Travellers, equality and school admission in the High Court: Stokes v Christian Brothers High School Clonmel

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This note examines the recent Irish High Court decision in Stokes v CBS High School 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 facts of the case have been set out in my earlier note on the proceedings below and will not be repeated here. The case concerned the fact that Mr. Stokes, a member of the Traveller community, was refused access to the school which was oversubscribed. The admission criteria included a rule whereby priority was given to children whose parents had attended the school and it was argued that this was indirectly discriminatory against Travellers given their very low participation in education in past decades. The Equality Tribunal and Circuit Court had correctly analysed the issues concluding that there was disproportionate impact and differing only as to whether this was objectively justified (the Court holding that it was). McCarthy J in the High Court (on further appeal) adopted a different approach.

The High Court ruling

It was accepted by the parties that any discrimination was indirect. McCarthy J set out the concept of indirect discrimination in the Equal Status Act, 2000:

[W]here an apparently neutral provision puts a person referred to in any paragraph of section 3(2) [which includes membership of the Traveller community] 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.

McCarthy J, however, 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”’. 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”.’

1 3 February 2012. Not yet on the Court’s website and no neutral citation has been allocated.
3 The High Court also considered an argument that the application to the Equality Tribunal was out of time (an argument apparently not made before the Tribunal and rejected by the Circuit Court). McCarthy J took the view that the application would have been out of time (at paras 4-13) but did not clarify the implications of this finding for the case before him as he went on to rule on the substantive issue of discrimination.
4 S. 3(1)(c) as substituted by Equality Act, 2004, s. 48.
5 At para 22.
6 At para 25.
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.\(^7\)

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.\(^8\)

Discussion

McCarthy J’s analysis is clearly incorrect. He ignored the analyses of the Director of the Equality Tribunal and Circuit Court judge, both of whom had found disproportionate impact, and his own finding that Travellers had not participated to any real degree in secondary education.\(^9\) In order to do so, he parsed the definition of indirect discrimination set out in the Equal Status Act as though it was purely national legislation. Now 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. 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.\(^10\) 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.\(^11\)

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 the case

\(^7\) At para 25.
\(^8\) One might have little doubt that, had the issue been considered, McCarthy J would have found that there was objective justification: see, for example, paras 18-19.
\(^9\) At para 22.
\(^11\) Ibid, at para 20. Insofar as the working language of the Court is French, if a detailed parsing of the language was appropriate, one might wish to have regard to the original French version. More recently, the term ‘particular disadvantage’ is translated directly from (or as) ‘un désavantage particulier’. However, in its earlier formulation, the section quoted in the main text is a translation of ‘à moins qu’elle ne soit objectivement justifiée et proportionnée à l’objectif poursuivi, une disposition de droit national doit être considérée comme indirectement discriminatoire dès lors qu’elle est susceptible, par sa nature même, d’affecter davantage les travailleurs migrants que les travailleurs nationaux et qu’elle risque, par conséquent, de défavoriser plus particulièrement les premiers.’
law to date, the use of the qualifier ‘particular’ does not appear to have attracted much judicial attention. Insofar as it adds anything to ‘disadvantage’, it may be that, as in the O’Flynn case, the rule in question also disadvantaged national workers but more particularly worked to the disadvantage of migrant workers. 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.

It is not very clear what the implications of McCarthy J’s approach would be. It might suggest a revival of the notion that discrimination must be intentional, e.g. that a rule would only be indirectly discriminatory if it was intended particularly to affect Travellers.\textsuperscript{12} Of course, the simple answer is that McCarthy J is entirely incorrect in his interpretation and that his approach should not be followed. However, it is perhaps, less readily open to, for example, the Equality Tribunal to dismiss a High Court ruling simply because it is clearly incorrect. Nonetheless, at least in interpreting EU law, the Tribunal is \textit{obliged} to interpret the law correctly. In the recent \textit{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 inconsistent with European Union law.\textsuperscript{13} As will be noted, this answer refers to a situation where the national court has made a \textit{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.\textsuperscript{14}

It is, of course, deeply regrettable that the High Court has produced by far the worst judgement (in legal terms) of the three courts and tribunals to have considered this issue: a decision which displays a total lack of any understanding of EU or equality law.\textsuperscript{15}

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\textsuperscript{12} Although an unlikely position (and one clearly not in line with Irish or EU case law), this is the position in USA constitutional law. See \textit{Washington v. Davis}, 426 U.S. 229 (1976).
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\textsuperscript{13} Case C-173/09, \textit{Elchinov} [2010] ECR I-000.
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\textsuperscript{14} At para 31.
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\textsuperscript{15} McCarthy J even seemed to have some difficulty with the ‘stark’ fact that the Equal Status Act mean that Travellers potentially had a remedy in relation to the operation of the admissions rules whereas other persons did not (at para 22).
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