of the Supreme Court including *AB v Minister for Justice* [2002] 1 IR 296, *Clinton v An Bord Pleanala* [2007] 1 IR 272 and *Stokes v Christian*

Brothers High School Clonmel [2015] IESC 13; [2015] 2 IR 509. Here, it was said, the relevant statutory provision is section 90(1) of the 1998 Act and it does not exclude a further appeal from the High Court. According to the Prison Service, Section 46 of the 2015 Act has no relevance to the issue of whether it is entitled to pursue its appeal here.

13. As regards the broader arguments advanced by Mr Cunningham, Counsel for the Prison Service stressed that Mr Cunningham had not challenged the validity of section 90(1), whether by reference to the Constitution, the Charter or the Convention. Considerations of effective remedy and/or delay could not operate to restrict or exclude a clear right of appeal arising under the Constitution. The argument advanced by Mr Cunningham was, it was said, a policy argument rather than one based in law. In any event, Counsel argued, it could not be said that a further appeal would *per se* involve a contravention of Article 6.

14. In her oral submissions (the issue was not addressed in Mr Cunningham's written submissions) Counsel for Mr Cunningham initially appeared to accept the starting premise of the Prison Service's argument, namely that there was a general right of appeal to this Court from all decisions of the

High Court and that any exception prescribed by law had to be in clear and unambiguous terms. Section 46 of the 2015 Act, it was said, satisfied the *Stokes* test. Later in her submissions, however, Counsel appeared to suggest that *Stokes* and the other case-law relied on by the Prison Service might not be applicable given that this Court is not the court of final appeal. It was also suggested that the reference in Article 34.4.1 to exceptions "*prescribed by law*" was not limited to enactments of the Oireachtas but also included other sources of law such as the provisions of the Convention including Article 6(1).

DISCUSSION

Article 34.4.1 of the Constitution

15. The starting point for analysis is Article 34.4.1 of the Constitution. In relevant part, it provides that:

> *"The Court of Appeal shall –*
>
> *...*
>
> *ii with such exceptions and subject to such regulations as may be prescribed by law,*

have appellate jurisdiction from all decisions of the High Court …"

16. Prior to its amendment by the Thirty-third Amendment of the Constitution (Court of Appeal) Act 2013, Article 34 contained (in Article 34.4.3) a provision in materially identical terms relating to the appellate jurisdiction of the Supreme Court from the High Court. That provision was considered in a number of Supreme Court decisions, including *State (Feran) v Browne* [1967] IR 147, *People v Conmey* [1975] IR 341, *People v O' Shea* [1982] IR 384 *Hanafin v Minister for the Environment* [1996] 2 IR 321, *AB v Minister for Justice* [2002] 1 IR 296, *Clinton v An Bord Pleanala* [2007] 1 IR 272, *A v Minister for Justice* [2013] IESC 18, [2013] 2 ILRM 457 and *Stokes v Christian Brothers High School Clonmel* [2015] IESC 13, [2015] 2 IR 509.

17. *Stokes* was referred to in detail in oral argument. The issue in *Stokes* was whether section 28 of the Equal Status Act 2000 excluded a further appeal to the Supreme Court from the decision of the High Court in proceedings under that Act. Ms Stokes' complaint had been the subject of a decision of the Director of the Equality Tribunal. Section 28(1) and (2) provided for

an appeal to the Circuit Court and section 28(3) then provided that *"[n]o further appeal lies, other than appeal to the High Court on a point of law."* The Supreme Court was divided on the issue of whether that provision excluded a further appeal, with the majority concluding that it did not. The language of section 29(3) differs materially from that of section 90(1) of the 1998 Act (at least since its amendment in 2004) and section 46 of the 2015 Act so the Court's detailed analysis of it is not relevant here. What is significant is the Court's unanimous affirmation of the principle that, for the purposes of Article 34.3.3, any statutory restriction of the right of appeal to the Supreme Court must be "*clear and unambiguous*": see per Hardiman J (with whose dissenting judgment McKechnie J agreed) at para 13 and per Clarke J (with whose judgment Murray and O' Donnell JJ agreed) at paras 76-78. The policy choice as to whether to exclude a further appeal or not was a matter for the legislature (per Hardiman J at para 46) and even where no rational basis for the legislative choice may readily be identified, it is not the function of the courts to remedy any *casus omissus* (per Hardiman J at para 13, citing with approval the statement to that effect by Keane CJ in *AB v Minister for Justice* [2002] 1 IR 296, at 303, also cited by Clarke J at para 77).

18. In this context, it is not sufficient that, as a matter of "*straightforward construction*", the more plausible or persuasive interpretation of a statutory provision is that a further appeal is excluded; the "*high constitutional test"* requires that such provision be "*free from ambiguity*": per Clarke J in *Stokes* at para 85.

19. Although the Court of Appeal had been established by the time of the Supreme Court's decision in *Stokes,* that decision related to an appeal from a decision of the High Court given in 2012 and what was at issue was the right of appeal to the Supreme Court as it existed prior to the Thirty-third Amendment. Obviously, the earlier jurisprudence was directed to that issue also.

20. However, in *Law Society of Ireland v Tobin* [2016] IECA 26, this Court held that the principles established by the Article 34.3.3 jurisprudence applied with equal force to the Court's jurisdiction under new Article 34.4.1. The issue in *Law Society v Tobin* was whether a 21 day time limit for appeals in certain solicitors' disciplinary matters contained in section 12 of the Solicitors (Amendment) Act 1960 was absolute or whether it could be extended by the Court. Giving the judgment of the Court, in which

it held that it had power to grant an extension of time for an appeal, Finlay-Geoghegan J stated:

> *"12. As appears and has been subsequently explained on more than one occasion by the Supreme Court legislation such as s.12 is a limitation by the Oireachtas of the scope of a constitutionally conferred right of litigants to appeal decisions of the High Court to the Supreme Court (and now the Court of Appeal) and as such must be expressed in clear and unambiguous terms. (See A.B. v. Minister for Justice and Equality and Law Reform [2002] 1 I.R. 296, per Keane S.J. at 303 and Clinton v. An Bord Pleanála [2007] 1 I.R. 271, per Fennelly J. at 293.)"* (my emphasis)

The Court concluded that, in the absence of clear language to the contrary in section 12, the time-limit was not absolute and was capable of extension.

21. In my judgment for the Court in *North Westmeath Turbine Action Group v An Bord Pleanala* [2020] IECA 355, where the issue was the scope of section 50A(7) of the Planning and Development Act 2000 (as amended), I cited *Law Society of Ireland v Tobin* as authority for the proposition that

the decisions referred to in paragraph 16 above "*apply with equal force to this Court's appellate jurisdiction under Article 34.4.1 of the Constitution*": see para 25. I went on consider a number of those decisions in detail, particularly *AB v Minister for Justice* and *A v Minister for Justice*.

22. In my view, the jurisprudence addressing the Supreme Court's former appellate jurisdiction under (former) Article 34.3.3 of the Constitution applies also to this Court's appellate jurisdiction under Article 34.4.1. The language of these Constitutional provisions is materially identical. In each case, the constitutionally entrenched "*primary rule*" *(*as it was described as by Fennelly J in *Clinton v An Bord Pleanala* [2007] 1 IR 272, at para 49) is that an appeal lies "*from <u>all</u> decisions of the High Court"* (my emphasis). The underlying rationale for requiring exceptions to that *"primary rule*" to be expressed in clear and unambiguous terms identified *in The People (Attorney General) v. Conmey* [1975] I.R. 341 (per Walsh J at 360) is as true of this Court's appellate jurisdiction as it was of the jurisdiction formerly vested in the Supreme Court:

> *"Before turning to deal specifically with these provisions I wish to express my view that any statutory provision which had as its object*

the excepting of some decisions of the High Court from the appellate jurisdiction of this Court, or any particular provision seeking to confine the scope of such appeals within particular limits, would of necessity have to be clear and unambiguous. The appellate jurisdiction of this Court from decisions of the High Court flows directly from the Constitution and any diminution of that jurisdiction would be a matter of such great importance that it would have to be shown to fall clearly within the provisions of the Constitution and within the limitations imposed by the Constitution upon any such legislative action." (my emphasis).

23. That this Court is not the Court of Final Appeal under the Constitution does not affect that conclusion in my view. The Supreme Court is, of course, a critical part of the Constitutional architecture. But its appellate jurisdiction is fundamentally different to the jurisdiction of this Court. Subject only to the provisions of Article 34 itself and to any exceptions or regulations prescribed by law, this Court's appellate jurisdiction from the High Court is available to litigants *as of right.* It is the final court of appeal to which litigants have access *as of right.* While the Supreme Court may, under Article 34.5.4, permit a direct appeal from the High Court - thus bypassing

this Court – no litigant has a *right* to bring such an appeal. Similarly, while the Supreme Court may under Article 34.5.3 permit an appeal from decisions of this Court (decisions which are otherwise "*final and conclusive*" under Article 34.4.3), no litigant has any *right* to such an appeal. In each case, the Supreme Court's jurisdiction is discretionary.

24. This Court's jurisdiction as the final court to which an appeal may be brought from the High Court as *a matter of right* is therefore of high constitutional importance also. It is not the case that, if that jurisdiction is excluded, litigants may simply appeal to the Supreme Court instead. That is not how Article 34 works. In practice, any exclusion of this Court's appellate jurisdiction from the High Court will generally mean that no further appeal is available to litigants. Of course, the "*primary rule"* that all decisions of the High Court may be appealed to this Court is not absolute and (subject to the provisions of Article 34.4.2) it is open to the Oireachtas to legislate for exceptions to it. However, it is entirely appropriate to require that such exceptions be expressed in clear terms: the appellate jurisdiction of this Court should not be restricted by oblique measures or statutory sidewinds. As Fennelly J explained in his judgment in *AB v Minister for Justice* (at 325):

"This is not to preserve some institutional prerogative of the court itself, but to protect the constitutional rights of litigants to bring an appeal against judicial decisions affecting them."

25. In reality, Mr Cunningham's rather faint suggestion that the approach taken in cases such as *Stokes* might not be applicable to the appellate jurisdiction of this Court appears to have been based entirely on an observation made by Clarke J in his judgment in *Stokes*. While acknowledging that there "*may very well be sound reasons of policy why parties should ordinarily be confined to one hearing on the merits and one appeal*", he also observed that there "*are also sound reasons why important legal issues should be capable of being brought to the highest court."* This Court is not, Counsel for Mr Cunningham observes, "*the highest court"*. The implication – though the point was not articulated expressly – appears to be that there are no such "*sound reasons*" why *"important legal issues*" arising in claims under the 1998 Act should be capable of being brought to this Court. If that is the argument, I reject it. There are, in my view, sound reasons why issues arising under the 1998 Act should be capable of being brought to this Court (though, of course, that assessment is ultimately one

for the Oireachtas to make). In any event, it is clear that this passage in Clarke J's judgment is not part of the *ratio* of his decision on the interpretation issue. It is also clear from the jurisprudence that the touchstone in this context is clarity of expression, rather than considerations of policy: see for example the judgments in *AB v Minister for Justice*.

26. The analysis above leads me to the conclusion that, for Mr Cunningham to succeed on the preliminary issue before the Court, he must be able to point to *"a clear and unambiguous ouster of the right of appeal" (per* Denham CJ in *A v Minister for Justice* [2013] IESC 18, [2013] 2 ILRM 457, at para 27, citing in turn the judgment of Geoghegan J in *AB*).

27. It is necessary therefore to consider the statutory provisions which, on Mr Cunningham's arguments, constitute such a "*clear and unambiguous ouster."*

The Statutory Regime Here

28. The 1998 Act is a significant piece of legislation, prohibiting discrimination against employees on any of the *"discriminatory grounds*"

set out in section 6(2) of the Act, one of which is the "*disability ground*". Section 16(3) of the 1998 Act imposes on employers a general obligation to take "*appropriate measures"* to enable a person who has a disability (*inter alia*) *"to participate or advance in employment".* The taking of such measures is also referred to as "*reasonable accommodation."* The obligation on an employer under section 16(3) is subject to various limitations and qualifications which it is not necessary to explore further in this judgment. The interaction between section 16(3) and section 37(3) (the terms of which have been set out above) is a key issue in the Prison Service's appeal.

29. Under the 1998 Act as enacted, a complaint of discrimination could be made to the Director General of the Equality Tribunal, though certain complaints could be brought to the Labour Court or the Circuit Court: section 77. Section 77 has since been amended by the Equality Act 2004 and by the 2015 Act. Complaints are now made to the Director General of the Workplace Relations Commission (WRC). Decisions on such complaints are then made under section 79 which again has been significantly amended by subsequent enactments, including the Equality Act 2004 and the 2015 Act. It appears that, in practice, such decisions are

now made by adjudication officers of the WRC. Section 83 then provided for an appeal to the Labour Court from decisions of the Director General under section 79. A new section 83 was substituted in 2015 to which detailed reference is made later in this judgment.

30. Section 90 of the Act (as enacted) provided for an appeal from the Labour Court (when exercising its appellate jurisdiction) to the Circuit Court and a further appeal on a point of law to the High Court.[3] Whether any further appeal was available under section 90 as enacted has not, to my knowledge, been considered by a court and, in circumstances where a new provision was substituted in 2004, no argument was addressed to that issue before this Court. Accordingly, I express no view on it. The Equality Act 2004 substituted a new section 90, in the following terms:

> *"(1) Where a determination is made by the Labour Court on an appeal under this Part, either of the parties may appeal to the High Court on a point of law.*

[3] Section 90(1) (as enacted) provided for an appeal from the Labour Court to the Circuit Court. Section 90(2) provided for the form of redress the Circuit Court could order and then provided that "*subject to any appeal to the High Court on a point of law, the decision of the Circuit Court on an appeal under subsection (1) shall be final and conclusive."*

(2) The Labour Court may —

(a) refer to the High Court a point of law arising in the course of such an appeal, and

(b) if it thinks it appropriate, adjourn the appeal pending the outcome of the reference."

The reference to "*this Part"* in section 90(1) is to Part VII of the 1998 Act, *Other Remedies and Enforcement.*

31. Notwithstanding the suggestion in argument that section 90(1) has become "*redundant*" and/or has been "*rendered obsolete"*, Mr Cunningham's appeal to the High Court from the decision of the Labour Court rejecting his claim was in fact brought pursuant to that provision.[4] It appeared to be common case that there is nothing in the language of section 90(1) that is capable of excluding a further appeal from the High Court (limited to a point of law). Certainly, no argument to the contrary was advanced on Mr

[4] Originating Notice of Motion dated 6 December 2020.

Cunningham's behalf. Any such appeal would now lie to this Court.

32. That, according to the Prison Service, is sufficient to dispose of Mr Cunningham's preliminary objection. However, before any such conclusion can properly be reached, it is necessary to explore the *"circuitous and complex route*" which, according to Mr Cunningham, leads to a different conclusion.

33. Significant reliance is placed by Mr Cunningham on the provisions of the 2015 Act. Again, it is a substantial piece of legislation, which, in the words of Counsel, marked a "*tectonic shift*" in the area of employment law. The Court was told that a constitutional challenge has been brought to parts of the 2015 Act and that the decision of the Supreme Court is awaited on that challenge (that Court having permitted a direct appeal from the decision of the High Court dismissing the challenge: *Zawelski v Workplace Relations Commission* [2020] IEHC 178). It was not suggested, however, that the pending Supreme Court decision might affect this Court's determination of the preliminary issue now before it.

34. The 2015 Act, particularly Part 4, makes significant changes to the

procedures applicable to the adjudication of statutory employment disputes. In broad summary, a complaint that an employer has contravened a provision specified in Part 1 or 2 of Schedule 5 of the Act, or a dispute as to the entitlement of an employee under an enactment specified in Part 3 of that Schedule, is to be referred for adjudication by an adjudication officer of the Workplace Relations Commission (WRC): section 41. An appeal lies to the Labour Court from such adjudication: section 44. Section 46 then provides:

> *"A party to proceedings before the Labour Court under this Part may, not later than 42 days from the service on that party of notice of the decision of the Labour Court in those proceedings, appeal that decision to the High Court on a point of law, and the decision of the High Court in relation thereto shall be final and conclusive."*

35. Again, there was no real dispute as to the effect of this provision. Counsel for the Prison Service did not challenge the contention that, as regards those proceedings to which it applies, section 46 provides for an appeal to the High Court on a point of law and excludes any further appeal to this Court. However, he observed that, although a wide range of statutory provisions

and enactments are specified in Schedule 5, no reference is made to the 1998 Act or any provision of it. It follows, Counsel submitted, that section 46 has no application to claims made under the 1998 Act. Counsel also emphasised that the 2015 Act did not amend or affect section 90(1) of the 1998 Act which, accordingly, continues to govern appeals from the Labour Court in claims under that Act.

36. That section 46 does not apply – at least not directly – to claims under the 1998 Act was not and could not be disputed by Mr Cunningham. A point was made that other enactments such as the Unfair Dismissal Acts were not specified in Schedule 5 either. However, section 80(1)(j) of the 2015 Act inserted a new section 10A into the Unfair Dismissals Act 1977, which is in materially identical terms to section 46. No equivalent amendment was made to the 1998 Act. In the circumstances, I have difficulty in understanding how the omission of the Unfair Dismissals Act from Schedule 5 might be thought to advance Mr Cunningham's position in any way.

37. The main argument made by Mr Cunningham relies less on the terms of the 2015 Act as enacted than on a subsequent amendment to the 1998 Act

made by section 17(1)(a) of the National Minimum Wage (Low Pay Commission) Act 2015. The effect of that amendment is to apply section 44 of the 2015 Act (subject to certain specified modifications) to decisions under section 79 of the 1998 Act i.e. decisions on discrimination claims made under the 1998 Act such as the claim made by Mr Cunningham here. Given the reliance placed on it, I will set out section 83 of the 1998 Act as amended:

> *"83. Section 44 of the Act of 2015 shall apply to a decision of the Director General of the Workplace Relations Commission under section 79 as it applies to a decision of an adjudication officer under section 41 of that Act, subject to the following modifications:*
>
> *(a) the substitution of the following subsection for subsection (1):*
>
> *'(1) (a) A party to a case referred to the Director General of the Workplace Relations Commission under section 77 of the Act of 1998 may appeal a decision of the Director General given in an investigation in relation to that case under section 79 of that Act to the Labour Court and, where the party does so, the Labour*

Court shall—

(i) give the parties to the appeal an opportunity to be heard by it and to present to it any evidence relevant to the appeal,

(ii) make a decision in relation to the appeal affirming, varying or setting aside the decision of the adjudication officer to which the appeal relates, and

(iii) give the parties to the appeal a copy of that decision in writing.

(b) The Labour Court shall have power to grant such redress in an appeal under this paragraph as the Director General has power to grant in an investigation under section 79 of the Act of 1998.';

and

(b) any other necessary modifications."

38. As I have said, the effect of this provision is to apply section 44 to decisions under section 79 of the 1998 Act, subject to the substitution of a new sub-section (1) and subject to "*any other necessary modifications."* It does not

appear necessary to set out the remainder of section 44. It is concerned with procedural aspects of appeals to the Labour Court, governing such matters the form of notice of appeal to that body, the applicable time-limit for the bringing of such appeals and so on. Section 44(6) should be noticed, however. It provides that:

> *"(6) The Labour Court may refer a question of law arising in proceedings before it under this section to the High Court for determination by the High Court and the determination of the High Court shall be final and conclusive."*

It may be recalled that section 90(2) of the 1998 Act, as amended in 2004, (set out in paragraph 30 above) already gives the Labour Court, when hearing an appeal under Part VII, a power to refer a point of law to the High Court. The language of Section 90(2) differs from the language of section 44(6) of the 2015 Act and, in particular, makes no reference to the determination of the High Court on such a reference being "*final and conclusive."*

39. In any event, Mr Cunningham argues that one of the "*necessary*

modifications" that follows from the application of section 44 to decisions made under section 79 of the 1998 Act is that section 90(1) "*becomes redundant or rendered obsolete*" even though "*it has escaped the parliamentary drafters pen."* That is so, Mr Cunningham submits, because section 90(1) is an "*anomalous provision*" which conflicts with the scheme of the 2015 Act in general – the object of which is to create a uniform system for legislative employment protections – and with section 44 in particular.

40. There are many fundamental problems with this argument in my view. In the first place, it appears quite clear that, whatever may be the nature and scope of the "*necessary modifications*" contemplated by section 83(b), they are confined to modifications to section 44 (as it applies to decisions of the Director General of the WRC under section 79 of the 1998 Act). Section 83(b) therefore provides no basis for arguing for any modification of section 90(1). In any event, what is argued for by Mr Cunningham cannot be characterised as a "*modification*" of section 90(1) but its effective repeal. Even in its less extreme form, in which it is suggested that the Court could "*modify*" section 90(1) by inserting into it words excluding any further appeal, Mr Cunningham's argument effectively invites the Court to

substitute itself for the legislature.

41. Secondly, subject to one issue that I will address in a moment, there is no conflict between section 44 of the 2015 Act, as it applies to decisions under section 79 of the 1998 Act, and section 90(1) of that Act. Section 44 is concerned with appeals *to* the Labour Court (previously provided for under section 83 of the 1998 Act itself). Section 90(1) is concerned with appeals *from* the Labour Court. The only apparent conflict relates to the power of the Labour Court to refer a question of law to the High Court in the course of an appeal being heard by it. As I have already noted, there are now overlapping provisions, expressed in different terms. It may be section 44(6) of the 2015 Act should be read subject to modification in order to avoid conflict with section 90(2) of the 1998 Act but that is not an issue that arises here and I express no view on it.

42. It could also be said that there is a tension between section 44(6) – which provides in express terms that a decision of the High Court on a reference from the Labour Court shall be "*final and conclusive*" – and the provisions of section 90(1) insofar as it permits (or, more correctly, does not exclude) a further appeal from the High Court on an appeal from the Labour Court.

However, it is clear that section 44(6) has no application to *appeals* from the Labour Court. Mr Cunningham's appeal to the High Court here was brought pursuant to section 90(1), not section 44(6). Furthermore, there may be sound policy reasons to impose procedural limitations on a *reference* made in the course of an adjudicative process that do not apply, or apply in the same way, to an *appeal* at the end of that process. But even if there is a conflict, it would not provide a basis for reading into section 90(1) words of limitation that simply are not there.

43. There is, in my view, a large legislative elephant in the room that Mr Cunningham's arguments fail to acknowledge or address. Section 90(1) of the 1998 Act governs appeals from the Labour Court to the High Court in claims made under the 1998 Act. Its terms do not impose any limitation on a further appeal from the decision of the High Court. In enacting the 2015 Act, it was open to the Oireachtas to bring claims under the 1998 Act within the scope of section 46 by including the relevant provisions of the 1998 Act in Schedule 5. It did not do so. It could have amended the 1998 Act, as it amended the Unfair Dismissals Act 1977, to include a provision equivalent to section 46. Again, however, it did not do so. The argument that the amendment to section 83 of the 1998 Act effected by the National

Minimum Wage (Low Pay Commission) Act 2015 has that effect is wholly implausible and unpersuasive. That the Oireachtas consciously decided to apply one aspect of the 2015 Act procedure – section 44 – to claims made under the 1998 Act actually serves only to emphasise the fact that the non-application of the other procedural provisions, including section 46, reflects a conscious choice on the part of the legislature. Rhetorical recourse to the "*scheme of the 2015 Act*" cannot provide a basis on which this Court can simply disregard section 90(1).

44. As a matter of statutory interpretation, the position is, in my view, quite clear. Section 46 of the 2015 has no application to claims under the 1998 Act. Rather, appeals from the Labour Court in relation to such claims are governed by section 90(1). Having regard to the language of section 90(1), it is clear that an appeal lies to this Court from the decision of the High Court. That is the position even as a matter of "*straightforward construction*" of section 90(1). There is no plausible interpretation of that provision that would exclude an appeal to this Court, still less could it be said that section 90(1) amounts to *"a clear and unambiguous ouster of the right of appeal".*

45. In reaching that conclusion, I have not overlooked the arguments by Mr Cunningham to the effect that the availability of a further appeal to this Court adds to the cost of bringing a claim under the 1998 Act and prolongs the determination of such claims. In this context, Mr Cunningham relies on statements of Charleton J in the High Court in *JVC Europe Ltd v Panisi* [2011] IEHC 279, at paragraphs 11 and 12 where he expressed concern that the procedure under the Unfair Dismissals Act could involve three full oral hearings (and indeed the possibility of a further hearing before a Rights Commissioner at the start of the process). That procedure was, in the Judge's view, *"cumbersome and redolent with the potential for unfairness."* Similar concerns were expressed by Hardiman J in *Stokes* as regards the procedures under the Equal Status Act 2000: at para 44.

46. The adjudicative procedure under the 1998 Act is different in a number of material respects from the procedure at issue in *JVC Europe Ltd v Panisi*, which involved the potential for three full oral hearings before, successively, the Employment Appeals Tribunal, the Circuit Court and the High Court. It also differs somewhat from the procedure under the Equal Status Act 2000 considered in *Stokes*. Notwithstanding those differences, there can be no doubt that a procedure that potentially involves two full

oral hearings (before the Director General of the WRC and then the Labour Court on appeal) and two appeals on a point of law (before the High Court and then this Court on further appeal) is liable to be prolonged and burdensome to the parties. There is also, as Counsel for Mr Cunningham observes, the possibility that the decision of this Court may be the subject of further appeal to the Supreme Court. The policy considerations that appear to have led the Oireachtas to restructure the adjudicative machinery applicable to the majority of employment-related claims arguably apply also to claims under the 1998 Act. But, as was emphasised by Hardiman J in his judgment in *Stokes*, that judgment is one for the Oireachtas to make. It could have brought claims under the 1998 Act fully within the adjudication structure of the 2015 Act but did not do so. The Thirty-third Amendment had been adopted, the Court of Appeal Act 2014 had been enacted and this Court was established prior to the enactment of the 2015 Act. The Oireachtas could have taken the view that, as a matter of policy, claims under the 1998 Act should conclude in the High Court (subject only to the possibility of an appeal to the Supreme Court pursuant to Article 34.5.4 of the Constitution) and then legislated accordingly. It did not do so in the 2015 Act and it has not done so since even though, as Counsel for Mr Cunningham observed, it has revisited the 2015 Act on several

occasions.

47. In my view, it is simply implausible to suggest that this was the result of inadvertence or mistake (though even if that was the case, it would not affect this Court's assessment). It seems clear that the Oireachtas took the view that claims under the 1998 Act should largely remain procedurally distinct. The availability of an appeal from the High Court to the Supreme Court (now to this Court) is not the only difference – there are also distinct procedures applicable to certain discrimination claims under section 77(3) of the 1998 Act, whereby a claimant can seek redress from the Circuit Court in the first instance. As Counsel for the Prison Service submitted, the Oireachtas appears to regard discrimination claims, or at least such claims as come within the 1998 Act,[5] as different and to consider that the legal issues potentially raised by such claims are such that a further appeal from the High Court should not be excluded. No doubt, any such judgment is contestable as a matter of policy and it is clear that it is one with which Mr Cunningham disagrees (though one might be forgiven for wondering whether his position might have been different in the event that his appeal

[5] As Counsel for Mr Cunningham explained, some discrimination claims can be framed under legislation that is within the scope of the 2015 Act, such as complaints of maternity-related discrimination under the Maternity Protection Act.

to the High Court had been unsuccessful). However, that does not provide a basis on which this Court could effectively rewrite the words of section 90(1). That would be so in any case but it is most emphatically so here, where the proper approach to section 90(1) is dictated by Article 34.4.1 of the Constitution and the decisions relating to it (and to Article 34.4.3 before it) to which I have referred above.

The Convention on Human Rights and the

European Convention on Human Rights Act 2003

48. As already mentioned, Mr Cunningham argues that the availability of an appeal to this Court would give rise to a breach of his right to a fair determination of his discrimination claim "*within a reasonable time*" under Article 6(1) of the Convention. The right to a hearing "*within a reasonable time*" is also reflected in Article 47(2) of the Charter but the principal focus of Mr Cunningham's arguments was Article 6(1).

49. Mr Cunningham also relied on his right to an effective remedy under the Convention, the Constitution and the Charter. However, this aspect of Mr Cunningham's appeared to be directed to the issue of delay and I did not

understand it to raise any independent ground of complaint. There was passing reference to the costs of pursuing a claim under the 1998 Act but the issue was not the subject of any detailed discussion. That is perhaps unsurprising given that Mr Cunningham has the benefit of being represented by the Irish Human Rights and Equality Commission.

50. The Court was referred to a number of decisions of the European Court of Human Rights addressing Article 6(1) (in conjunction with Article 13), with special emphasis being placed on its recent decision in an Irish case, *Keaney v Ireland (*Application 72060/17), a decision of the Fifth Section given on 30 April 2020. In *Keaney*, a delay of 11 years between the institution of proceedings and their conclusion on appeal was found to be incompatible with the reasonable time requirement in Article 6. Particular reliance was also placed on the decision of the Grand Chamber in *Frydlender v France* (Application No 30979/96) where the Court concluded that there had been a violation of Article 6 in circumstances where the determination of a claim for unlawful dismissal from employment took 9½ years, including 6 years for the Conseil d'Etat to determine an appeal brought by the applicant from the decision at first instance. In reaching that conclusion, the Court stated:

"45. The Court reiterates that it is for the Contracting States to organise their legal systems in such a way that their courts can guarantee to everyone the right to a final decision within a reasonable time in the determination of his civil rights and obligations (see Caillot v. France, no. 36932/97, § 27, 4 June 1999, unreported). It further reiterates that an employee who considers that he has been wrongly suspended or dismissed by his employer has an important personal interest in securing a judicial decision on the lawfulness of that measure promptly, since employment disputes by their nature call for expeditious decision, in view of what is at stake for the person concerned, who through dismissal loses his means of subsistence (see the Obermeier v. Austria judgment of 28 June 1990, Series A no. 179, pp. 23-24, § 72, and the Caleffi v. Italy judgment of 24 May 1991, Series A no. 206-B, p. 20, § 17)."

51. There is no doubt that Mr Cunningham has the right to have his discrimination claim determined "*within a reasonable time"* under Article 6. However, what is a *"reasonable time"* is not susceptible to *a priori* determination. Rather it depends on all of the circumstances of the case. That approach was re-iterated by Court in *Keaney*:

"85. According to the case-law of the Court on Article 6 § 1 of the Convention, the "reasonableness" of the length of proceedings must be assessed in light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what is at stake for the applicant in the dispute ((see, among other authorities, Lupeni Greek Catholic Parish and Others v. Romania [GC], no. 76943/11, § 143, 29 November 2016, Frydlender v. France [GC], no. 30979/96, § 43, ECHR 2000-VII, Comingersoll S.A. v. Portugal [GC], no. 35382/97, § 19, ECHR 2000-IV and Sürmeli v. Germany [GC], no. 75529/01, § 128, ECHR 2006-VII)"

52. As a matter of common-sense, the existence of multiple levels of adjudication/appeal in any decision-making process has the potential to lengthen the time it takes for the process to reach a final conclusion. That is true of the decision-making regime under the 1998 Act, involving as it does a hearing before the Director General of the WRC, an appeal to the Labour Court, an appeal to the High Court on a point of law and a further such appeal to this Court, with the possibility of a further appeal to the

Supreme Court from this Court. But, as is made clear in the passage from *Keaney* set out above, the Article 6(1) assessment is not an arithmetic one. Article 6(1) does not set out *a priori* times limits. Equally, there is nothing in Article 6(1) itself, or in the jurisprudence, that suggests that it can be read as imposing any *a priori* limit on the number of stages of decision-making/appeal that Contracting States may provide for in any given category of proceeding. The existence of multiple layers of adjudication/appeal does not *per se* give rise to a breach of Article 6(1), any more than limiting a decision-making process to a single stage, or providing for a single level of appeal only, necessarily excludes the risk of such a breach.

53. In the course of argument, the Court noted that, since at least the 2004 (when section 90 was amended by the Equal Status Act), there had been an appeal as of right from the High Court in 1998 Act cases (that appeal being to the Supreme Court prior to the establishment of this Court) and asked whether, on Mr Cunningham's argument, the availability of such an appeal had violated Article 6(1). The effect of Counsel's response, as I understood it, was that the real issue was the introduction of a further layer of appeal consequent on the establishment of this Court in 2014. The

existence of a further appeal was not, *per se*, the problem. But, as I have already explained, any further appeal from this Court is discretionary and as the Court observed in argument, the net effect of Mr Cunningham's argument was that the possibility that there might be *two* appeals should lead us to conclude that there should be *no* appeal from the High Court to this Court (that appeal being the only appeal as of right) in *any* 1998 Act claim, which in practice could – and in many cases would – result in their being *no* appeal at all from the High Court. How Article 6(1) could mandate such an outcome was not explained.

54. The suggestion that the *availability* of a right of appeal to this Court in the circumstances here is *per se* incompatible with Article 6 is therefore misplaced.

55. Of course, the Court is conscious of the entirely legitimate interest of Mr Cunningham in having his claim determined and his employment status resolved. No specific complaint is made as to the time that such claim has taken to this point. This Court has given priority to this appeal to date and there is no reason to suppose that there will be any undue delay in the determination of the substantive appeal in this Court, due regard being had

to the novelty, complexity and importance (both to the parties and generally) of the legal issues that it raises and bearing in mind also the possibility that the Court may consider it appropriate to make a reference to the Court of Justice. There is also, as Mr Cunningham emphasises, the possibility of a further appeal to the Supreme Court. That is not, of course, a matter for this Court but I would observe that any decision to grant leave for such an appeal would necessarily reflect an assessment on the part of the Supreme Court that the general public importance of the issues raised and/or the interests of justice warranted such an appeal. That would clearly be relevant to any Article 6(1) assessment.

56. The decision of this Court on the appeal here may bring the claim to a final conclusion. Assuming that leave to appeal to the Supreme Court is sought by the unsuccessful party – and it may not be – a further appeal may be permitted to that Court but that is uncertain. There may be a reference to the Court of Justice but that too is uncertain. The claim may ultimately be referred back to the Labour Court for further hearing but, once again, that is far from certain. These multiple and cumulative contingences serve to demonstrate the impossibility of conducting any Article 6(1) assessment at this point and highlight the fact that this Court is being asked to deny the

Prison Service a right to appeal to this Court based on speculative assumptions and/or predictions as to the future course of these proceedings.

57. Mr Cunningham's invocation of section 2 of the 2003 Act is premised on the contention that the very *availability* of an appeal to this Court is *per se* incompatible with Article 6(1). As I have explained, that premise is not well-founded in my opinion and it follows that the section 2 argument fails. In any event, having regard to the jurisprudence on section 2 (none of which was opened to the Court), it is difficult indeed to see how it could permit the Court to "*interpret*" section 90(1) so as to exclude a right of appeal from the High Court to this Court. Such an exercise would necessarily appear to involve "*reading*" into section 90(1) additional words such as *"and the decision of the High Court in relation thereto shall be final and conclusive*" (the form of words used in section 46 of the 2015 Act). That would seem to be precisely the kind of "*significant redrafting exercise"* which, according to the Supreme Court in *Ryan v Clare County Co* [2014] IESC 67, [2015] 1 I.L.R.M. 81, is outside the proper scope of section 2. The observations of the Court (per McMenamin J) in *Ryan* would appear to apply with at least equal force here:

"55. To interpret the sub-section in this way would be a fundamental departure from the accepted rules of construction. I am not persuaded that what would be in question here would be a possible "interpretation", as properly understood. The construction urged could not be said to be implied in this section, nor could it be capable of implication, even if there was supporting ECtHR case law to support such an interpretation. To treat the situation in this way would, in fact, require a declaration of incompatibility. The court is not a legislator. What is urged for would be a process of statutory redrafting which would, in effect, fundamentally alter the effect and range of application of the subsection. Under s.2(1) of the ECHR Act 2003, the courts are enjoined "insofar as is possible, subject to the rules of law relating to such interpretation and application" to carry out a process of interpretation in a manner compatible with the State's obligations under the Convention provisions. These rules of law relating to interpretation and application include, inter alia, the provisions of the Constitution which prevent the courts from engaging in legislation."

58. Here, of course, there is a further and significant consideration – any such

refashioning of section 90(1) would restrict access to this Court and limit the right of appeal provided for in Article 34.4.1 of the Constitution. It is very difficult to see how section 2 of the 2003 Act might give this Court power to do this. That is a matter for the Oireachtas under Article 34.4.1, not for this Court. Furthermore, as I have explained, the Oireachtas is required to do so in express and unambiguous terms. That principle is, it would seem, a "*rule of law*" relating to the interpretation of provisions such as section 90(1) which would exclude the operation of section 2 in the manner suggested here.

59. As to section 5 of the 2003 Act, it simply cannot be raised as casually as it was raised here, mentioned for the first time late in of the reply of Counsel for Mr Cunningham (as Counsel for the Prison Service aptly put it, "*in the last breath of the reply*"). There are rules governing the making of declarations of incompatibility – contained in section 6 of the 2003 Act itself and augmented by Order 60A RSC. In light of Mr Cunningham's manifest failure to comply with those rules, the section 5 argument cannot be entertained. Section 6 and Order 60A aside, it would be fundamentally unjust to the Prison Service – who had no notice of this argument and no opportunity to respond to it – for the Court to engage with it. However, it

will be apparent from the discussion above what conclusion I would have reached on this issue if it had been properly put before the Court.

60. In any event, even if this Court made a declaration of incompatibility in respect of section 90(1) of the 1998 Act, that would not have the effect of barring the Prison's Service appeal here or otherwise affecting "*the validity, continuing operation or enforcement*" of section 90(1): see section 5(2)(a) of the 2003 Act.

61. Finally, as I have mentioned, it was argued on Mr Cunningham's behalf that the reference in Article 34.4.1 to *"exceptions and .. regulations .. prescribed by law"* encompassed "*law*" other than and in addition to enactments of the Oireachtas. The point was not the subject of any detailed argument and in light of the conclusions I have reached it does not appear necessary to address it. I would, however, observe that, notwithstanding the enactment of the 2003 Act, the Convention is not *per se* part of Irish domestic law and has effect in this jurisdiction to the extent, and only to the extent, provided by that Act: *McD v L* [2009] IESC 81, [2009] 2 IR 199. It would appear to follow that the provisions of the Convention do not constitute "*law*" for the purposes of Article 34.4.1. It may be that a directly-

effective provision of EU law would be in a different position. That is, happily, an issue that can be left for another day, though it seems difficult to envisage circumstances in which such an issue might actually arise.

CONCLUSIONS

62. For the reasons set out above, I conclude that the preliminary objection taken by Mr Cunningham to this Court's jurisdiction to determine the Prison Service's appeal from the decision of the High Court of 9 June 2020 is without merit and must be rejected.

63. The relevant legal position is clear. Having regard to the provisions of Article 34.4.1, there is a right of appeal to this Court from that decision unless it is the subject of an "*exception … prescribed by law."* A long line of Supreme Court authority, and more recent authority from this Court, establishes that any such exception must be clear and unambiguous. The relevant statutory provision – section 90(1) of the 1998 Act – clearly does *not* exclude an appeal to this Court. The suggestion that the governing statutory provision is, in fact, section 46 of the 2015 Act – a suggestion wholly at odds with the fact that Mr Cunningham's own appeal to the High

Court was brought pursuant to section 90(1) – is mistaken. The argument that the amendment to section 83 of the 1998 Act effected by section 17 of the National Minimum Wage (Low Pay Commission) Act 2015 operates to exclude the Prison Service's appeal is also misplaced. That amendment does not affect section 90(1) of the 1998 Act or somehow substitute section 46 of the 2015 Act for section 90(1) as the provision governing appeals to the High Court in claims under the 1998 Act.

64. Section 2 of the 2003 Act does not provide any basis on which section 90(1) can be interpreted so as to exclude a right of appeal to this Court. Mr Cunningham's belated appeal to this Court to declare section 90(1) incompatible with Article 6(1) of the Convention cannot be entertained and such a declaration would not affect the Prison Service's entitlement to proceed with its appeal in any event.

65. The Prison Service is therefore entitled to prosecute its appeal. As has been the position to date, the Court will seek to ensure that such appeal is heard and determined without any undue delay, having due regard to the novelty, complexity and importance (both to the parties and generally) of the legal issues raised by the appeal.

66. As the Mr Cunningham has been wholly unsuccessful in relation to the preliminary issue determined by this judgment, it would appear to follow that the Prison Service is entitled recover the costs of the preliminary issue from him. In accordance with normal practice, it appears appropriate to place a stay on any order for costs pending the determination of the substantive appeal. If either party wishes to contend for a different order, they will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, the party that requested it may be liable for the additional costs of such hearing: In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Faherty and Pilkington JJ have authorised me to record their agreement with it.