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A case of premature litigation: surrogacy, equal protection and social welfare benefits

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The issue of surrogacy in Irish law has received considerable (if somewhat belated) attention following the decision of the High Court to recognise a surrogate mother as the child’s mother for the purposes of birth certification. The Equality Tribunal has also referred to the European Court of Justice a complaint in which it has been argued that the failure to provide leave to a surrogate mother was in breach of EU and international law. A claim has also been brought under the Equal Status Acts (ESA) arguing that the failure of the Department of Social Protection (DSP) to provide a payment during surrogacy leave – equivalent to that provided during maternity and/or adoption leave – is in breach of the Acts. This note discusses this particular claim which has been rejected by both the Equality Tribunal and, on appeal, the Circuit Court. It is understood that the case has been further appealed to the High Court and may be heard during 2013.

Facts

The complainant had a diagnosis of cervical cancer and had to undergo a hysterectomy. As a result of this she was unable to support a pregnancy but was otherwise fertile. She and her husband chose to avail of a surrogacy service in Massachusetts, a jurisdiction which provides that the biological parents are entitled to register themselves as the parents of the child. She became the biological mother of her daughter who was born to a surrogate in Massachusetts. The birth certificate named the biological parents, that is, the complainant and her husband, as the mother and father. The claimant did not qualify for maternity or adoptive leave under current legislation. However, her employer provided unpaid special leave equivalent to that available for adoptive leave. The complainant sought payment from the Department of Social Protection but was informed that she did not qualify for either maternity benefit or adoptive benefit within the current legislative framework. She then brought this case before the Equality Tribunal.

1 I would like to thank Gerry Whyte, TCD for very helpful comments on an earlier draft. Views expressed and any remaining errors are the sole responsibility of the author.

2 M.R v An tArd Chlaraitheoir [2013] IEHC 91.

3 Case C-363/12, Z v A Government Department and the Board of Management of a Community School. The Equality Tribunal referred questions as to whether a refusal of paid surrogacy leave was in breach of various aspects of EU and international law as amounting to either gender or disability discrimination. A similar UK case has also been referred to the Court of Justice and has recently been heard by the grand chamber of the Court (Case C-167/12, C.D. v S.T.).


5 The legality of this broader issue is under consideration in the Court of Justice referral discussed above.

Arguments

The complainant argued that she has been unlawfully treated by reason of her gender and/or family status and/or disability contrary to section 5(1) of the ESA as the respondent refused to grant her payment for leave similar to that which is available to recipients of maternity benefit or adoptive benefit in respect of the surrogate birth of her biological child. In addition she argued that the respondent had failed to provide her with reasonable accommodation in accordance with section 4(1) of the ESA.

Section 5(1) provides that

A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.

Discrimination occurs

(a) 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 [discriminatory grounds] which—
   (i) exists,
   (ii) existed but no longer exists,
   (iii) may exist in the future, or
   (iv) is imputed to the person concerned,
(b) [not relevant in this case]
or
(c) where an apparently neutral provision puts a person ... 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.  

In addition, section 4(1) provides

For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.

The complainant’s main argument was that she had been discriminated against on grounds of disability. Indeed the equality officer accepted that she had a disability for the purposes of the ESA, as did the Circuit Court. She argued that due to her disability she was unable to become pregnant. Nor could she produce evidence of adoption (as required for adoptive

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7 Unfortunately both the equality officer’s decision and the Court judgement are not models of clarity and it is not always clear what arguments were advanced by the parties.

8 S. 3(1) as amended by s. 48(a), Equality Act 2004. The discriminatory grounds include gender, disability and family status.

9 DEC-S2011-053, para 5.4; R.G. v DSP at p. 10.
benefit), since she did not need to adopt the child. However, she was the biological and genetic mother of the child and similarly with natural and adoptive mothers she was the person primarily responsible for the care and nurturing of the child during the post-natal period. Her employer had granted her leave and she would have satisfied the social insurance contribution requirements for benefit. She argued that she was being treated less favourably than mothers in a comparable position who were entitled to leave under the Maternity Protection Acts and the Adoptive Leave Acts.

In the alternative, it was argued that the complainant has been discriminated against on the ground of gender. The protection of gender-related discrimination, it was argued, extends beyond mere comparisons between men and women. Discrimination in such circumstances may relate to the very definition of the characterisation itself and may occur where a person is subjected to less favourable treatment on the basis of a condition or an illness which applies to one gender and not another. In the circumstances of this case, the complainant argued that she had been denied a service provided to other mothers for the sole reason that she has had to use a surrogate mother to carry and give birth to her child.

Finally it was argued that the respondent discriminated against the complainant on the ground of family status. The complainant was, she argued, being treated less favourably than other persons with a different family status, in particular those who are pregnant.

The issues

Section 14

The first (and arguably last) point in relation to this case is that the outcome was foreclosed by s. 14(1) of the ESA. This provides that

Nothing in this Act shall be construed as prohibiting (a) the taking of any action that is required by or under (i) any enactment ... .

In this case, the Social Welfare Acts provide for maternity benefit and adoptive benefit. They do not make any such provision for leave in other circumstances, including where a child is to be brought up after a surrogacy arrangement. Therefore, the Department of Social Protection was required to refuse such payment by the provisions of the Acts. No argument as to why s. 14 did not bar the claim is apparent from the decision of the equality officer or the Circuit Court judgement (which includes the grounds of appeal) and it is difficult to conceive of any such argument.

In this context it is rather surprising that both the tribunal and court did not simply (or clearly) dismiss the claim on these grounds. Indeed, one may assume that this is what the equality officer had in mind in saying that

... almost all legislation addressed to the regulation of society resorts to some form of classification and such can be used as a classification of inclusion or exclusion for various legislative purposes. There is nothing, in accordance with section 14(1) of these Acts that entitles this Tribunal to find such classification as invidious, unfair or discriminatory. In deciding, as a matter of policy, to establish a special scheme for Maternity and Adoptive Leave, the Oireachtas necessarily had to define the scope...
and limits of its application. I am satisfied that the definitions currently contained in the statutes do not recognise the situation that the complainant finds herself in and in such circumstances the respondent had no option but to turn down her application.  

Judge Lindsay may also have had this in mind when she held that the Minister for Social Protection was confined by the terms of the Act and any benefit given to the applicant would be ultra vires.  

While commenting on the ‘lack of clarity’ on the reasoning of the Circuit Court, David Fennelly speculates that the Court may have sought to base its ruling on s. 14 (although acknowledging that this is not expressed in the judgement). However, there is no doubt that the claim should have been rejected on the basis that it was barred by the clear wording of s. 14.

**Other issues considered**

A number of other issues were considered by the equality officer.

**Scope of ‘services’** – It appears that the DSP argued that statutory schemes, such as maternity and adoptive benefit, did not fall within the definition of ‘service’ for the purposes of the ESA. Section 2 defines ‘service’ as ‘a service or facility of any nature which is available to the public generally or a section of the public’ and goes on to list a number of specific services including facilities for banking, insurance, grants, loans, credit or financing. Equality officers have, to date, consistently understood it to include state benefits and these decision were followed by the equality officer in this case. The equality officer stated that

While it was argued that that the language of the Acts, in section 2 defining service, does not specifically mention statutory entitlements, I find that ‘banking, insurance, grants, loans, credit or financing’ is not an exhaustive list and, by applying a purposive approach appropriate for a remedial statute such as the Equal Status Acts, I find that such definition is not exhaustive and is intended to be read as ‘including’.  

In Donovan v. Donnellan, the equality officer commented that

While State services are not specifically mentioned as being covered, they are not specifically excluded either and I believe it is clear that certain services provided by

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10 Para 5.3.

11 At p. 11. Presumably the reference is to the Social Welfare Act although grammatically the Judge refers to the Equal Status Act.

12 Op cit at p. 92.

13 At para 5.2.
the State are available to the public and are covered by the Act, e.g., social welfare services, health services.\textsuperscript{14}

He quoted from the Dáil Debates of 15 December 1999 in which the Minister for Justice, Equality and Law Reform distinguished between controlling duties exercised by the State and services provided by the State and accepted that the service aspect of policing, immigration, defence and prisons would come within the scope of the 2000 Act. Donovan was subsequently cited with approval in \textit{Two Complainants v. Department of Education and Science}, in which the equality officer also expressed the view that a maintenance grant payable by the Department of Education was a 'facility' for the purposes of the ESA. He said:

While the term ‘facility’ is not specifically defined in the ESA 2000 or in the UK discrimination acts, I note that \textit{Butterworths on Discrimination Law} suggests the following ‘a facility is usually a manner, method or opportunity for the easy or easier performance of anything. It might enable a member of the public to have easier access to a service; a cash machine facilitates the withdrawal of money from a bank. It may present a method of obtaining goods; a collection point in a department store facilitates the purchase of heavy or bulky commodities. The term should cover most instances where a person is not actually providing goods or a service himself, but is providing a means to obtain access to those goods or that service.’ On the basis of the above, I have formed the opinion that the provision of a maintenance grant is a ‘facility’ covered by the provisions of the ESA. I also note that the Department of Education and Science has not disputed that the grant comes within the scope of the Act.\textsuperscript{15}

Several subsequent decisions by equality officers ruled that administrative schemes fall within the scope of the ESA.\textsuperscript{16} A similar approach has been adopted in a number of Canadian jurisdictions which have also ruled that social welfare type provisions are services for the purposes of their analogous legislation.\textsuperscript{17} The equality officer’s ruling was not appealed by the State in this case.

\textit{Existence of the service} – However, while accepting that statutory benefits fell in principle within the definition of ‘services’, the equality officer went on to say that

\textsuperscript{14} DEC S2000-011 at para.5.1.

\textsuperscript{15} DEC S2003-042/043 at para.7.2. See also DEC S2004-187 in which Donovan is cited with approval in obiter comments by the Equality Officer, DEC S2005-037 where an Equality Officer drew a distinction between the controlling duties of the Gardaí in relation to the investigation and prosecution of crime, on the one hand, and the provision of a service to the public in the form of dealing with enquiries, signing passport applications, etc. on the other, holding that the latter fell within the ESA; and DEC S2006-030 in which a claimant was allowed to bring a claim under the ESA against the Health Service Executive, though the claim failed on its facts.

\textsuperscript{16} McCall v ADM, DEC-S2007-058 and Hoey v ADM, DEC-S2008-010 both concerning the taxi hardship payments scheme. See also DEC-S2009-011 and DEC-S2009-012 concerning mobility allowance.

I do accept that the language used in "available to the public or a section of the public" is clear using every day language and therefore, in the context of statutory entitlements, applies to actual schemes that are in place. It is clear that the service that the complainant is seeking - maternity leave for a mother who has not carried her own child or adoptive leave for a person who has not adopted her child - does not exist in the statutory scheme and therefore this Tribunal has to find that the complainant has not been refused such a service within the meaning of these Acts.18

At one level the equality officer is clearly correct: a ‘surrogacy’ leave and/or benefit does not exist in Irish law. However, this is a rather narrow basis on which to dismiss a claim. In many cases, the complainant will not be receiving the benefit sought as no statutory benefit will exist to cover her precise circumstances. But to take such an approach in all cases would greatly limit the impact of the ESA. Even if we accept that the equality officer had in mind the rather specific facts of this case (as she clearly did), it is rather difficult to decide in principle, when the service sought does or does not exist. Clearly maternity and adoptive leave and benefit do exist and the complainant was arguing that she had been treated less favourably in relation to access to such a benefit on discriminatory grounds. Arguably, issues in relation to the relevance of maternity and adoptive leave and benefit to situations of surrogacy would better have been addressed in the consideration of whether she was ‘comparably situated’ within the meaning of s. 3 of the ESA. This issue is discussed below.

‘Reasonable accommodation’ - In relation to the alleged disability discrimination and the obligation to provide reasonable accommodation, the equality officer accepted that the complainant was protected by the disability ground as the treatment of her medical condition has resulted in 'the absence of a part of a person’s body' within section 2(1)(a) of the ESA. She explained that

Reasonable accommodation requirement arises in circumstances where a person, because of their disability, finds it impossible or unduly difficult to avail of a service. In the circumstances of this case, it was argued that the failure to provide the service of maternity benefit, made it unduly difficult or impossible for the complainant to avail of the entitlement. It was argued that the respondent could have simply accepted an alternative proof of the fact that the complainant was the child's mother and primary carer during the post-birth period. I find that the respondent cannot offer such special treatment as for it to do so would mean that it would have been acting ultra vires of the powers conferred to it by the statute.19

Judge Lindsay, in what appears to be a reference to this issue, stated that the Minister for Social Protection
doess have a discretion to make a special provision and many interesting cases were open to me but to exercise this discretion would be beyond the defined scope of the Act.20

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18 Para 5.2. In fact the complainant was seeking a benefit during her leave rather than leave itself but this does not affect the point being made. This ruling was appealed by the complainant but not clearly addressed in the judgement of the Circuit Court.

19 Para 5.4.

20 P. 11.
At first sight, this sentence appears to be contradictory. However, it appears that Judge Lindsay means to say that the Equal Status Act creates a discretion for the Minister to make a ‘special accommodation’ (in fact, it creates a duty to make reasonable accommodation) but that the Minister does not have the power to do so (in the manner sought by the claimant) under the Social Welfare Acts.

It would appear that the reasonable accommodation claim might have been dismissed on the basis of s. 14. The Department was obliged to refuse a claim for benefits from someone who has no legal entitlement thereto (under the Social Welfare Acts) and s. 14 of the ESA means that the requirement of reasonable accommodation (set out in s. 4 of the ESA) does not prohibit the taking of such an action. However, it might be argued that while s. 14 prevents a failure to provide reasonable accommodation from being found to be unlawful, it does not prevent the Minister from providing reasonable accommodation. But here the equality officer and Judge Lindsay are clearly correct to hold that for the Minister to pay a benefit to a person with no statutory entitlement thereto would be ultra vires. Indeed it would be an entirely unsustainable argument to suggest that the Minister had some kind of general power to make payments to ‘deserving’ persons (contrary to statute): an argument which would not only ignore basic principles of administrative law but show a complete lack of understanding of the constitutional separation of powers.

A hypothetical scenario

Let us suppose that s. 14 of the ESA did not exist. How should this issue have been approached and what would the outcome of this case have been? Less hypothetically, a challenge to the absence of surrogacy leave and benefit could also be brought under the European Convention on Human Rights (ECHR) and many of the conceptual issues would be the same. Article 14 of the ECHR (prohibition of discrimination) is applicable to social security as a property right protected by Protocol No.1, and both gender and disability are prohibited grounds of discrimination under art. 14.

As we have seen, s. 5 of the ESA provides that a government agency shall not discriminate in providing services to the public generally or a section of the public. Although the Irish courts have yet to consider the issue of whether state benefits are a ‘service’ for the purposes of the ESA, the approach adopted by the Equality Tribunal (and courts in other jurisdictions) appears correct.

The complainant’s argument was that, in providing the ‘service’ of maternity and adoptive benefit, the Department of Social Protection was discriminating against her. S. 3(1)(a) of the ESA provides that discrimination exists where a person is (a) treated less favourably than another person is, has been or would be treated (b) in a comparable situation (c) on any of the grounds specified. This is what is often referred to as ‘direct’ discrimination. Section 3(1)(c) also provides that discrimination exists where an apparently neutral provision puts a person at a particular disadvantage compared with other persons on a discriminatory ground, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This is often referred to as ‘indirect’ discrimination.

One may accept, as the equality officer appears to have done, that the complainant was treated ‘less favourably’ than persons who received maternity or adoptive benefit. After all
they got a benefit while she did not. Whether such persons are in a comparable situation, however, appears to raise more difficult issues. In the case of maternity benefit, at least one of the objectives of the payment is to protect the health and safety of the mother and child during pregnancy. Thus it is one of the conditions of the benefit that a mother not work during a period before childbirth. Therefore, it is arguable that a mother of a child born though surrogacy is not (at least in this respect) in a comparable situation to a pregnant mother. However, it is more difficult to see how such a mother is not comparable to an adoptive mother (at least in terms of the experience of parenthood).\textsuperscript{21} It might be argued that such a mother was not in a comparable position given the significant legal differences between the regulation of surrogacy and adoption in Ireland but arguably this is an issue which relates to justification rather than comparability.\textsuperscript{22}

The question as to whether discrimination (if any) in this case was direct or indirect does not appear to have been considered in detail. However, a failure to provide a surrogacy benefit does not, on its face, discriminate against persons with a disability. Disability is obviously one reason – as in this case – why a person would opt for a surrogate arrangement but it difficult to see how the absence of a surrogacy benefit could be seen as direct discrimination on grounds of disability.

The arguments in relation to the denial of surrogacy leave as gender discrimination will be clarified by the cases currently before the Court of Justice.\textsuperscript{23} Of course both men and women can be surrogate parents but arguably only women will rely on surrogacy arrangements due to an inability to become pregnant\textsuperscript{24} and the Court of Justice has, to a certain extent, recognised discrimination on grounds of pregnancy as gender discrimination. However, the Court has tended to confine protection rather narrowly to circumstances directly involving pregnancy\textsuperscript{25} and has been slow to extend protection to broader issues.\textsuperscript{26} In \textit{Mayr} the Court did rule that EU gender discrimination law precludes the dismissal of a woman worker who was at an advanced stage of in vitro fertilisation treatment. However, this is a long way from finding that EU law requires surrogacy leave on gender discrimination grounds.\textsuperscript{27}

\textsuperscript{21} It might be noted that in such a hypothetical world, it is not clear that confining a benefit to mothers would not be inconsistent with principles of gender equality. One might find it rather strange to see the Equality Authority arguing that the mother ‘is the [person] primarily responsible for the care and nurturing of the child during the post-natal period’ (at para 3.2.4 of the equality officer’s decision).

\textsuperscript{22} Though see below as to whether justification of ‘direct’ discrimination is possible under the ESA.

\textsuperscript{23} Supra fn. 2. At the time of writing the advocate general’s opinion has not yet been delivered.

\textsuperscript{24} Although indeed two gay men might also rely on a surrogacy arrangement.

\textsuperscript{25} Case C-177/88 Dekker [1990] ECR I-3941,

\textsuperscript{26} For example, the Court has ruled that EU law does not require that a woman receive full pay while on maternity leave: Case C-342/93, Gillespie [1996] ECR I-429.

\textsuperscript{27} Even if the Court was to uphold the claims before it, this does not determine the issue of a claim to surrogacy benefit as EU laws concerning employment and social security rights are substantially different.
The absence of a surrogacy benefit does differentiate directly between persons with one family status (pregnancy is included as a family status) and another. However, as argued above, a woman who becomes a mother (in the circumstances of this case) by way of a surrogacy arrangement is arguably not in a comparable position to a pregnant mother. Therefore, the absence of surrogacy benefit is likely to involve indirect discrimination (under s. 3(1)(c)) rather than direct discrimination. Even if – contrary to the view expressed here – the absence of surrogacy benefit was considered as possible direct discrimination, it is arguable that even direct discrimination may, in at least some circumstances, be justified under the ESA.

Given the limited case law to date, it is somewhat difficult to predict how the Irish courts may interpret the provisions of the Equal Status Acts. Very different approaches are taken in relation to other equality provisions. In the case of EU gender equality directives (such as Directive 79/7 on equal treatment in social security), direct discrimination on grounds of gender is generally not allowed. In the case of possible indirect discrimination, it is necessary to show that a particular provision is objectively justified by factors unrelated to any discrimination on grounds of sex, i.e. that the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so.

The approach adopted in relation to the European Convention on Human Rights is that article 14 (non-discrimination) does not, in itself, prohibit a member state from treating groups differently in order to correct ‘factual inequalities’ between them. Indeed in certain circumstances a failure to attempt to correct inequality through different treatment may itself give rise to a breach of article 14. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification, i.e. if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court of Human Rights allows a ‘margin of appreciation’ in assessing whether and to what extent differences in otherwise similar situations justify different treatment and the scope of this margin varies according to the circumstances, subject matter and background to the case.

Given the broad sweep of the ESA, it would not seem possible that the Irish courts will hold that every difference in treatment on any of the nine substantive grounds amounts, in itself, to actionable direct discrimination. As noted above, the ESA does give guidance in relation to the approach to be adopted to indirect discrimination. Section 3(c) of the ESA provides that discrimination occurs where an apparently neutral provision puts a person (under one of the nine substantive grounds) at a particular disadvantage compared with other persons unless the provision is objectively justified by a legitimate aim and the means of attaining

28 It is not clear whether becoming a parent by way of surrogacy could be seen as a different ‘family status’ than becoming a parent by way of adoption.

29 As noted above, it remains to be seen whether the Court of Justice finds that the absence of surrogacy leave involves direct gender discrimination.

30 See, for example, the discussion in Stec v. United Kingdom, 65731/01, 12 April 2006.
that aim are appropriate and necessary.\textsuperscript{31} This provision indicates that, in relation to cases of indirect discrimination, the ESA should be interpreted in line with the approach to ‘objective justification’ adopted by the Court of Justice. It might be considered logical that the same approach be adopted to direct discrimination, i.e. that any difference in treatment would require to be objectively justified (at least where no higher standard was mandated under another provision such as, for example, in relation to gender discrimination in matters falling within the scope of Directive 79/7).\textsuperscript{32} However, the wording of the ESA does not specifically provide for such objective justification in cases of ‘direct’ discrimination. Nonetheless, it is difficult to see that, for example, different treatment on grounds of age will in itself be considered direct discrimination and it may well be that the courts will tend to allow \textit{de facto} justification by way of their interpretation of terms such as ‘treated less favourably’, ‘in a comparable situation’ and ‘on any of the [discriminatory grounds]’.\textsuperscript{33}

Insofar as justification is allowed under the ESA, it is submitted that the difference in legal status between parents involved in surrogacy arrangements (which remain without any clear legal regulation in Ireland) and parents of adoptive children (where a detailed and highly regulated legal framework exists) would justify the absence of surrogacy benefit.\textsuperscript{34}

How could the Department of Social Protection decide whether a valid surrogacy arrangement was in force? Should the Department accept any type of surrogacy arrangement (which in itself begs the question as to how to define surrogacy) or should it consider whether some forms of surrogacy might be contrary to Irish public policy?\textsuperscript{35} While employers may be able to grant leave on a discretionary basis in cases of individual surrogacy, it is an entirely different thing for the Department of Social Protection to operate a statutory scheme of leave without any underlying framework defining the concept and limits of surrogate parenthood.

Similar issues would arise in relation to a claim under the European Court of Human Rights. The Court has, of course, recently ruled that a ban on artificial procreation techniques for \textit{in vitro} fertilisation by Austria was \textit{not} in breach of the Convention on Human Rights as Austria did not exceed the allowed margin of discretion especially in the absence of an established European consensus as to whether such techniques should be allowed.\textsuperscript{36} The Court might well dismiss any claim on the basis that a surrogate parent was not in a comparable legal

\textsuperscript{31} As amended by section 48 of the Equality Act 2004. This definition reflects the definition in Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of race or ethnic origin.

\textsuperscript{32} Art 4(2) of Directive 79/7 states that ‘The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.’

\textsuperscript{33} It must be noted that many (but not all) of the decisions of the higher courts on the ESA have not been good examples of interpretative clarity.

\textsuperscript{34} If justification of a direct difference in treatment if not possible under the ESA, then arguably one would hold that such persons are not in a comparable situation.

\textsuperscript{35} A number of European countries do not allow aspects of reproductive technology necessary to (some forms of) surrogate parenthood while in the USA a state court has ruled that some forms of surrogacy are contrary to public policy and will not be recognised: \textit{In re Baby M}, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988).

\textsuperscript{36} \textit{S.H. v Austria}, 57813/00, 3 November 2011.
position to an adoptive parent. If the Court reached the issue of justification, there can be little doubt that it would find that, at this stage in legal developments, a failure to provide benefit to surrogate parents is within the state’s margin of discretion.

**Broader issues**

The litigation also raises two broader issues. First, the availability of Circuit Court judgements. In the case of the Equal Status Act, the Circuit Court is the first court of appeal and should establish legal principles as to the interpretation of equality principles. However, there is a major problem of access to the decisions of the Circuit Court. The author of this note has considerable difficulties in obtaining a copy of the Circuit Court judgement in this case. Not only that but the recent detailed review of equality jurisprudence published by the Equality Authority shows that the authority responsible for overseeing the implementation of the equality legislation has not been able to obtain a number of recent Circuit Court judgements.\(^{37}\) This is clearly a very unsatisfactory position and one, given modern technology and the very limited number of judgements as issue, which is entirely unnecessary.

A second issue is why the Equality Authority decided to invest resources in supporting this case. As noted above, the case appears to be unstateable given s. 14(1) of the Equal Status Acts. If any argument as to why s. 14(1) did not bar the claim was advanced, it is not specified in either the decision of the equality officer or the judgement of the Circuit Court.\(^{38}\) In this context, it is unclear why the EA decided to resource legal representation (including both senior and junior counsel) to advance a claim which could not legally have a successful outcome.\(^{39}\) A recent value-for-money review of the Equality Authority (now in the process of amalgamation into the new Human Rights and Equality Commission) recommended that the Authority should adopt ‘more strategic and cost effective management’ of the cases to be represented.\(^{40}\) It is not obvious that that this recommendation has been fully implemented.

**Conclusion**

There is undoubtedly a case for legislation to address the numerous issues raised by developments in reproductive technology, including surrogacy.\(^ {41}\) In that context, one (though perhaps not the most pressing) issue is the possible development of paid leave for surrogate parents. This is a serious policy issue and one which merits informed discussion.

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\(^ {37}\) See *Selected Issues in Irish Equality Case Law 2008-2011*, 2013, at pp. 7 and 82.

\(^ {38}\) While the Circuit Court makes reference to the ‘discretion’ of the Minister/Department of Social Protection, it would clearly be ridiculous to argue that the Minister somehow has a discretion to pay an allowance to surrogate mothers which is not provided for in law.

\(^ {39}\) Thereby, of course, using the resources of both the Tribunal and the Court and also requiring the use of resources by the Department of Social Protection to defend this claim.

\(^ {40}\) *Value for Money Review of the Equality Authority*, DJELR, 2009.

and in which organisations like the Equality Authority might play a useful role. However, litigation – at least on the specific issue involved in this case – is premature. First the claim is clearly barred by s. 14 of the Equal Status Act. Even if it was not, and even if a court was satisfied that a surrogate mother was comparable to a person receiving adoptive benefit and was treated less favourably, it seems unlikely in the extreme that any court would hold that such treatment amounted to unlawful discrimination in a context where adoption is highly regulated and controlled and surrogacy (in Ireland) has no legal regulation whatsoever. As noted above, it would seem difficult if not impossible for the Department of Social Protection to operate a scheme of surrogacy benefit without any basis to decide whether surrogacy arrangements would be recognised in Irish law (or might be found to conflict with principles of public policy).