THE HIGH COURT

[2011 No. 15 CAT]

BETWEEN

MARY STOKES (ON BEHALF OF HER SON JOHN STOKES)

APPELLANTS

AND

CHRISTIAN BROTHERS HIGH SCHOOL CLONMEL TIPPERARY

RESPONDENT

Judgment of Mr. Justice McCarthy delivered the 3rd day of February 2012

1. This is an appeal from the Circuit Court on behalf of John Stokes against an order of his Honour Judge Teehan of the 26th July 2011. The claim made on his behalf is one for alleged discrimination by the school in its refusal of admission to him, misconduct alleged to be of the type contemplated by s. 3 of the Equal Status Act 2000, as amended by the Equal Status Act 2004 and the Civil Law (Miscellaneous Provisions) Act 2008, (hereinafter referred to as "the Act") and, applicable to the school by virtue of s. 7 thereof. Where discrimination is alleged under the Act a party may seek relief from the Director of Equality Investigations established under it and from any decision by him, as here, an appeal lies to the Circuit Court (by way of re-hearing) and to this Court, but only in respect of points of law. All agree that if there is discriminating conduct it is indirect only.

2. The sequence of events commenced in November 2009 when an application was made on John Stokes' behalf for admission to the school. The school's Admission Policy

dated November 2009 was applied, of course, not just to him but to all applicants. This was in respect of admission in 2010. As has almost invariably been the case in recent years, the school was oversubscribed. Fifty-seven places were allocated on the ground that they were siblings of present or past pupils and of the remaining eighty-three, thirty-six were allocated on the basis of what has been called its "Parental Rule" leaving a further forty-seven places to be filled by lottery. Had the parental policy not been applied, 84 applicants, including the respondent, would, it was submitted, have been placed in the lottery since he was not the son of a past pupil; on this basis it is suggested that the random chance of the applicant receiving a place in the school was reduced from 70% to 55%. The Parental Rule is one which gives automatic entry to the sons of past pupils and it is that Parental Rule which is said to render the admissions policy discriminating within the meaning of the Act: it is, of course, only one element of the policy and the legitimacy of the other elements are not in doubt. The policy can only be viewed as a whole for the purpose of determining the lawfulness or otherwise of the impugned elements. The number of boys admitted in the year in question as sons of past pupils thus amount to approximately one quarter. It is with the school's policy as applied to John Stokes with which we are concerned – not some notional school with an admissions policy with a similar rule but different numbers of boys admitted solely under that head. I do not find the reference to a supposed reduction in the chances of admission by lottery of particular assistance: we simply do not know what the policy would be if the Parental Rule were abolished.

3. The applicant was informed on a date unspecified in January 2010 that he had been refused a place. The policy provides for an appeal against a refusal in accordance

with an independent structure established by the school. That internal appeal was heard on the 8th February 2010 and the applicant was informed by letter of the 12th February thereof that the appeal was unsuccessful. There is in existence under s. 29 of the Education Act 1998, provision for appeals from refusals of admission to the Secretary General of the Department of Education and Science; a process of informal "facilitation" is contemplated by that provision but this was unsuccessful (on the 31st March 2010) and, ultimately, the appeal to him was refused, the applicant being informed of that by letter dated the 7th May 2010.

4. A preliminary issue has arisen as to whether or not the initial application to the Equality Tribunal was made within the times prescribed by the Act. This was raised in the Circuit Court for the first time and the learned Circuit Court Judge found against the school. The present appeal purports to also raise (by way of cross-appeal) the issue of whether or not that decision was correct in law: there is no dispute about the fact that notice of the claim was not given until at least the 6th July 2009.

5. Counsel for the school has frankly stated that there is no question of prejudice by what it alleges was a failure to fulfil the time limits under the Act. These limits are of some complexity and I will attempt to summarize them shortly. A party seeking redress (as it is called in the Act) against conduct allegedly prohibited under it does so under Part III (titled "Enforcement") of the Act. Before seeking redress, the complainant must notify the respondent wrongdoer within two months of the last incident of prohibited conduct of, *inter alia,* the nature of the allegation and of any intention to seek relief if not satisfied by the respondent's response. The date of notification is the date on which it is sent. These time limits are prescribed by s. 21(1) of the Act and pursuant to its

provisions they may also be enlarged (as I shall describe it), for the sake of brevity (though the forms of words used in the Act refer to directions providing that the time limits shall not apply or that longer limits be substituted for them). The Director may, effectively, enlarge the time under s. 21(3)(a)(i) and (ii) and (b)(i) and (ii) of the Act.

6. The school's position is that time began to run from the date on which the applicant was informed that the internal appeal was unsuccessful (i.e. the appeal against a refusal of a place communicated by undated letter in January 2010). The applicant submits the date on which the prohibited conduct occurred, or if more than one incident is to be regarded as having occurred, the last occurrence, was the date of the unsuccessful appeal to the Department, notified by letter of the 7th May 2010. The Human Rights Commission has submitted that the prohibited conduct is continuing and, in effect, accordingly, that time has not yet begun to run. I reject the two latter propositions.

7. It seems to me that the prohibited, discriminatory conduct was the single, freestanding, event of refusal of admission to the school which is the subject of the substantive complaints. The applicant in his written complaint to the Equality Tribunal asserted that he had last experienced discrimination on the 7th May 2010: I cannot see that the decision of the Secretary General of the Department of Education and Science falls into any category of discrimination or prohibited conduct that is defined by the Act. Nor was that the occasion upon which the refusal became complete: it is only in the event that a refusal has occurred that one may invoke the appeal process in the Education Act 1998, and, by definition, there would be nothing upon which the Secretary General could adjudicate, if there was no prior refusal. Nor do I think that what one might term a continuing wrong has occurred: this follows inevitably from my conclusion that one is

dealing here with such a single free standing incident. Thus, the occurrence in question is the ultimate refusal of admission after the internal appeals process, concluded on the date of notification i.e. the 12th February 2010. Thus, the notification was approximately five months out of time.

8. The school submitted in the Circuit Court (and also here) that the Director had no jurisdiction to adjudicate on the application because notification had not been sent within the time prescribed and this is correct as an application within time is a condition precedent to exercise of jurisdiction by the Director and he had not exercised his powers to enlarge time. Hence it was submitted that neither the Circuit Court nor this Court had or has jurisdiction.

9. In response to the latter point, Mr. O Dualacháin, in the Circuit Court and here, says that any challenge to the jurisdiction of the Director was one which ought to have been taken by judicial review, that there was full participation in the process before the Director and the party who does not move to set-aside the decision of, say, a tribunal cannot afterwards seek to challenge it on appeal. The time for judicial review, is, of course long past, apart from the fact that the appeal process was availed off. Similarly, so far as any issue of jurisdiction of the Circuit Court is concerned judicial review has not been sought so its order stands good and an appeal lies from it.

10. Its seems to me that, by definition, the Director cannot enter upon the issue of whether or not any redress should be granted unless the conditions precedent for doing so referred to in the Act have been fulfilled. Should he consider that the relevant limits have not been complied with he is then entitled to adjudicate upon the issue of whether or not the time should be extended. If he does enlarge time he may enter upon the

merits. He did not do so in as much, presumably, the issue was not raised by the parties and he did not himself advert to it.

11. An appeal lies under s. 21(7)(A)(a) of the Act against a decision of the Director on an application by a complainant for an extension of time to the Circuit Court which may affirm, quash or vary the decision and pursuant to para (d) it is provided that –

> "Unless otherwise agreed by the complainant and respondent, effect shall not be given to a decision of the Director on such an application [to extend time] until –
>
> (i) The period of 42 days mentioned in paragraph (a) has expired [being the time prescribed for appeals], or
>
> (ii) Any appeal against it has been determined,
>
> which ever first occurs."

12. When the Director makes a decision in favour of a complainant on time he proceeds to decide the matter on the merits pursuant to s. 25 of the Act. An appeal lies against a decision on the merits under s. 25 by virtue of the provisions of s. 28, the material part of which is as follows:-

> "(1) Not later than 42 days from the date of a decision of the Director under s. 25, the complainant or respondent involved in the claim may appeal against the decision to the Circuit Court by notice in writing specifying the grounds of the appeal".

13. When the Director has dealt with any time point, and unless the parties otherwise agree, he may do nothing further for 42 days or until any appeal against the extension has been determined, whichever first occurs. Thus, an automatic stay is granted to permit an appeal to the Circuit Court. Since a separate appeal provision arises pursuant to s. 28(1)

when the Director makes a decision on the merits appeals to the Circuit Court after such a decision are not appeals on all aspects but limited, in as much as questions of time are dealt with separately on a preliminary basis. One can see the sense of dealing with time issues separately in as much as the parties will not have to enter into the merits until the procedural issue of time is first addressed. The school would have succeeded before the Director on the time point. Judicial review would, *prima facie,* have been granted of the Director's decision on the basis that he had no jurisdiction *ab initio* to enter into the merits but no such application is before me.

14. In its body the policy explicitly states that its rationale is to fairly and transparently allocate the available places in accordance with the school's mission statement, the guidelines and recommendations of its Patron and the Department of Education and Skills (DES) which arise, and the selection criteria and lottery referred to in it.

15. The school's goals in dealing with admissions are described as follows:-

1. On the basis of its mission as a Roman Catholic School.
2. On the basis 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 at the school for his post primary education.
3. To make reasonable provision for accommodation for boys within its locality or demographic area, including students with disability and special education needs, in accordance with the resources provided by the DES and otherwise available to it.

One of the goals of the school is fulfilment of its mission statement and the admission policy is described as being intended to reflect that primary goal.

16. The first round of places are given to boys -

1. 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.
2. Who already have or had a brother in attendance or who attended the school or is the child of a past pupil or has close family ties with the school.
3. Who attended for primary education at one of the schools scheduled to the policy (being schools within the locality or demographic area of the school).

17. It also allocates or has allocated places under a number of exceptional heads which are not relevant here. The impugned policy was issued in November 2009. Some months prior to its publication a meeting with the parents of prospective pupils was held at which the written terms were supplemented and, in particular, they were informed that the sons of past pupils would be admitted in priority on the same basis as brothers of present or past pupils.

18. It seems to me that the ethos of the school is made up of what I might describe as a bundle of values and traditions that mark out its objectives and influence how the school is conducted. I believe that the ethos of the school is in substance the same as what is referred to as the "characteristic spirit of the school" (a term used in the Education Act 1998). I also think that the fact that the ethos or aims of a school (or of an

admission policy) may or may not be in substance the same as those which appear, for example, in a mission statement or admissions policy. It seems to me, however, that in general one should have regard to the mission statement (and, it is not, itself, being put into evidence but merely referred to in the body of the admissions policy), the admissions policy itself and such other evidence of fact as may be adduced. It seemed to me that the Human Rights Commission and, to a degree, the applicant misconceived the state of the evidence in the Circuit Court by failing to have regard to the fact that inferences of secondary fact can be drawn from it, on the balance of probability.

19. In any event, though there is no mention of the sons of past pupils in the second of the goals of the admissions policy it is plain that in the first round places are allocated, amongst others, on the basis of that policy to children of past pupils, to say nothing of the oral supplement to the policy to which I have referred. I am satisfied, accordingly, that the ethos and goals of the school extend to the provision of education services for the children of past pupils. The ethos is, however, in my view, wider than that, when one considers the evidence of Dr. Bannon in the Circuit Court. The ethos extends to the avoidance of an elitism, the advancement of inclusivity, the maintenance of traditional connections with certain feeder schools (even though outside Clonmel itself on which pupils that have historically come), and provision of facilities with special educational needs even though the school has not been designated as a disadvantaged school and has no home/school liaison officer who might deal with such difficulties or members of the travelling community. Further, it extends to the establishment and maintenance of links between the school and the community, those who attended the school and the parents of existing pupils (in circumstances where the school was built with the contributions of the

townspeople when the Christian brothers founded it at their request). It appears also from the evidence that the inclusivity extends as Dr. Bannon put it, to "welcoming people" and "making people feel wanted" and to "people of all shapes and sizes". In fact, he said that on his arrival at the school to take up his post as headmaster that inclusivity was immediately obvious. In passing one might say that having regard to the present and historical exclusion of travellers from many services and the undoubted prejudice (at least in the past) towards them amongst the settled community practical factors such as inclusivity may, indeed, take on almost as much significance in terms of avoidance of particular disadvantage as any written policy.

20. The concept of indirect discrimination is addressed in s. 3 of the Act. Of particular relevance is s. 3(1)(c) which provides that discrimination is taken to have occurred:-

> "Where an apparently neutral provision puts a person referred to in any paragraph of s. 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".

21. Section 3(2) so far as material, is to the effect that:-

> "As between any two persons the discriminatory grounds (and the descriptions of those grounds for the purpose of this Act), are (*inter alia*):-
>
> (i) that one is a member of the traveller community and the other is not ("the Traveller community ground")

If one proceeds to s. 7(2) of the Act there is a prohibition on discrimination by an educational establishment (as defined by the Act and of which the school here is one) in relation *inter alia* (at subpara. (a)) to

> "The admission or the terms or conditions of admission of a person as a student to the establishment".

Obviously the provisions of the Act are to be interpreted in accordance with the ordinary and natural meaning of the words.

22. The applicant is a traveller and hence is entitled to the benefit of these provisions. It is not in dispute that for generations, travellers have not participated to any real degree in second level education and this is especially so where male travellers are concerned. As a matter of policy it has been sought to remove any barrier against such participation (including one constituted by the terms on which a person may be admitted as a student). It is against that background of grave educational deprivation that John Stokes' father did not enjoy secondary education. John Stokes has broken that cycle. He relies, of course, on the historic disadvantage of his father or more remote ancestors in this action. Thus both the impugned element of the admissions policy and the applicant's entitlement under the Act to certain remedies on the basis of a claim of unlawful discrimination are respectively based on the disadvantages suffered or advantages enjoyed by earlier generations. Of course, as pointed out by the *amicus curiae*, travellers are amongst what it calls "protected classes" of persons under this and other legislation. On this basis travellers are given rights and remedies under the Act which many others in society do not enjoy when, for example, the educational disadvantage of others who are not the sons of past pupils might have been for social or economic reasons of the same order

practically or morally speaking. Indeed, Mr. O'Dualacháin has made the point, which is stark but true, that it does not matter for the purpose of my decision that persons other than travellers have no remedy if they were put at a particular disadvantage. This disparity of treatment is not one about the lawfulness or otherwise of which are concerned here, of course. No remedy is available to travellers of course merely because they can show their disadvantage as such but only if they can go further and say that the disadvantage is "particular". It might well have been open to the legislature to provide a remedy if travellers could show that they suffer merely a disadvantage and not one which was particular but it did not do so.

23. In the Oxford English Dictionary, 2nd Ed. various definitions are given of "particular". These include –

> "Pertaining or relating to a single definite thing or person or set of things or persons, as distinguished from others",

and

> "Of or belonging to some one thing and not another or to some and not all; of one's (its etc) own; special not general",

and also

> "Belonging only to a specified person or thing...",

and furthermore

> "Peculiar, restricted to",

and finally

> "distinguished in some way among others of the kind; more than ordinary; worth notice, marked; special".

24. The school further submits that in as much as the parental policy or the admissions policy generally is not based upon the educational achievement of the parents, per se there is no "particular" disadvantage, this is irrelevant since we are dealing with males (father and son).

25. Whether or not an admissions policy (and in particular this policy) is discriminating within the meaning of the Act is a question of fact in each case. I do not believe that the disadvantage suffered by travellers (in common with all other applicants who were not the sons of past pupils) pertains or relates to "a single definite person... or persons as distinguished from others" or "distinguished in some way among others of the kind: more than ordinary; worth notice, marked; special". The disadvantage relates to persons in addition to travellers 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.

26. If one takes as the comparison all other applicants (173) everyone who is not the son of a past pupil is at a disadvantage by virtue of the rule. There is no distinction between the extent of the disadvantage suffered by travellers and others. If one makes the comparison with those who are the sons of past pupils the disadvantage suffered is the same as all applicants who were not such sons and have no priority. If one were to further break down the total number into another class and make the comparison with persons other than those enjoying priority entry as sons, similarly, the applicant would be in the same position as all of those persons. Or if the persons chosen for comparison were only those admitted because their siblings were present or past pupils no

discrimination is alleged and if, finally, one were to chose persons of the class in the lottery (as an actual fact) there would similarly be the same disadvantage. If one were to posit the existence of a hypothetical class, namely, a class comprising of those given priority entry and those who, as a fact, were in the lottery alone, a similar conclusion would follow.

27. Obviously in as much as I have decided that the policy in question did not place the applicant at a particular disadvantage, no question of dealing with whether or not the policy is objectively justified arises. Similarly, I do not have to address any issue pertaining to the constitutional guarantee of equality in Article 40.1, the requirements of the Education Act pertaining to admission policies, other obligations and functions of schools or issues under the European Convention on Human Rights Act 2003 and the Convention itself. Had I found it necessary to determine these issues, I would have welcomed fuller argument, especially on issues other than justification. No issue of European law raised by the *amicus curiae* arises in the light of the grounds of my decision: whether or not travellers are a separate ethnic group does not fall to be determined in the present case.

28. I therefore refuse this appeal and affirm the order of the Circuit Court.

Approved
Frank McCarthy
6th February 2012