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Education and the Equal Status Acts - Stokes -v- Christian Brothers High School Clonmel

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'[T]he focus should be on what matters to the claimant, the issue of discrimination, rather than an analysis of statistical information' - Stokes -v- Christian Brothers High School Clonmel¹

As Mr. Justice Clarke pointed out '[h]ow scarce places in popular schools are to be allocated has been a matter of controversy for many years.'² This case involved a challenge under the Equal Status Act³ (ESA) to the admissions rules of a Clonmel secondary school which, it was argued, indirectly discriminated against children from the Traveller community. At first instance (before the Equality Tribunal) and on appeal to the Circuit Court it had been held that this rule did have a disproportionate impact on Travellers but the Court and Tribunal differed as to whether this was objectively justified or not.⁴ On further appeal to the High Court, McCarthy J. held that there was no disproportionate impact as, adopting a dictionary definition of the term 'particular', the rule did not put Travellers at a 'particular disadvantage'. The case was further appealed to the Supreme Court.⁵

The quote above is unfortunately not from the Supreme Court in this case.⁶ In fact, the Supreme Court did quite the opposite: focusing on statistics and ignoring the discrimination. In doing so it interpreted the Equal Status Act as though it was purely national legislation ignoring the fact that aspects of the Act implement EU law and ignoring the extensive case law on indirect discrimination before the European Court of Justice, European Court of Human Rights and national courts. The Court, unlike Judge Teehan in the Circuit Court, also appeared to be unaware of, or unwilling to take any judicial notice of, discrimination against Travellers in access to education.

The majority of the Court dismissed the appeal holding that the decisions-makers had asked the wrong question and that sufficient statistical evidence had not been advanced to support a finding of disproportionate impact. This decision has erected considerable barriers to successful indirect discrimination claims under the ESA. It is argued below that this interpretation is wrong both as a matter of law and as a matter of legal policy and calls for legislative intervention.

¹ [2015] IESC 13.

² At [1.1].

³ Formally the Equal Status Acts 2000 to 2012.

⁴ See M. Cousins, 'Travellers, Equality and School Admission: Christian Brothers High School Clonmel v. Stokes', Bar Review, Vol 16, Issue 6, 2011, pp 116–19. The Equality Tribunal (DEC-S2010-056) held that it was not objectively justified but the Circuit Court held that it was so justified: *Christian Brothers High School Clonmel -v- Stokes*, [2011] IECC 1.

⁵ A major issue in the case was whether such an appeal was allowed by law. By a 3-2 majority the Court ruled that it was. This aspect of the case is not discussed in detail here. Hardiman J (with whom McKechnie J. concurred) strongly dissented on this issue. His only comments on the issues discussed here are set out at [43] of his judgement.

⁶ Rather it is from Judge Jacobs of the Upper Tribunal in *Her Majesty's Revenue and Customs v D.H.* [2009] UKUT 24, a case which eventually reached the UK Supreme Court as *Humphreys v Revenue and Customs* [2012] UKSC 18.

In part 1, we set out the facts of this case and briefly outline the decisions below. Part 2 examines the ruling of the majority of the Supreme Court in relation to the requirements to bring a successful case of indirect discrimination under the ESA. Finally, part 3 comments on this ruling and discusses legal and policy responses to this ruling.

1. The context

The facts

John Stokes is a Traveller and Roman Catholic child. He had attended a local primary school and was the oldest child in the family. His mother has attended secondary school but, like many other Travellers of his age, his father had not. He applied for admission to Clonmel Christian Brothers High School. Like many secondary schools the High School received more applications than it had places and it had, over the years, developed a set of priorities for applications. The Admissions Policy of the school first offered places to applicants with maximum eligibility in accordance with the school's selection criteria and the mission statement and the ethos of the school. Any remaining places were allocated by lottery. The selection criteria were that the application was in respect of a boy:

- whose parents are seeking to submit their son to a Roman Catholic education in accordance with the mission statement and Christian ethos of the school;
- who already has a brother who attended or is in attendance at the School, or is the child of a past pupil, or has close family ties with the School
- who attended for his primary school education at one of the schools listed ..., being a school within the locality or demographic area of the school

John satisfied the Roman Catholic and local education requirements but could not satisfy the sibling requirement (being the oldest child) and he did not satisfy the parental link as his father had not attended secondary school. John was unsuccessful in the lottery. John's statistical possibility of obtaining admission declined at each stage in the process and fell from about 70% (if access was allocated randomly without application of the parental rule) to 55% after admittance of sons of past-pupils.⁷

The law

It was argued that John had been discriminated against by the School on the 'Traveller community' ground in section 3(2)(i) of the ESA by being refused admission to the High School. Section 7 provides that

- (2) An educational establishment [which includes a post-primary school] shall not discriminate in relation to—
 - (a) the admission or the terms or conditions of admission of a person as a student to the establishment,

⁷ The data provided by the Director and the Court are slightly different but these figures are quoted by the Supreme Court (at [3.7]). See O. Smith, 'Perpetuating Traveller children's educational disadvantage in Ireland', *International Journal of Discrimination and the Law* 2014 14: 145 at fn. 48 for an explanation of the calculation.

Section 3 (a) of the Act provides that discrimination shall be taken to occur ‘where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the [specified] grounds’ which includes membership of the Traveller community. Finally, section 3(c) covers indirect discrimination and provides that

where an apparently neutral provision puts a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The Equality Tribunal

Before the Director of the Equality Tribunal⁸ it was argued that as a member of the Traveller community, John Stokes’s father was statistically much less likely to have attended second level education than the settled population. Therefore the criterion of having a family member who attended the school disproportionately affected members of the Traveller community and amounted to indirect discrimination. The complainant referred to the statistical evidence that historically Travellers had suffered ‘extreme educational deprivation’. For example, the Report of the Travelling People Review Body (1983) estimated that only half of Traveller children of school going age attended school and very few remained after reaching the age of 12 years. The Report stated that only 10 per cent of Travellers who finished primary school continued to attend school and most of these dropped out after one or two years.

The High School argued that there was no direct discrimination against Travellers and that, on the issue of indirect discrimination, the family criterion was a standard one in admissions policies which was entirely justified. Finally, it argued that the school had an excellent record of working with students who are members of the Traveller community. There were 5 members of the Traveller community enrolled in the school in 2010 (out of about 700 students) and all Travellers who applied for admission in both 2007 and 2008 were accepted. No Travellers applied in 2009 and the complainant was the only Traveller to have been unsuccessful in his application to date.

The Equality Tribunal first considered the impact of the sibling rule. The complainant argued that giving priority to brothers puts Travellers at a particular disadvantage in that, due to historical low participation by Travellers in secondary education, an older Traveller sibling is much less likely than a non-Traveller to have attended secondary school. However, the Tribunal pointed out that Traveller family size is on average double that of the general population. Priority for siblings could therefore favour Travellers. The Director concluded that, on the balance of probabilities, he could not conclude that giving priority to brothers of either existing or former pupils was ‘intrinsically liable to put Travellers at a particular disadvantage’. This finding was not appealed.

Turning to the parental rule, official data showed that less than 100 Travellers in the entire country were enrolled in post-primary schools in 1988. The Director noted that there was no evidence that any Travellers attended the High School during the 1980s. Referring to the data which show that the complainant’s possibilities of obtaining a place were reduced

⁸ Rather than delegate the case to an equality officer, the Director investigated this case himself.

because of the application of the parental rule, the Director concluded on the balance of probabilities that the policy of giving priority to children of past pupils put the complainant as a member of the Traveller community at a particular disadvantage compared with non-Travellers.

Therefore, he had to consider whether the rule was objectively justified by a legitimate aim and whether the means of achieving that aim were appropriate and necessary. He accepted that strengthening bonds between the parents, as primary educators of a child and the school was a legitimate aim. However, the Director did not consider that giving a blanket priority in admission to children was proportionate or necessary because (i) the priority applied to the children of all past pupils, irrespective of the actual level of current engagement of the father with the school; (ii) there were other ways of achieving this aim which would not disadvantage children whose fathers did not attend the school, such as organising a past pupils' union, by the activities of a parents' association etc.; and (iii) the impact on Travellers was disproportionate to the benefit of the policy.

The Circuit Court judgement

The High School appealed to the Circuit Court which involves, in effect, a rehearing of the case. On the issue of discrimination, Judge Teehan referred to the evidence painting

a very stark picture of members of the Travelling Community availing only in minuscule numbers of access to secondary education over the last few decades.

By contrast, he took judicial notice of the fact that

it is notorious that, since the advent of free secondary education in the late 1960s and the raising of the school leaving age to 16, the overwhelming majority of students in the general population have attended secondary school to at least Junior Certificate level.⁹

Accordingly, he found that it could

be stated unequivocally that the 'parental rule' - an ostensibly neutral provision as provided for by the amended section 3(1)(c) of the Equal Status Act 2000 - is discriminatory against Travellers. Of course, the Respondent must be shown to be at a *particular* disadvantage, but I am satisfied that groupings such as members of the Travelling Community (and also the Nigerian Community and the Polish Community, for example, where parents of boys were most unlikely to have attended the school previously) are particularly disadvantaged by such rule.¹⁰

Judge Teehan, however, concluded that the rule was objectively justified.¹¹

⁹ At [15].

¹⁰ At [16].

¹¹ His reasoning on this point is discussed in more detail in M. Cousins 'Travellers' *Bar Review, op. cit.*

High Court

In contrast to the detailed consideration in the lower courts, the case received rather unsatisfactory consideration on appeal on a point of law to the High Court.¹² McCarthy J focussed on whether Mr. Stokes had been put at a ‘particular disadvantage’. McCarthy J. pointed out that no remedy was available to a member of the Traveller community simply because he or she could show some disadvantage but ‘only if they can go further and say that the disadvantage is “particular”’.¹³ He referred to dictionary definitions of ‘particular’ and concluded that that ‘the disadvantage suffered by travellers (sic.) (in common with all other applicants who were not the sons of past pupils)’ did not pertain or relate ‘to “a single definite person ... or persons distinguished from others” or “distinguished in some way among others of the kind; more than ordinary; worth notice, marked, special”.’¹⁴

He ruled that

The disadvantage relates to persons in addition to travellers (sic.) and is not peculiar or restricted to travellers, and does not distinguish them among others of the kind (i.e. applicants for admission) and cannot be said to be ‘more than ordinary’, ‘worth notice’, ‘marked’, and ‘special’ because, of course, there are others in the same position as they are.¹⁵

Accordingly he found that the policy in question did not place the applicant at a particular disadvantage and, therefore, there was no necessity to consider justification.¹⁶

2. The Supreme Court ruling

As noted above, the first question before the Court was whether a further appeal lay. By a narrow majority the Court concluded that it did and that the wording of s. 28(3) of the ESA was not sufficiently clear to exclude the constitutional right of appeal from the High Court to the Supreme Court.¹⁷ The majority then went on to consider the decisions below. In short, the Court decided that the Equality Tribunal and the Circuit Court had not asked the ‘proper question’, that they did not have adequate evidence to find that there had been disproportionate impact and that McCarthy J’s interpretation of the term ‘particular

¹² *Stokes v Christian Brothers High School Clonmel*, unreported, High Court, 3 February 2012. The ruling does not appear to have been allocated a neutral citation number not to have appeared on the Courts website. For a helpful discussion, see O. Smith, ‘Perpetuating Traveller children’s educational disadvantage in Ireland’, *International Journal of Discrimination and the Law* 2014 14: 145.

¹³ At [22].

¹⁴ At [25].

¹⁵ At [25].

¹⁶ One might have little doubt that, had the issue been considered, McCarthy J would have found that there was objective justification: see, for example, [18-19].

¹⁷ At [6.1]-[6.15]. S. 28(3) provides that ‘No further appeal lies, other than an appeal to the High Court on a point of law.’ The Court also considered whether the claim had been brought in time, an issues which had not been raised before the Equality Tribunal. Clarke J, held (at [7.5]) that ‘it is incumbent on a respondent to a claim before the Director to make any point concerning time which may be open to them so as to put the claimant on notice that there is a time issue, and to afford the claimant an opportunity to seek to persuade the Director to extend time’ and that, on the facts of this case, the respondent was now precluded from raising the point.

'disadvantage' was incorrect. In the light of its conclusion that there was no evidence to support a finding of 'particular disadvantage', the Court dismissed the appeal. It did not remit the matter to the Equality Tribunal as has happened in other cases.¹⁸ In view of its finding on this point, it did not consider whether any disproportionate impact would have been justified. We turn to each of these issues in turn.¹⁹

The 'proper question'

Clarke J. first pointed out that

in order for indirect discrimination to be established, it must be shown that the challenged provision places John Stokes, as a member of the travelling community (*sic.*), at a 'particular disadvantage' vis-a-vis persons who are not members of the travelling community.²⁰

In order to decide whether such disadvantage had been made out, it was necessary for the decision maker to ask the 'proper question'. Clarke J. emphasised that

the issue of the proper question which a decision maker (be it, on the facts of this case, either the Director or a Circuit Judge) should ask, is a question of law. Therefore, if it can be shown that the decision maker did not ask the right question, the decision cannot stand.²¹

Clarke J. concluded that

the measure or 'provision', the effect of which must be assessed, is that containing the various components of the second leg of the rule adopted by Clonmel High School, for each of those components are alternatives. Thus, the cumulative effect of those alternative qualifying requirements on a potential applicant for a place in Clonmel High School must be assessed.²²

The Equality Authority (as *amicus*) argued that that a discriminatory measure could not be justified by some other measure which, to a greater or lesser extent, ameliorates the effect of the discriminatory measure. Clarke J. agreed that '[a]t the level of principle, it is possible that there may well be some merit in that argument.'²³ However, he took the view that where a number of alternative means are provided for complying with a qualifying measure

¹⁸ For example in *National University of Ireland Cork -v- Ahern* [2005] IESC 40 (a case concerning the employment equality legislation). See. D. Whelan 'Traveller school admission appeal should have considered wider human rights issues,' Irish Times, Feb 26 2015.

¹⁹ Not in the order that the Court approached them.

²⁰ At [2.4].

²¹ At [11.1]. Whether the decision maker has asked the proper question is to be reviewed on the basis of correctness. Clarke J did concede (at 11.2) that 'it may well be that some reasonable discretion must be left to a decision maker as to the intermediate or subsidiary questions which need to be asked in order to reach a proper overall conclusion. In reviewing that aspect of the decision making process, it will be necessary, before overturning a decision, to be satisfied that the subsidiary or intermediate questions asked were outside of the bounds of those which might reasonably lead to a proper answer to the overall question'.

²² At [11.1].

²³ At [10.7]. Though this appears to mean that at the level of practice, there was none.

'the provision' must mean the totality of the alternative measures available. Where there are alternative means of qualification, then it does not seem that one can sever one possible means of qualification without having regard to all of the others. This is apparent for at least two reasons. First, it is in the nature of a provision, which may give rise to a disadvantage, that an assessment of that disadvantage must have regard to any alternative means of qualifying within the same provision. Second, and perhaps of equal importance, it is, for the reasons already analysed, necessary to have regard to the extent of any disadvantage in order to determine whether it can be said to be a particular disadvantage within the meaning of the legislation. It is impossible to measure the extent of any disadvantage without also having regard to any alternative means of qualifying.²⁴

He correctly pointed out that no such analysis had been carried out and, therefore, one could only speculate as to what the outcome of such analysis would have been. However, he felt that the possibility that the sibling element of the rule might have positively affected the extent to which potential students who came from the Travelling Community might have been disadvantaged was 'by no means fanciful'.²⁵

Clarke J set out the implications of this as being that

In order to attempt such a calculation [i.e. of the likelihood of a member of the Travelling Community satisfying the second leg of the test by qualifying under either the sibling or parental aspects of the rule], it would have been necessary to at least seek to obtain information about the number of members of the Travelling Community who met either of those criteria. In order for the results of any such analysis to be meaningful, it would have been necessary to look at figures over a sufficient number of years to be able to reach a reasonable conclusion on the extent of the effect of the rule as a whole (involving both its sibling and parental components) on relevant members of the Travelling Community. It would also have been necessary to determine whether, and if so to what extent, its effect was more severe on members of the Travelling Community than on non-Travellers. In that context, it should be recorded that a reasonable degree of discretion would necessarily have to be allowed to a decision maker as to what scale of numbers would need to be considered in order to provide any meaningful analysis.²⁶

Clarke J. further stated that while it might be preferable to include all *potential* applicants to the High School, he was satisfied that that selecting those who applied for a place in Clonmel High School would be within the range of groupings which a decision maker was entitled to select.²⁷

²⁴ At [10.8]. He emphasised that '[w]here cumulative requirements, as opposed to alternative requirements, are imposed, then it is appropriate to look at each one individually.'

²⁵ At [11.3-4]. Though if this was the case one might have expected to find some suggestion to this effect in the hearings before the Tribunal, or the Circuit and High Courts.

²⁶ At [11.5].

²⁷ At [11.6]. Subject to the caveat that 'if the number of members of the Travelling Community assessed was, as a result of choosing both the catchment group and the time period at which that group was to be looked at, too small to warrant an appropriate inference on disadvantage, then it might have been necessary to extend the scope of the matters examined under one or both criteria so as to provide meaningful statistics'.

The Court did not explain how any individual applicant might be expected to assemble this evidence²⁸ or whether it is now a requirement that in order to bring a claim of indirect discrimination under the ESA one must have access to a team of legal and statistical experts. Leaving these practical issues aside, there are a number of difficulties with the approach adopted by the Court.

First, we look at the Court's approach to the 'proper question'. In reality, issues do not always fall neatly to be classified as a 'question of law' or 'of fact'. Rather there is a continuum from 'pure' questions of law, through mixed questions of law and fact, to purely factual issues. In this case, the proper question was fact-intensive and was very much bound up with the factual issues. It was certainly not a pure question of law and was arguable a mixed question of law and fact.

In its review of the appropriate standards of review to apply to the decisions of administrative tribunals, the Supreme Court of Canada held that under Canadian law

questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness.²⁹

In addition, the Canadian Supreme Court ruled that

Deference will usually result where a tribunal is interpreting its own statute ... with which it will have particular familiarity³⁰

While the Court held that a question of law of 'central importance to the legal system . . . and outside the . . . specialized area of expertise' of the tribunal would always attract a correctness review, it considered that a question of law that did not rise to this level might be compatible with a reasonableness standard depending on the context.³¹

In this context, it is arguable that where, as in this case, a Tribunal with specialist knowledge has been established to adjudicate on complaints, some reasonable discretion should be given to that Tribunal to decide on the 'proper question' and this should be subject to review for reasonableness not correctness.³² The approach adopted by the Irish Supreme Court leaves open the possibility that the decisions of specialist tribunals will be overturned simply because a higher court takes a different view as to the proper question. Second, in relation to the 'provision' at issue, it is not immediately obvious why the focus should be on *all* the ways in which the person should qualify rather than on one aspect of particular relevance, in this case the parental rule. Of course, the onus would be on the complainant to show *prima facie* that the parental rule had a disproportionate impact and it would be open to the school, which would be better placed to have access to the data, to show that

²⁸ For some discussion of the available data, see Smith, 'Perpetuating ... disadvantage' *op. cit.* at pp. 160-1.

²⁹ *Dunsmuir v. New Brunswick*, 2008] SCC 9 at [51]. See also at [53] where the Court stated that 'We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.'

³⁰ *Dunsmuir* at [54].

³¹ At [55].

³² On deference for such tribunals see, for example, numerous statements of the Irish High and Supreme Courts including *O'Keefe v An Bord Pleanala* [1993] 1 IR 39; *Henry Denny & Son (Ireland) Ltd. v. Minister for Social Welfare* [1997] IESC 9; *Ashford Castle v. SIPTU* [2006] IEHC 201; *Calor Teoranta -v- McCarthy* [2009] IEHC 139; *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3.

there were other ways in which it ensured that Travellers did, in fact, have equal access to places. In any case, the amicus was surely correct to argue that that an unjustified discriminatory measure could not be justified by some other measure which, to a greater or lesser extent, ameliorated the effect of the discriminatory measure. Again, it is arguable that the precise provision to be reviewed is best left to the discretion of the specialist Tribunal.

The onus of proof and the evidence required

The Court did not discuss in, in any detail, the issue of the onus of proof, simply stating that ‘the onus of proof lay on John Stokes’.³³ However, the issue is somewhat more complicated than this. It is, of course correct that in equality law the onus – the EU tends to use the term burden – is on the complainant to make out a *prima facie* case of discrimination. Once this is done, the burden switches to the respondent to show that such a measure is objectively justified. This was first established in the case law of the Court of Justice. For example, In the *Danfoss* case, the Court ruled that where a company applied a system of pay which was lacking in transparency and statistical evidence indicated a difference in pay between male and female workers, the burden of proof shifted to the employer to account for the pay difference by factors unrelated to gender.³⁴ This approach is now explicitly set out in EU equality law. For example, article 8(1) of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin provides that

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

Indeed, such an approach can also be seen at common law, as one aspect of the (rather ill-defined) ‘peculiar knowledge’ doctrine. This has been summarised recently by McDermott J.

The shifting of the onus of proof to a defendant in civil or criminal proceedings, may be prescribed by statute or arise under common law because it would be unfair to require a plaintiff to prove something beyond his or her capacity but which is ‘peculiarly within the range of the defendants capacity of proof’, a concept which embraces facts ‘peculiarly within their knowledge’.³⁵

Clarke J emphasised on a number of occasions the need for statistical analysis in indirect discrimination claims. He stated that the analysis of the effect of the measure on the

³³ At [12.9]. See also at [10.10]: ‘It is clear that the onus of establishing particular disadvantage rests on the person claiming indirect discrimination.’

³⁴ Case 109/88 *Danfoss* [1989] ECR 3199.

³⁵ *Jordan -v- Minister for Children and Youth Affairs* [2014] IEHC 327 at [65] citing *Rothwell v. Motor Insurers Bureau of Ireland* [2003] 1 IR 268 at pp. 275-6 and *Hanrahan v. Merck Sharp & Dohme* [1988] ILRM 629 at p. 634.

'protected' and the comparable groups 'necessarily carries with it some degree of statistical analysis'.³⁶

He goes on to identify a number of criticisms of the Equality Tribunal and the Circuit Court's approach. First, he criticised the Tribunal and the Circuit Court for considering solely the figures for one year's set of applicants to Clonmel High School.³⁷ He emphasised that whether it would be sufficient to carry out an analysis over a narrow timeframe would depend on all the circumstances of the case.³⁸

Second, Clarke J. pointed to the need to

identify[] the relevant group of persons, from a geographical perspective, for the purposes of assessing any differential effect on members of the Travelling Community, on the one hand, and non-Travellers, on the other, so as to assess whether, and to what extent, disadvantage has been established.³⁹

In this context, he again criticised the Tribunal and Circuit Court for extrapolating from the national figures – which showed that the likelihood of a typical potential secondary school pupil from the Travelling Community nationwide having a parent who attended any secondary school was very substantially less than that applicable to a non-Traveller – to the context of Clonmel High School. This he described as 'an inappropriate inference'.⁴⁰ With respect, this is nonsense. Not alone was there no evidence that Clonmel differed (positively) from the national data, the Equality Tribunal specifically noted that there was no evidence that *any* Travellers attended the High School during the 1980s (when Mr. Stokes' father would have attended school).

In general, the Court is very clear that statistical analysis is necessary. However, one paragraph of the judgement appears to take a somewhat different view. Towards the end of the judgement, in a section explaining why risk is relevant to indirect discrimination, Clarke J states

I should emphasise that there is, of course, no reason in principle why particular disadvantage cannot be established by statistical analysis. Indeed, in many cases it may well require statistical analysis to assess whether a provision gives rise to a particular disadvantage in respect of a protected group. The very fact that the provision which may be found to give rise to indirect discrimination is ostensibly neutral makes this likely. However, the fact that indirect discrimination can be established by proper statistical analysis emphasises the need that such analysis be

³⁶ At [8.6]. See also [9.4].

³⁷ At [10.4].

³⁸ For example, Clarke J. stated that 'large numbers of persons were continuously affected by a challenged provision or measure, then it might well be enough to analyse the differential effect of that measure on the protected and the alternative group over a relatively short period of time'. He did not explain why one might expect significant annual variation on the issue before the court. It appears that the Court's concerns were primarily with the numbers involved in the analysis rather than the time period (at [10.5]).

³⁹ At [10.11]. He emphasised that this was a matter for the decision maker and that the High Court 'must accord significant deference to an assessment made by the decision maker as to the respective groups to be assessed'.

⁴⁰ At [11.8].

sufficiently robust to sustain a determination of the extent of disadvantage which the impugned provision creates.⁴¹

This section is rather difficult to reconcile with the rest of the judgement. It is, of course, obvious that particular disadvantage *can* be established by statistical analysis and, in fact, much of the judgement has been spent telling us that such analysis will be necessary. But here the Court appears to suggest that such analysis *may* be necessary *in many cases*. Which suggests that it is *not* in fact necessary in all. The final sentence is not well structured but appears to emphasise the need for *robust* statistical analysis.

But while one can parse the language this way and that, the fact remains that the Supreme Court overturned the decisions below, in part, because it felt that a more rigorous approach to the statistical evidence was required. However, an over-reliance on statistical evidence is something which has been recognised to constrain the possibilities of bringing cases of indirect discrimination, given the absence of reliable statistics in many cases.

For example, Directive 2000/43 provides that

The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means *including* on the basis of statistical evidence.⁴²

Similarly in *D.H. v Czech Republic*, the European Court of Human Rights, while emphasising the importance of statistics in showing disproportionate impact also stated

This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.⁴³

One can readily envisage cases in which statistical evidence should not be necessary. For example, an Irish language requirement for employment is obviously likely to have a disproportionate impact on non-Irish nationals.

Nonetheless, the decision of the Supreme Court would appear to call into question the practice of the Equality Tribunal and the Labour Court (in employment equality cases) of being prepared to apply their specialist knowledge rather than insisting on detailed statistical evidence in all cases.⁴⁴

'Particular disadvantage'

Finally, as we have seen, the ESA (s.3) provides that a complainant must show that the provision in question puts her at a 'particular disadvantage'. The Supreme Court correctly rejected McCarthy J's approach to this issue. Clarke J, stated that

⁴¹ Para 12.8.

⁴² Preamble, recital 15. My emphasis.

⁴³ (2008) 47 EHRR 3 at [188].

⁴⁴ See, for example, *Inoue v. NBK Designs* (2003) Employment Law Reports 98 ; *McDonagh v. Navan Hire Limited*, DEC-S2004-017; *Mr. A. v Department of Social Protection*, DEC-S2013-010.

I am satisfied that the use of the term ‘particular’ brings with it a requirement, as a matter of law, that it must be established that the extent of any disadvantage is significant or appreciable.⁴⁵

A ‘slight’ disadvantage would not be sufficient for a finding of indirect discrimination. However, he pointed out that the Oireachtas had

not chosen to adopt any quantifiable measure of the extent of the disadvantage which must be established in order that it can be properly said, as a matter of law, to be a ‘particular disadvantage’. That is left to the judgment of either the Director or, on appeal, of the courts.⁴⁶

Clarke J once again emphasises the importance of statistical analysis stating that

a starting point must, necessarily, be to conduct an appropriate analysis of the extent of any disadvantage. In passing, it should be noted that such an analysis is required for two purposes. Firstly, the scale of any disadvantage must be known in order to determine whether, in all the circumstances, it can be said to place the relevant protected group at a ‘particular disadvantage’. Secondly, the scale of any disadvantage may well be relevant in assessing whether any objective justification meets the ‘appropriateness’ test. A provision or measure, which places a protected group at a highly significant level of disadvantage, and which only contributes in a very marginal way to a legitimate aim, might very well fail the appropriateness test. On the other hand, a measure which creates a much lesser degree of disadvantage (although just about sufficient to meet the particular disadvantage test), but which contributes to a very great extent to an important, legitimate objective, might meet the appropriateness test. An analysis of the degree of disadvantage may, therefore, be necessary not only to determine whether the level of disadvantage is sufficient to be properly described as a ‘particular disadvantage’ but also to form an important component in the analysis of whether justification has been made out.⁴⁷

It is helpful, at least, that the Court’s has corrected McCarthy J’s clearly incorrect approach to indirect discrimination and has arrived at a broadly correct understanding – even without any explicit reference to EU law. It is clearly the case that there must be some significant difference between the two groups if discrimination is to be made out.

In one of the few cases in which it considered this issue, the CJEU ruled in *Seymour-Smith* that ‘it must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition’ at issue in that case or, alternatively, ‘a lesser but persistent and relatively constant disparity over a long period’.⁴⁸ The CJEU suggested that the difference in that case (77.4% of men and 68.9% of women fulfilled the condition) did not ‘appear, on the face of it, to show that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by the disputed rule’.⁴⁹ The majority of the House of Lords took the view that, having regard to the

⁴⁵ Para 9.2.

⁴⁶ At [9.3].

⁴⁷ Ibid.

⁴⁸ C-167/97 Seymour-Smith [1999] ECR I—623 at [60]-[61].

⁴⁹ Ibid at [64].

persistence of the difference in qualification between men and woman, it was indeed ‘considerable’ or at least represented a ‘lesser but persistent and relatively constant disparity’ and found disproportionate impact.⁵⁰

3. Discussion

This is a very disappointing judgment from an equality perspective and one which entirely ignores the considerable disadvantages faced by Travellers in the educational system.⁵¹ Of course, the function of the Supreme Court is to interpret the law and not to address social problems but, in this case, the Court has interpreted national law in isolation, ignoring both EU law and the experience of other jurisdictions. It is noteworthy that the majority judgment of the Court cited (in passing) *one* equality case in its 24 page ruling, in contrast to 5 cases cited on the issue of whether an appeal lay.⁵² The Court also made no reference at all to EU law despite the fact that, in several areas, the Act implements EU Directives.⁵³

In this case, the evidence advanced before the Equality Tribunal and the Circuit Court clearly established that the parental rule put Traveller children and, in particular, Mr. Stokes at a particular disadvantage. The Tribunal and Court approached the issues in the correct manner and had regard to appropriate evidence. They were entitled to conclude that the complainant had made out a *prima facie* case of discrimination and that the onus now shifted to the school to show objective justification. The Supreme Court was incorrect to overturn the ruling of a specialist tribunal and, as discussed below, its emphasis on the need for extensive statistics is undesirable and, more importantly, wrong.

The Supreme Court was clearly correct to disapprove of McCarthy J.’s bizarre interpretation of the concept of ‘particular disadvantage’. However, if McCarthy J’s error arose in part from treating the concept of indirect discrimination as though it was purely national legislation, the Supreme Court adopted exactly the same approach.

⁵⁰ *R (Seymour-Smith) v Secretary of State for Employment* [2000] UKHL 12.

⁵¹ See, for example, Department of Education and Science, *Report and Recommendations for a Traveller Education Strategy*, 2006.

⁵² *R (Seymour-Smith) v Secretary of State for Employment* [2000] UKHL 12. Even this hardly counts as it is simply mentioned as having been relied on by the amicus (the Equality Authority) in support of its interpretation of the concept of ‘particular disadvantage’.

⁵³ These include Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; Directive 2002/73/EC amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment vocational training and promotion, and working conditions (now replaced by Directive 2006/54/EC on implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation); and Directive 97/80/EC on the burden of proof in cases of discrimination based on sex (now repealed by Directive 2006/54/EC); and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. The most recent amendment, the Equal Status (Amendment) Act 2012, provides the legal basis in national law for the mandatory introduction from 21 December 2012 of ‘unisex premiums’ and benefits in insurance in response to the decision of the CJEU in Case T-224/10 *Association belge des consommateurs test-achats v Commission* [2011] E.C.R. II-7177.

EU law

The concept of indirect discrimination is well understood in EU law (and even, generally, in Irish law). The definition of indirect discrimination set out in the Act is drawn from EU law and, in some fields, the Equal Status Act implements EU law and, therefore, it should be interpreted in line with EU law.⁵⁴ The definition of indirect discrimination found in the Act is currently set out in, for example, Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin but originates in the case law of the Court of Justice.⁵⁵ In the *O'Flynn* case, for example, a case involving indirect discrimination against migrant workers, the test for indirect discrimination was phrased as

unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.⁵⁶

It is clear from this that it is the fact that a particular provision is intrinsically liable to affect one (protected) group more than another comparable group (and which, therefore, creates a risk that it will place the former at a particular disadvantage) which is critical. In this case, the parental rule worked to the disadvantage of many applicants but, given that Travellers were particularly unlikely to benefit from the rule, put them at a *particular* disadvantage.

EU law clearly envisages that statistics are *not* the only way in which a case of disproportionate impact can be made out. As we have seen, a number of EU Equal Treatment Directives specifically provide that

rules [of national law or practice] may provide in particular for indirect discrimination to be established by any means *including* on the basis of statistical evidence.⁵⁷

This has now been reflected in the case law of the CJEU in case such as *Meister*.⁵⁸

The general trend of the CJEU to ensure the efficacy of the Equal Treatment Directives is also shown in recent case law. In *Meister*, the complainant was a Russian national who had a Russian degree in systems engineering which had been recognised as equivalent to a German degree.⁵⁹ She applied for a job in Germany but her application was rejected without any explanation. She believed she met the requirements of the post and argued that she suffered less favourable treatment on the grounds of her sex, age and ethnic origin. In order

⁵⁴ The instant case did not, of course, explicitly involve EU law. Whether Mr. Stokes could bring a claim under the EU Race Directive (2000/43) is discussed by Smith ‘Perpetuating ... disadvantage’ *op cit.* at 148-49.

⁵⁵ See, for example, Case C-237/94, *O'Flynn* [1996] ECR I-2617.

⁵⁶ *Ibid.* at [20]

⁵⁷ My emphasis. See Directive 2000/43, preamble, recital 15; Directive 2000/78, preamble, recital 15.

⁵⁸ C- 415/10, *Meister* EU:C:2012:217.

⁵⁹ Case C- 415/10, *Meister* EU:C:2012:217. See also Case C-104/10 *Kelly* [2011] ECR I-6813. In this case also, the CJEU held that while a complainant was not entitled, under EU law, to information held by the respondent which would show discrimination, nonetheless, ‘a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving, in particular, Article 4(1) thereof of its effectiveness.’ *Kelly* at [39].

to show disproportionate impact, she sought information as to whether the employer had engaged another applicant and, if so, as to the criteria on the basis of which that appointment has been made. The Court did not go this far but held that it was for the national court

to ensure that the refusal of disclosure by [the employer], in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination against Ms Meister, is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54. It must, in particular, take account of all the circumstances of the main proceedings, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been such discrimination have been established.⁶⁰

Given that ‘indirect discrimination may be established by any means including on the basis of statistical evidence, the Court stated that

Among the factors which may be taken into account is, in particular, the fact that, ... the employer in question in the main proceedings seems to have refused Ms Meister any access to the information that she seeks to have disclosed.⁶¹

Thus, in case a case such as *Stokes* the complainant or the equality officer could seek from the respondent statistical data which would assist in establishing discrimination and, if this is not provided, take this into account in deciding whether disproportionate impact has been established.

UK law

There has been a general recognition over time of the importance but also the limitations of statistics in establishing disproportionate impact in other jurisdictions. This has, in general, led to a lesser emphasis on purely statistical evidence and the recognition of the need for a flexible approach to the evidence so as to give real effect to equality laws rather than applying rigid evidentiary rules. Of course, it is still necessary to show that there has been a disproportionate impact.

This is well shown in (what became) the *Humphreys* case.⁶² This case involved alleged indirect discrimination on grounds of gender under the ECHR. Mr. Humphreys shared the care of his children with their mother but, like many fathers, was the minority carer.⁶³ The social security rules favoured the majority carer and he argued that this involved indirect discrimination. Before the specialist Upper Tribunal, the respondent argued that no evidence has been adduced to show disproportionate impact. In fact the claimant had produced rather general statistics which showed that substantially more men than women were minority carers. The data did not, however, relate to the particular payment at issue.

⁶⁰ At [42].

⁶¹ At [43]-[44].

⁶² *Her Majesty's Revenue and Customs v D.H.* [2009] UKUT 24; *Humphreys v Revenue and Customs* [2012] UKSC

⁶³ That is he cared for the children for less time in the week than did the mother.

However, having referred to the case law of the House of Lords and the European Court of Human Rights, Judge Jacobs concluded that

the focus should be on what matters to the claimant, the issue of discrimination, rather than an analysis of statistical information.⁶⁴

He noted that the Revenue and Customs, who were responsible for administering the payment, were unable to provide relevant data. Judge Jacobs noted that

It would no doubt be possible for an outsider to obtain this information, but it does not come well from the Department of State entrusted to receive and decide claims to argue that others should obtain the information that it does not, but could easily, retain.⁶⁵

On the basis of the evidence submitted and his own experience of hearing cases involving child support payments, he accepted that the rule did have a disproportionate impact on men. On appeal before the Court of Appeal and, subsequently, the House of Lords, the respondents accepted this finding and argued that this was objectively justified (on which they were successful).⁶⁶

Again this approach is consistent with that adopted by the Equality Tribunal and the Circuit Court in *Stokes* and clearly inconsistent with the Supreme Court's rigid approach.

The way forward

Obligation to apply EU law

It is clear that the Supreme Court's approach requires a more rigorous approach to statistical evidence than has been the practice at the Equality Tribunal and Labour Court (at least in recent years).⁶⁷ Arguably, this is inconsistent with EU law where Irish equality law is implementing EU directives. EU law emphasises that statistical evidence is just one means of proof and highlights the importance of not compromising the achievement of the objective pursued by EU equality law and thus depriving it of its effectiveness.⁶⁸ In interpreting EU law, the Tribunal (and the courts generally) are *obliged* to interpret the law correctly. In the *Elchinov* case, the Court of Justice confirmed that EU law precludes a national court from being bound by legal rulings of a higher court, if it considers, having regard to the interpretation which it has sought from the Court of Justice, that those rulings are

⁶⁴ At [17].

⁶⁵ At [19].

⁶⁶ *Humphreys v HM Revenue and Customs* [2010] EWCA Civ 56 at [11]; *Humphreys v Revenue and Customs* [2012] UKSC 18 at [1]. See *Mr. A. v Department of Social Protection*, DEC-S2013-010 for a somewhat similar Irish case (involving rent supplement) where on the basis of limited evidence the equality officer was satisfied that disproportionate impact had been shown.

⁶⁷ It should be emphasised that the *Stokes* decision was not a 'maverick' ruling but was a well-reasoned analysis of the issues. The same can be said of the Circuit Court ruling. Rather this is a case of the Supreme Court rushing in where it would have been better advised not to tread.

⁶⁸ See, for example, Case C-104/10 *Kelly* [2011] ECR I-6813 at [39].

inconsistent with European Union law.⁶⁹ As will be noted, this answer refers to a situation where the national court has made a *reference* to the ECJ. However, the Court went further stating that

a national court which is called upon ... to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation [including rules as to precedent] and it is not necessary for the court to request or await the prior setting aside of that national provision by legislative or other constitutional means.⁷⁰

Imperfect statistics

Clarke J did (with considerable understatement) accept that 'some level of difficulty might well have arisen for the production of accurate figures' in this case.⁷¹ However, he held that this did not 'mean that an attempt could not have been made'. Clarke J. did point out that

The Director is, of course, entitled to seek such information as might be considered relevant and necessary to a proper determination of the question. Any difficulties in compiling relevant information would need to be properly taken into account, and would need to be assessed by the Director in order to determine whether the onus of proof had been met. Like considerations would clearly apply in the case of an appeal to the Circuit Court. There is no requirement that any figures relied on are unimpeachable. Any analysis is open to difficulty in compiling figures. The fact that the figures may not be perfect does not prevent either the Director or a Circuit Judge on appeal from nonetheless being satisfied that the onus of proof has been met.

He went on

The information may, in some cases, be so imperfect that the onus of proof may not be met. However, the information may, in the judgment of either the Director or a Circuit Judge, be sufficient to allow an appropriate conclusion to be reached despite its imperfections. Subject to a test of irrationality on O'Keeffe principles, those are matters for the fact finder, be it the Director or the Circuit Judge. However, whether the correct question was asked in the correct way is a matter of law capable of being reviewed on appeal to either the High Court or to this Court. The fact that the information, which might have been produced had the correct question been asked, could have fallen short of complete, ... , would, of course, have been a matter which the decision maker could have to have taken into account in assessing whether the onus of proof had been met. But it is not a reason for not asking the right question in the first place.

Thus, when one combines this with the approach of the CJEU in case such as *Kelly and Meister*, there is considerable scope for the decision-maker to seek evidence and to draw appropriate conclusions.

⁶⁹ Case C-173/09, *Elchinov* [2010] ECR I-000.

⁷⁰ At para 31.

⁷¹ At [

Legislative response

Overall one can attempt to distinguish the *Stokes* case and to use EU law, from cases such as *Meister*, to require respondents to produce evidence which will support a case of discrimination or to ask the decision maker to draw the appropriate inferences where this is not done. However, the fact remains that the Supreme Court ruling is likely to have a chilling effect on indirect discrimination cases under the ESA. Therefore, there is a compelling argument for the Oireachtas to act to clarify that statistical evidence is not required in all cases and to put EU case law on a statutory basis in the ESA.

More broadly, on the substantive issue involved in this case, a critical question is how to increase the numbers of Travellers *applying* to schools such as the High School and again broader legislative and policy action is required.