December, 2011

Travellers, equality and school admission: Christian Brothers High School Clonmel -v- Stokes

Mel Cousins, *Glasgow Caledonian University*

Travellers, equality and school admission: *Christian Brothers High School Clonmel -v- Stokes*[1]

This note examines the recent decisions in *CBS High School Clonmel v Stokes* which concerned whether the rules for admission to the school – in particular a rule giving priority to children whose parents had attended the school - were compatible with the Equal Status Acts 2000-2008. The Equality Tribunal held that the rule was indirectly discriminatory and in breach of the Act.[2] However, on appeal the Court held that while the rule had a disproportionate impact on Travellers, it was objectively justified.

The facts

The facts of the case are quite straightforward. John Stokes was 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 CBS. 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 High 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 from about 80% initially (if access was allocated randomly) to 56-63% after admittance of sons of part-pupils.[3]

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 Equal Status Acts by being refused admission to the High School. Section 7 provides that

---

[1] [2011] IECC 1. The case is under appeal to the High Court.

[2] DEC-S2010-056.

[3] Unfortunately the data provided by the Director and the Court are slightly different.

(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, ...

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's decision

Before the Equality Tribunal it was argued that as a member of the Traveller community, John Stokes' 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 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 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 Director of the Equality Tribunal[4] 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 Director 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 to the Circuit Court.

Turning to the parental rule, the Director noted that there was no evidence that any Travellers attended the High School during the 1980s. He concluded on the balance of probabilities that the policy of giving priority to children of past pupils put the complainant at a particular disadvantage compared with non-Travellers.

Therefore, he had to consider whether the rule was objectively justified by a legitimate aim and that the means of achieving that aim are appropriate and necessary. He referred to the

[4] Rather than delegate the case to an equality officer, the Director investigated this case himself.

justification for the rule as set out in the admissions policy, i.e. that of ' supporting the family ethos within education by providing education services for the children of families who already have, or have recently had, a brother of the applicant attend the School'. The Director took the view that while this might justify giving priority to siblings it did not, on its face, state an aim which required giving priority to the children of former pupils. In oral evidence the High School stated that it had as its aim the strengthening of family loyalty to the school, by rewarding those fathers who supported the school by assisting in various ways. 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 appropriate (i.e. 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. In many cases therefore, the means would not achieve the aim; (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.

As it was impossible to re-run the lottery under revised criteria, the Director ordered that the High School immediately offer a place to the complainant; and that the High School review its Admissions Policy to ensure that it did not indirectly discriminate against pupils on any of the grounds covered by the Equal Status Act.[5]

The Circuit Court judgement

The High School appealed to the Circuit Court which involves, in effect, a rehearing of the case. Although the claim against the Department of Education and Science was not pursued, it was argued that the Circuit Court could make findings against the school on the basis of alleged breaches of statutory duty under the Education Acts. Judge Teehan correctly did not accept that argument for two reasons. First, the principle of finality in litigation required that matters determined under section 29 of the Act of 1998 could not be revisited; and, second (and rather more convincingly), he ruled that proceedings pursuant to the Equal Status Acts could only succeed where a breach of duty under that legislation had been established to the satisfaction of the court. Nonetheless, he pointed out that the court must necessarily be informed by relevant statutory provisions and, in particular, to sections 6 and 15 of the Education Act 1998.[6]

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

[5] The Director also rejected a complaint against the Department of Education and Science for failure to enforce its guidelines. This issue was not appealed to the Circuit Court.
[6] At 8.

> students in the general population have attended secondary school to at least Junior Certificate level.[7]

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.[8]

With regard to the question of the legitimacy of the aim, Judge Teehan found that the overall aim of the Board in introducing the 'parental rule' was entirely in keeping with its goal (as set out in the admissions policy) of 'supporting the family ethos within education' and the 'characteristic spirit of the school', a concept to which it must have regard in accordance with section 15(2) (b) and (d) of the Education Act 1998.[9]

He, therefore, turned to whether the rule was appropriate and necessary. Here he relied on the evidence of the school principal concerning the history of the admissions policy. This showed that, in most years, there had been more applicants than places for incoming students. At one time, priority was given to students where there were 'exceptional circumstances' which had led to almost all applicants seeking admission under this heading. Prior to that, a lottery applied to all applicants, while at one time entry was by means of an assessment test. The evidence had been that these policies were 'for obvious reasons' highly unsatisfactory. Judge Teehan found that the current policy fell somewhere between these extremes. This did not, in itself, mean that the policy was appropriate, but it was one which is reviewed annually and he was satisfied that, having regard to all the many relevant considerations of which the Board must take account, it struck the correct balance and was, therefore, appropriate.

Finally, on the issue, of necessity, the principal had given evidence concerning the links between the school and the community in Clonmel going back to the nineteenth century. There was an active past pupils' union; former students had been active in providing mentoring, bursaries for sports and financial assistance for the sons of impoverished parents; and former students were active in (what was described as) the very difficult but necessary task of bridging the shortfall in State funds. He believed that these activities

---

[7] At 15.

[8] At 16.

[9] At 17, Section 15(2) provides 'A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall … (*b*) uphold, and be accountable to the patron for so upholding, the characteristic spirit of the school as determined by the cultural, educational, moral, religious, social, linguistic and spiritual values and traditions which inform and are characteristic of the objectives and conduct of the school, … (d) publish, … , the policy of the school concerning admission to and participation in the school, including the policy of the school relating to the expulsion and suspension of students and admission to and participation by students with disabilities or who have other special educational needs, and ensure that as regards that policy principles of equality and the right of parents to send their children to a school of the parents' choice are respected and such directions as may be made from time to time by the Minister, having regard to the characteristic spirit of the school and the constitutional rights of all persons concerned, are complied with, … .

would most probably be considerably less were such a strong bond not in place. The principal spoke of 'a sense of ownership about the school where people have attended', and gave concrete examples of this in the course of his evidence.

Judge Teehan concluded that these issues were

> manifestly important considerations in the formulation of school policies. In the light of all this (and, in particular the highly important issue of funding) I find -- and not without hesitation -- that the inclusion of the 'parental rule' was a necessary step in creating an admissions policy which is proportionate and balanced.[10]

Therefore, he rejected the discrimination claim. He did, however, suggest that 'the Oireachtas should look (or look again) at the issue of providing a mandatory requirement for positive discrimination in schools' admissions policies.'[11]

Discussion

Although there has been some criticism of the Circuit Court decision, in fact both the Director and Circuit Court are to be commended for their analysis of this area of equality law (an area which has not always been blessed with judicial clarity). Both correctly identified the legal principles and relevant facts, both accepted that the rule did have a disproportionate impact on Traveller children; and differed only as to whether it could be objectively justified. On this point there is an absence of Irish judicial authority as to the correct approach.

The key issue is whether the admission rules were appropriate and necessary. With respect to the Director's approach, it is arguable that the parental rule is clearly appropriate, i.e. providing priority access to children of former parents is one way of implementing the legitimate policy of attempting to foster parental involvement. The fact that some parents may benefit from this rule (in respect of their children) without actively participating in school life does not make the policy inappropriate and, ultimately, the school is best placed to assess whether the policy is achieving its objectives. But the key question is whether the rule is necessary. Now 'necessary' here does not mean absolutely essential. Rather it directs the court (or tribunal) to examine whether there are other ways in which the objective could be achieved which would have a less negative impact on the group concerned.

The key issue is how stringently the concept of 'necessary' should be applied and, as noted, there is no Irish case law directly on this issue to date. The concept of objective justification is, of course, take from European law. However, again the extent to which it is rigorously applied depends on both the factual and legal issues involved.[12] In the case of *D.H. v Czech*

[10] At 19.

[11] At 20.

[12] Although Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin includes access to education, there does not appear to have been any relevant case law to date.

Republic, the Court of Human Rights considered a case of indirect discrimination concerning the assignment of Roma children to special schools.[13] In that case the Court stated that

> Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.[14]

Without entering into questions of ethnicity, one might expect that a similar approach would be taken to discrimination on the Traveller community grounds under the Equal Status Acts. However, the facts involved in cases such as *D.H.* are rather far from the circumstances involved in the Clonmel case. As noted above, it appeared that Traveller children had previously been successful in their applications to the school and that John Stokes was the first unsuccessful application in recent years. In addition, the parental rule was not an absolute bar and made a small (though not insignificant) difference to his chances of being admitted.[15] On balance, and pending clarification by the High Court of the approach to be adopted, it is arguable that Judge Teehan was correct to hold that the inclusion of the parental rule was justified in the instant case. Of course, this is not to say that schools could not adopt a different approach or indeed take positive action to include disadvantaged groups such as Travellers under section 14 of the Act. Indeed, there is much to be said for Judge Teehan's suggestion that the Oireachtas should look again at the law in this area.

Access to Travellers to education is clearly of critical importance. However, the parental rule involved in this case makes a rather marginal difference in terms of such access. Indeed more children appear to have been admitted under the sibling rule. For reasons which were not explained no appeal was lodged by Mr. Stokes in relation to the finding that the sibling rule was not discriminatory. He clearly was disadvantaged by the operation of the rule but this was, in part, because he was the oldest child. However, the figures quoted for Traveller participation and the fact that there are only 5 Traveller children in the High School would strongly suggest that the rule does have a disproportionate impact on Travellers

---

[13] *D.H. and Others v. the Czech Republic*, 57325/00, 47 EHRR 3 (2008). See also *Sampans and Others v. Greece,* 32526/05, 5 June 2008 and *Oršuš v Croatia*, 15766/03, 16 March 2010.

[14] Ibid at 196. In *E v The Governing Body of JFS* [2008] EWHC 1535 (Admin) (a case with rather unusual facts), Munby J accepted that attempts to justify practices which are potentially racially discriminatory must be assessed strictly, the measure in question must be shown to correspond to a 'real need' and the means adopted must be 'appropriate' and 'necessary' to achieving that objective. There must be a 'real match' between the end and the means ((at 183-4). However, he found that the rule in question was objectively justified. This decision was overturned on appeal (ultimately) to the House of Lords which held, by a narrow majority, that the case involved direct discrimination which could not be justified *E, R (on the application of) v Governing Body of JFS* [2009] UKSC 15. However the unusual facts of the case make it of limited relevance. See also *Mandla (Sewa Singh) v Dowell Lee* [1982] UKHL 7; and *SG v Head Teacher & Governors St Gregory's Catholic Science School* [2011] EWHC 1452 (Admin) although the facts of these cases – which concern children excluded from school because of wearing a turban and a hair style relating to ethnicity respectively – are again far from the facts here.

[15] Judge Teehan questioned whether the difference between a 70% chance of getting a place before the application of the parental rule and 55% afterwards might be considered *de minimis* but did not find it necessary to decide the issue (the percentages appear to have been taken from the Director's analysis). On the facts, it is submitted that the difference in clearly not minimal but, in any case, this issue might better be addressed as part of the assessment of 'particular disadvantage' under s. 3. If the applicant's chances have only been minimally affected then s/he will not have suffered such a disadvantage.

(notwithstanding their larger families). However, it would appear that the rule could be objectively justified as there are additional arguments in favour of such an approach including the advantages to parents in having all their children (of a given gender) in one school and the support which may be provided amongst siblings attending a school. Such a rule appears to be common in other jurisdictions and does not appear to have attracted judicial notice.[16] More broadly 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.

[16] See, for example, *Parents Involved in Community Schools v Seattle School District No. 1* 551 U.S. 701 (2007),