Does EU law mean that the Equality Tribunal has jurisdiction to disapply secondary legislation?

The Irish Supreme Court has decided to refer a question to the Court of Justice of the European Union (CJEU) as to whether EU law requires that the Equality Tribunal has a competence or jurisdiction to disapply secondary legislation.[1] This short note discusses the rather lengthy judgement of Clarke J setting out his reasons in support of that decision. The case suggests – yet again[2] – that the Supreme Court has little understanding of and less interest in equality law.[3] It also suggest a rather worrying questioning of EU law supremacy by the Court in favour of the 'principle of subsidiarity'.

The context

The case dates back to before 2009 and concerned a claim that a maximum recruitment age for members of An Garda Síochána (the police force) amounted to unlawful discrimination on the grounds of age. The relevant maximum age was provided for in secondary legislation.[4] A complaint was brought to the the Equality Tribunal but the Minister for Justice sought an order preventing the Tribunal from investigating the complaint on the basis that, even if it found discrimination, the Tribunal did not have jurisdiction to set aside or disapply substantive law. Charleton J. (also now a member of the Supreme Court) held that the Equality Tribunal did not have a jurisdiction to disapply a statutory instrument made by the Minister.[5] This ruling has been heavily criticised by Fahey as involving 'an unfortunate example of litigants being denied remedies that they were entitled to under EC law and being subjected to procedural disadvantage through erroneous interpretation'.[6]

A mere eight years later, the Supreme Court has now decided to refer the issue to the CJEU which will ensure a further delay of at least a year or two (average time for dealing with references is currently over 15 months).

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[1] *Minister for Justice, Equality and Law Reform -v- Workplace Relations Commission*, [2017] IESC 43. See also the order of reference (which sets out the full wording of the question) which is attached to the judgement on the courts website: http://courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/7b97206199a365a480258141004d3f72?OpenDocument

[2] After rulings such as *Equality Authority -v- Portmarnock Golf Club* [2009] IESC 73; *Stokes -v- Christian Brothers High School Clonmel* [2015] IESC 13; *Cahill v. Minister for Education and Science* [2017] IESC 29.

[3] In fairness, understanding of equality law is not that common anywhere in the Irish superior courts.

[4] Garda Síochána (Admissions and Appointments) (Amendment) Regulations, 2004.

[5] *Minister for Justice, Equality and Law Reform v. Director of the Equality Tribunal* [2009] IEHC 72.

[6] Elaine Fahey, 'A Constitutional Crisis in a Teacup: The Supremacy of EC Law in Ireland' (2009) 15 *European Public Law*, Issue 4, pp. 515–522.

The powers of the Tribunal under Irish law

Clarke J has set out a lengthy ruling explaining his agreement with this decision.[7] Having set out the facts, he first addressed the question of whether the Tribunal could, under national law, set aside or disapply a statutory instrument.[8] It is not clear that anyone ever suggested that the Tribunal did have this power and, unsurprisingly, he concluded that

> as a matter of national law, it cannot be said that there is anything even remotely resembling an express jurisdiction conferred on the Tribunal to set aside or disapply general measures of secondary legislation … .[9]

The Supreme Court's proposed answer

Unusually, before posing the question of legal interpretation for the CJEU, Clarke J already suggested to the CJEU how it might respond to the reference. Clarke J points out (frequently) that the High Court does have the power to disapply secondary legislation.[10] He goes on to suggest

> there are two potential solutions to the problem of disapplication, at least so far as national law is concerned. The first would be to confer on the Tribunal a power to disapply national legislation. The second would be to disapply any measures of national law which might otherwise restrict the power of the High Court fully to vindicate any European Union law rights which may be established.[11]

He goes on to make the perhaps unexpected suggestion that

> While it would, ordinarily, be the case that the High Court could not embark on a hearing dealing with an ordinary employment equality case (for the jurisdiction in that regard is, ordinarily, conferred on the Tribunal), in circumstances where the complaint, if it is to be upheld and if the rights of the persons making the complaint are to be vindicated, would require the disapplication of a measure of national legislation, then it would be necessary to disapply any rules of national law which stood in the way of the High Court exercising the full powers which would ordinarily be enjoyed by the Tribunal in order that the Union law rights of the complainant concerned be fully vindicated.[12]

The latter solution, he concludes, would be

> in full conformity with the Irish constitutional legal order for it derives from the constitutional power of the High Court to deal with all matters of law and fact … .[13]

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[7] It is not apparent from the judgement itself whether the other member of the Court agreed with his reasoning but it appears from the order of reference that they must have done so (MacMenamin J., Laffoy J., Dunne J., and O'Malley J.).

[8] At [5.2] Clarke J discusses the difference between the two terms.

[9] At [5.11]. See also, [5.15].

[10] At [2.2], [5.4], [5.15], [6.6].

[11] [5.13].

[12] Ibid.

[13] [5.14].

In contrast

> The alternative solution of extending a power, which would not otherwise arise, to the Tribunal to disapply national legislation is wholly contrary to the national legal order and, certainly as a matter of national law, would not represent an appropriate solution to the problem.[14]

Principles of equivalence and effectiveness

In an earlier Irish reference on a somewhat related issue, the CJEU referred to the general EU law principle of 'effective judicial protection' (a phrase noticeably absent from both the recent ruling and the order of reference).[15] It is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law. However, Member States must ensure that rights are effectively protected and that procedures comply with the principles of equivalence and effectiveness.

Clarke J acknowledged that any measure of national procedural law must comply with the principles of equivalence and effectiveness. 'Equivalence' means that 'the procedure to be followed in enforcing a claimed entitlement under Union law must be equivalent to the procedure which would be followed in the same national court by a party seeking to pursue an analogous claim based purely on national law'.[16] 'Effectivness' requires that 'the procedures required to be followed in proceedings seeking to place reliance on entitlements guaranteed by Union law must be such as provide an effective remedy being one which is not " practically impossible or excessively difficult."'[17] He rapidly concluded that the principle of equivalence would be satisfied since 'any other case of this type, where it is suggested that a measure of secondary legislation was not to be followed … , would require, as a matter of national law, to be brought in the High Court.'[18]

The issue of effectiveness was considered under a number of headings including the right of appeal from the Tribunal (cases will end up in the courts anyway), the issue of whether court fees might deter applicants (courts can award costs against a losing party, the fact that the Tribunal cannot award costs may deter litigants, and cases will end up in the courts anyway), whether the Tribunal has expertise in equality matters (cases will end up in the courts anyway) and so on.[19] He concluded that the Tribunal had not

> pointed to any aspect of the regime which would require to be followed in the event that national law is applied and proceedings of this type are required to be brought

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[14] Ibid. Again it is not clear who suggested that this would be appropriate as a matter of national law.

[15] *Impact v Minister for Agriculture and Food,* ECLI:EU:C:2008:223 at [43].

[16] At [6.3] citations omitted. In *Impact,* the CJEU defined this as requiring that 'the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions' at [46].

[17] At [6.4].

[18] At [7.1].

[19] At [7.4]-[7.14].

> before the High Court, which would render the vindication of Union employment equality rights in the High Court excessively difficult.[20]

Does EU law require that the Tribunal have a jurisdiction to disapply secondary legislation?

Keeping the most relevant issue till last, Clarke J. finally turned to the question as to whether EU law nonetheless requires that the Tribunal have a jurisdiction to disapply secondary legislation. In contrast to previous sections of his ruling, this one is rather short. Perhaps surprisingly it is also entirely devoid of any case law. But Clarke J concludes that the answer to the question can 'not be said to be acte clair' and he therefore proposed to refer the question to the CJEU, a proposition which which the other member of the Court agreed.[21]

However, the answer which the Court would like is obvious and the order of reference goes so far as to suggest that

> it might well be that it would be an excessive interference in the national legal order to determine at Union level that a body, which would not normally, as a matter of national law and the national legal order, have competence to deal with a particular issue, must be given that competence.[22]

Discussion

It is rather clear that the Supreme Court (or at least those members sitting on this case) think that the desirable option is to disrupt the normal mechanism of the Employment Equality Acts (and presumably the Equal Status Acts) and to allow the High Court *only* to investigate cases which may involve the disapplication of secondary legislation.[23] Presumably, the same approach would, a fortiori, apply to primary legislation. This is the view which has been advanced by the Minister for Justice *and Equality* (my emphasis).[24] It seems rather unlikely that it is a view which would be shared by many equality law practitioners.

Indeed, it seems rather inconsistent with the views recently expressed by a majority of the Supreme Court in *Cahill v Minister for Education and Science,* a case concerning the Equal Status Act which provides provides similar protection for equality rights in relation to non-employment issues.[25] O'Donnell J. (with whom Laffoy and Dunne JJ. agreed) stated that

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[20] [7.15].

[21] [9.6]-[9.7].

[22] At [6.10].

[23] The points made in the judgement are, if anything even more strongly emphaised in the order of reference. For example (at [6.4]: 'The Supreme Court noted, therefore, that the issue in this case was not one where a body which undoubtedly had jurisdiction was limited in its power to provide an effective remedy but rather was one where national law, as definitively interpreted by the Supreme Court, in effect divides the jurisdiction in equality cases between the Commission and the courts by confining to the courts a jurisdiction in cases which involve the disapplication of measures of national legislation.'

[24] In reality, one might assume that this is the Department's view.

[25] [2017] IESC 29.

> The Equal Status Act of 2000, is an ambitious piece of social legislation targeted at a range of discriminations which may occur in fields other than employment. I do not doubt the real injury and damage that can be caused by such discrimination, or indeed the desirability of having an authoritative determination that such discrimination has occurred, but it is surely unsatisfactory if that requires the considerable time and expense (and risk of costs) that occurred in this case. *What is required, is cheap, expeditious and sensitive enforcement at an administrative level, together with the possibility of binding review at an appellate level when important issues of law arise*.[26]

Further, it is rather difficult to accept that the question identified by the Supreme Court is not *acte clair.* The Court of Justice famously ruled in *Simmenthal* that

> A national court which is called upon, within the limits of its jurisdiction, to apply provisions of community 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, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means".[27]

The reference to 'within the limits of its jurisdiction' does not provide a get-out for national courts reluctant to acknowledge EU supremacy.[28] It is clear that this is a reference to substantive 'subject matter' jurisdiction and not to 'procedural' national rules as to what a court (or tribunal) may do within its area of jurisdiction. For example, in *Elchinov*, a lower court was, under national law, bound to follow the rulings of a higher court even if these appeared to be inconsistent with EU law.[29] However, the Grand Chamber of the CJEU ruled that a lower court must apply EU law regardless of national procedural rules.

The CJEU stated that

> a national court which is called upon, within the exercise of its jurisdiction, 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 national procedural rules] 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.[30]

From a policy perspective, it is rather difficult to accept that establishing multiple fora for equality claims will enhance effective judicial protection of EU rights. Rather, as Fahey states

> The effectiveness of EC law is substantially diminished if the litigation of EC law rights becomes mired in claims before multiple fora and is rendered costly and inefficient[31].

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[26] *Cahill* at [2] of his judgement (emphasis added). Of course, Laffoy and Dunne JJ. are also members of the Court in the WRC case.

[27] *Amministrazione del Finanze dello Stato v. Simmenthal*, ECLI:EU:C:1978:49.

[28] As indeed argued in the order of reference at [6.8].

[29] ECLI:EU:C:2010:581.

[30] At [30].

[31] Op cit. at [520].

The Supreme Court has always taken a very limited view of the scope of Article 40.1 of the Irish Constitution (which provides that "all citizens shall…be held equal before the law'). The recent and current judges of the Court have also taken a very limited view of the extent to which the European Convention on Human Rights is 'incorporated' into Irish law (if one compares, for example, to the approach of the UK Supreme Court). Whether or not one agrees with these interpretations, they are ones which the Supreme Court is entitled to make and of which the Court is (subject to constitutional or statutory amendment) the master. However, this does not apply to equality law insofar as it is implementing EU law. Here the Court appears to have a very limited understanding of EU equality principles. The fact that the Court does not find it necessary to develop its understanding of EU equality law and the tone of its recent equality rulings suggest a Court which has little understanding of or interest in equality. More 'judicial studies' (aka training) and less hubris might make for more effective judicial protection.[32]

Perhaps as concerning, for a Court generally seen a pro-*Communitaire*, the Supreme Court appears to be trying to stake out its territory vis-a-vis EU legal supremacy in a somewhat similar, if necessarily more restricted, manner to its approach to the European Convention on Human Rights Act. It will be very interesting to see how the CJEU responds to the tentative legal IREXIT and the Supreme Court's attempts to answer its own questions.

[32] The order of reference notes, with some horror, (at [4.7] that 'In some such cases there is no requirement that decision-makers have any form of legal training and it is the case, in practice, that some decision-makers who are called on to determine rights arising under national and European legislation, do not have legal training.' Leaving aside the issue as to whether this applies to the Equality Tribunal, it is clear, for example, that the Equality Tribunal in *Stokes* and *Cahill* made a better attempt to interpret the law than did the High Court.