THE SUPREME COURT

IN THE MATTER OF SECTION 28 OF THE EQUAL STATUS ACT 2000-2008

Between:-

CHRISTIAN BROTHERS HIGH SCHOOL CLONMEL

Appellants/Circuit Court

- and -

MARY STOKES (ON BEHALF OF JOHN STOKES A MINOR)

Respondents/Circuit Court

-and-

THE EQUALITY AUTHORITY

Amicus Curiae

LEGAL SUBMISSIONS ON BEHALF OF THE EQUALITY AUTHORITY

A. INTRODUCTION

1. This submission is filed by the *Amicus Curiae* pursuant to the Order of this Honourable Court made on the 19th of October, 2012 which granted the *Amicus Curiae* leave to appear in this appeal.

2. As proposed in its leave application, the *Amicus Curiae* seeks in this submission to identify relevant jurisprudence and interpretative principles that may assist this Honourable Court in the proper determination of the substantive matters before coming before the Court on this appeal. The issues arising have been identified by the Appellant in their written submissions at paragraph 8 of their submissions.

3. These proceedings concern a schools admissions policy and the question of whether it discriminates against a young boy who is a member of the traveller community. Under the admissions policy at issue, children whose fathers have not attended the school are treated less favourably than children whose fathers have. Although this issue arises in the specific context of a child who is a member of the Traveller community where the level of educational attainment historically is accepted to be considerably lower than in the population as a whole thereby making it far less likely that the child can satisfy the pedigree based criterion that his father have attended the school, such a pedigree based criterion in an admissions policy raises issues of far more general concern impacting also, for example, on members of the newly established immigrant community where there may not necessarily be the same historic educational disadvantage. The *Amicus Curiae* considers that the issues which lie at the heart of these proceedings are of the first order of public importance.

It is in the education system that one is best placed to respond to historic disadvantage as a result of discrimination and an ineffective response today permits the perpetuation of discrimination and results in the loss of a valuable opportunity to break a cycle of disadvantage. As a society, this is a class of discrimination which we must be most vigilant to combat.

4. Accordingly, the *Amicus Curiae* considers that the case raises important issues in relation to the protection in law against "indirect discrimination". Indirect discrimination arises in a situation of formal "equal treatment" in circumstances where such treatment disadvantages certain protected classes and is not objectively justified within the meaning of the sub-section. The Circuit Court has given its interpretation in this case and had found that while the Appellant was placed at a "particular disadvantage", the school's admission policy could be objectively justified. This was in conflict with the finding of the Equality Tribunal which held that the provisions of the policy were not proportionate and therefore were not justified within the meaning of the Equal Status Acts. This is the first case in which section 3(1)(c) of the Act falls to be construed coming before the Superior Courts in circumstances where the primary legislation is over a decade in being. It represents an important opportunity to obtain clarity in relation to the scope and nature of the protection against indirect discrimination in Irish law.

5. The *Amicus Curiae* previously appeared in the High Court and to the extent that it may become appropriate, the amicus adopts and repeats its earlier written submissions before the High Court. The submissions before the High Court were addressed, firstly, to the proper interpretation of the prohibition on indirect discrimination contained in section 3(1)(c) of the Equal Status Act, 2000 (as amended) and, secondly, the remedies available under the Equal Status Act, 2000 (as amended).

6. Given the manner in which the decision was reached by the Learned Trial Judge in the High Court, the substantive issues of law remain largely unaddressed. Should this Honourable Court consider that the basis for the decision in the High Court was wrong in law and that it has jurisdiction to proceed to hear submissions on all matters of law raised in the High Court on this appeal, then the Amicus proposes to rely on its written submissions in the High Court.

7. It appears that before the Court proceeds to determine the important issues arising in relation to the proper application of section 3(1)(c) of the Equal Status Act, 2000 (as amended) to the facts in this case that this Court will be called upon to determine as a preliminary issue to jurisdiction (i) whether there is a right of appeal to this Court from a decision of the High Court under section 28 of the Equal Status Act, 2000 (as amended). A secondary issue in relation to time limits is canvassed in the Appellant's submissions.

8. The *Amicus Curiae* is committed to ensuring that its submissions are as brief as possible consistent with its role and duty to the Court and it endeavours not to duplicate the arguments of the parties unnecessarily or to entrench upon matters of factual dispute.

B. FACTUAL BACKGROUND

9. As appears from the pleadings and documentation filed in this case, these proceedings concern a child, namely John Stokes, who is a member of the Traveller community. The essential facts appear not to be in dispute. John Stokes made application to the Christian Brother High School [hereinafter "the High School"] to

commence in the academic year 2010/2011. It appears that in recent years the number of applicants for places in the school has exceeded the number of places available in the school and it has developed an admissions policy to assist in the allocation of places. The publication of an admissions policy is a function of the Board of Management of a school under Section 15(2)(d) of the Education Act 1998 which, inter alia, requires the "principles of equality" to be complied with. John Stokes' application fell to be considered under the terms of an admissions policy which provides:

> "The Admissions Policy of the High School (dated November 2009) sets out the following Enrolment Policy that applies when places are oversubscribed:
>
> "**First Round**
>
> The school will examine all applications received on or prior to the closing date in the first round review to determine which applicants have maximum eligibility in accordance with the school's selection criteria mentioned in this policy and the mission statement and the ethos of the school.
>
> "**Second Round**
>
> All or any remaining places not allocated in the First Round shall be allocated in accordance with the Lottery Procedure mentioned below.
>
> "Rationale
>
> The rationale of the admissions policy is to fairly and transparently allocate the available places in accordance with the mission statement, the guidelines and recommendations of the Patron and the Department of Education and Skills (DES) where arising, and the selection criteria and lottery referred to below.
>
> "The School's goals generally
>
> The primary goal of the School is to fulfill its mission statement in accordance with the law, Patron or DES guidelines and the resources currently available to it. The Admissions Policy is intended to reflect that primary goal and in this context the school aims to:
>
> - Provide a fair system of enrolment for boys
>
> - Make reasonable provision and accommodation for students, including students with a disability and special educational needs in accordance with relevant legislation, with due regard to the efficient use of resources provided by the DES.
>
> - Allow for full participation by all students, subject to resources being available and allowing for Health and Safety implications

- Transparently allocate those limited places in accordance with its Mission Statement and the Selection Criteria mentioned below.

"The School's Goals on dealing with Admissions

When dealing with Admissions where there are a limited number of places, the School seeks to fulfil the above goals in the following manner, namely to allocate the number of places available:

- firstly on the basis of its Mission as a Roman Catholic school;
- Secondly 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 attend the School for his post primary education;
- And thirdly to make reasonable provision and accommodation for boys within its own locality or demographic area, including students with disability and special educational needs, in accordance with the resources provided by the DES and otherwise available to it.

"**Selection Criteria**

First Round criteria:

In the first round the School shall firstly select from all of the applications submitted that have maximum eligibility in accordance with the following criteria:

The application is made on behalf 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 in Schedule Two, being a school within the locality or demographic area of the school;

The School may also allocate some places to take account of:

- families who have located to Clonmel through work

- the urban/rural balance on a proportional basis in the context of the allowed number of applicants

- exceptional circumstances

- students (living in the catchment area) who are diagnosed with ASD (Autistic Spectrum Disorder).

Second Round

With respect to all or any remaining places not allocated in the First Round the School shall run a Lottery to determine the order in which same shall be filled. Because the School can only provide a limited number of places for boys, in the event of one or more appeals, a corresponding number of places from the lottery cannot be confirmed pending determination of the relevant Appeal(s), starting with the last place to be filled by the lottery and proceeding accordingly."

10. John Stokes met the High School's first round criterion save that (as an eldest child) he did not have a brother who attended or is in attendance at the School and he was not the child of a past pupil viz. his father had not attended the School. The complainant, therefore, did not have maximum eligibility under the First Round criteria. His application was placed in a lottery along with those who, like him, applied in time but did not have maximum eligibility and he was not successful in the lottery. He claims that the criterion in the enrolment policy of the High School that prefers the child of a past pupil indirectly discriminates against him.

11. The High School has not challenged the evidence that within the Traveller Community there has been widespread disadvantage in accessing and staying in education and that the vast majority of children within the Traveller Community do not have a parent and particularly not a father educated to secondary school standard. The High School has sought to contend, however, that this disadvantage does not apply to John Stokes as his mother received some secondary school education, although his father did not (page 4 of High School's submissions in High Court).

12. Given that the policy in question treats boys whose fathers (as opposed to mothers) have not attended the school less favourably, it is difficult to understand the logical basis for the distinction which the High School has sought to draw in this case in arguing that John Stokes cannot show disadvantage qua member of the travelling community because his mother went to secondary school. The *Amicus Curiae* submits that the relevant consideration is surely that his father in common with the vast majority of fathers from within the Traveller Community did not go to secondary school and it is the educational pedigree of fathers which is relevant to the school's admissions policy.

13. The High School has also sought to contend that as John Stokes was treated in the same way as any other child whose father did not attend the school he is not at a "particular disadvantage" within the meaning of section 3(1)(c) of the Equal Status Act, 2000. The High School do not accept that the application of the parent rule disproportionately affected John Stokes by reason of his membership of the traveller community in circumstances where a disproportionately high number of fathers within the traveller community will not have attended secondary school and in this way the parent rule perpetuates disadvantage.

C. ISSUE FOR SUBSTANTIVE APPEAL

14. This case concerns indirect discrimination and the proper interpretation of section 3(1)(c) of the Equal Status Act, 2000 (as amended). To quote from an eminent academic commenting on this case:

> "what indirect discrimination targets is the risk of belonging to the disadvantaged class and when the question is framed in this manner, one could argue that the plaintiff's son had a 'more than ordinary' risk of coming within the affected class than the child of settled parents".[1]

15. The Amicus submits that this is the essence of the appropriate test under section 3(1)(c) in a nutshell. This, however, is not the test posited by the Learned Trial Judge on an appeal on a point of law from the Circuit Court (reversing both the Circuit Court Judge and the Director of Equality Investigations in so doing) and accordingly, the Amicus submits that he erred in law. This is the first ever High Court decision dealing with section 3(1)(c) of the Equal Status Act, 2000 (as amended) and the decision has significant ramifications in terms of the proper application of the prohibition on discrimination in Irish law.

16. The Amicus is concerned to ensure that in the wake of the decision of the High Court which it is believed is wrong in law, clarity should be obtained as to the state of Irish law in this area. The Amicus is particularly concerned that the decision should not be allowed to stand as a statement by the Superior Courts as to the proper application of section 3(1)(c) of the Equal Status Act, 2000 (as amended) recalling that the final decision in this case (be it a decision of the High Court or the Supreme Court) is binding on the Equality Tribunal (or the Circuit Court on appeal) in its day to day and routine application of the Act. The ramifications of the decision are far-reaching and dramatic. The reasoning which underpins the decision curtails in a radical fashion the scope of the protections against discrimination prescribed by the Oireachtas, in part for the purpose of implementing EC law and in part for the purpose of providing a mechanism for the vindication of rights guaranteed under Article 40.1 of the Constitution.

D. STATUTORY CONTEXT

17. For the purpose of these submissions and to avoid duplication, the *Amicus Curiae* proposes to adopt without repeating the summary provided by the Appellant in their written submission of the relevant provisions of the Equal Status Act, 2000 (as amended). We also adopt the recital contained in the Appellant's submission in relation to the change in the statutory provisions from "substantially more" to "particular disadvantage" and the reasoning for same, noting the central importance of this change to the decision of the Learned Trial Judge in the High Court in this case.

E. PROCEEDINGS

18. The decision to refuse the Appellant a place at the High School resulted firstly in an internal appeal (determined in February, 2010) and then in an appeal pursuant to section 29 of the Education Act, 1998. Following the unsuccessful appeal to the Minister under section 29 of the Education Act, 1998, a complaint was notified to the High School and then referred to the Equality Tribunal alleging discrimination on grounds of membership of the Traveller community. It is understood (although the

---

[1] Professor Gerry Whyte, "Implications for Schools of Irish Equality Legislation", delivered at a conference in Trinity College on the 24th of March, 2012.

Amicus Curiae was not a direct party) that the complaint was notified within two months of the decision on the section 29 appeal and referred to the Tribunal within six months of the decision of the High School following internal appeal. It is noted that the admissions policy continued in existence and applied in respect of applications on the waiting list, such as the Appellant's. Although it appears that the Appellant's solicitor alerted the Tribunal to a possible time issue, no issue as to time was raised by the High School before the Tribunal and the Equality Officer (in this case the Director of Equality Investigations himself) did not advert to any issue or invite submissions on same. Presumably, this was because the Equality Officer was satisfied that no time issue arose.

19. The Equality Tribunal, in a decision dated ***7th December 2010***, found that the admissions policy of the school was indirectly discriminatory in so far as it accorded ***preference to boys whose fathers had been pupils of the school*** (see Decision of Equality Tribunal at Tab ____, Book of Appeal).

20. This decision was in turn appealed to the Circuit Court by the High School. Although the Amicus was not a party to the proceedings before the Circuit Court, it appears that a time issue was raised for the first time during the course of the hearing before the Circuit Court judge (see pages 37-77 of Day 1- Transcript – Circuit Court). On ***25th July 2011*** the Circuit Court decided against the High School in relation to their preliminary objection on the time issue on the dual basis that the School had acquiesced in the original hearing not having raised this issue earlier and that the complaint was in time.

21. The Circuit Court further decided that the admissions policy of the school was indirectly discriminatory but was objectively justified and therefore not in breach of the Equal Status Acts (See Decision at Tab _, Book of Appeal). At paragraph 15 of his decision the Learned Circuit Court Judge held:

> "*The evidence from the Respondent's witnesses painted a very stark picture of members of the Travelling Community availing only in miniscule numbers of access to secondary education over the last few decades. By contrast, while there was no specific evidence in relation to this, 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 students in the general population have attended secondary school to at least Junior Certificate level. Accordingly, it can 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 Ac, 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 and Polish Community, for example, where parents of boys were most unlikely to have attended the school previously) are particularly disadvantaged by such rule".*

22. Having found that a particular disadvantage had been established, the Learned Trial Judge then found that the High School had discharged the onus upon them of establishing that the policy was objectively justified.

23. The matter then came before the High Court as an appeal against the Circuit Court decision on a point of law pursuant to section 28 of the Equal Status Act, 2000 (as amended). The appeal was heard over a number of days in ***September and October, 2011***. The *Amicus Curiae* sought leave to intervene because the proceedings raised significant issues of law in connection with the school's admission policy insofar as it favours children who can demonstrate a particular pedigree.

24. The broad legal parameters within which the issues arising before the High Court fell to be determined were uncontroversial: namely that it is for the complainant to prove, on the balance of probabilities, that the criterion in the High School's Admission Policy puts a Traveller at a particular disadvantage compared with non-Travellers. If he succeeded in this, the burden of proof would then shift to the High School to prove that the criterion was objectively justified by a legitimate aim and that the means of achieving that aim were appropriate and necessary. The High School must then prove each element of the defence namely, objective justification, legitimate aim, appropriateness and necessity. However, although there was agreement between the parties as to the broad parameters within which the issues in this case fall to be determined, there was no agreement as to the meaning of the terms ***objective justification, legitimate aim, necessary and appropriate,*** and ***particular disadvantage*** as they appear in section *3(1)(c).* The Court was also asked to address the question of general importance of the ***remedies*** which can be ordered in these circumstances under the Equal Status Acts.

F. HIGH COURT DECISION

25. In his decision in the High Court, the Learned Trial Judge focussed on the term "particular disadvantage" within the meaning of section 3(1)(c) of the 2000 Act and decided the appeal on this basis without determining the other questions which were raised. According to the Learned Trial Judge, this wording required the Claimant to show that the school's admission policy put travellers at a "particular" disadvantage. The finding in relation to "particular disadvantage" within the meaning of section 3(1)(c) is set out in paragraphs 20-26 of the judgment as follows:

> *"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.*

26. He then went on to conclude at p. 13 of his judgment:

> *"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 to 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. If one takes as the comparison all other applicants (173) everyone 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."*

27. This conclusion of the Learned Trial Judge, as set out above and at page 13 of his judgment, was contrary to the submissions of the Equality Authority before the High Court. The Learned Trial Judge focussed on the extent of the disadvantage suffered by Travellers and non-Travellers where both are unable to rely on the preferential treatment given to sons of past pupils rather than on the difference between Travellers and non-Travellers in relation to the risk of suffering that disadvantage. The Learned Trial Judge arrived at this position by reference to various definitions of "particular" as found in the Oxford English dictionary rather than on an application of the case-law in this area.

28. It is evident from the foregoing that the Judge formed the opinion that the adverse impact had to be exclusive to the protected class or peculiar or restricted to them. The Amicus considers the decision of the Learned Trial Judge to be seriously flawed and to deviate in a significant fashion from the jurisprudence of the European Court of Justice and, therefore, from the requirements of EC law which the Equal Status Act, 2000 (as amended) was intended to implement in Ireland.

29. The Learned Trial Judge further erred, it is submitted, in how he approached the comparator question focusing on comparing all the children who were placed in the lottery with each other, instead of looking at the pool of children immediately before the application of the parental rule – in other words as if there were no parental rule. If all children in this category were placed in the lottery, then John Stokes would stand a markedly higher prospect of securing a place because he would be competing for a place from a larger pool of places. By reason of the application of the parent rule he was competing for a far more restricted number of places and his chances of securing a place on a lottery (following the application of the parental rule) were therefore significantly reduced.

30. It is respectfully submitted that the decision of the Learned Trial Judge is out of line with a substantial body of case-law opened to the High Court and is made without reference to those decisions notwithstanding that the relevant authorities were opened before the High Court. It is very unsatisfactory that the decision relies not on the decided case law but on the Oxford English Dictionary in interpreting the scope of protection available under section 3(1)(c) of the Act. It is manifestly clear that from the very introduction of the concept of indirect discrimination, one was concerned with a disparity of effect ("disparate impact"), not an exclusive effect as the Learned Trial Judge appears to conclude. The interpretation adopted by the Learned Trial Judge has the effect of rendering section 3(1)(c) almost meaningless and wholly ineffective in redressing the problem of "indirect discrimination".

31. As pointed out by the Appellants in their submission to this Court, it was also implicit in the judgment of the Learned Trial Judge that the referral of the complaint was out of time but he held against the High School in this regard, on the basis that any such issue was a matter for judicial review and could not be raised in an appeal on a point of law under section 28 of the Equal Status Act, 2000 (as amended). Although a time issue is quintessentially a matter between the parties, the Amicus does not consider that any real issue as to the jurisdiction of the Tribunal arises on the time ground in this case, in part, because the allegedly discriminatory act is continuing and, in part, because the notification requirement does not go to jurisdiction and the complaint was referred within time on any construction of the facts.

32. Finally, if the interpretation posited by the Learned Trial Judge is allowed to prevail, the inevitable conclusion would seem to be that the State may be in continuing breach of its obligations under EC law.

G. EC LAW AND "PARTICULAR DISADVANTAGE"

33. The Long Title to the Equality Act, 2004 (which amends the Equal Status Act, 2000) states that the Act is made, inter alia, for the purpose of making further and better provision in relation to Equality of Treatment in the Workplace and Elsewhere, to give effect to Council Directive 2000/43/EC of the 29th of June, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [hereinafter "the Race Directive"], Council Directive 2000/78/EC of the 27th of November, 2000 establishing a general framework for Equal Treatment in Employment and occupation [hereinafter "the Framework Directive"] and Directive 2002/73 of the European Parliament and Council on the Implementation of the Principle of Equal Treatment for Men and Women as regards access to employment, vocational training and promotion and working conditions. The principle of prohibiting discrimination or requiring equality of treatment is now well established in a large body of Community law instruments based on Article 13 of the Treaty instituting the European Community.

34. Article 2 § 2 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex provides:

> "Indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex".

35. The Race Directive provides as follows in Articles 2 (Concept of discrimination):

Article 2

> "1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
>
> 2. For the purposes of paragraph 1:
>
> (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
>
> (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
>
> ..."

36. The parallels between the definition of "indirect discrimination" in section 3(1)(c) of the Equal Status Act, 2000 (as amended) and the definition in the Race Directive are striking and the definitions are identical in all material respects. Accordingly, although it is noted that the High School somewhat controversially contend that members of the Traveller Community do not come within the scope of the Race Directive,[2] the fact remains that the Legislature has provided for a level of protection

[2] Both the English Courts and the European Court of Human Rights have found membership of the Traveller Community to constitute membership of a minority ethnic group ***Mandla v. Dowell Lee*** [1983] 2 A.C. 548***, Chapman v. the United Kingdom*** Application No. 0002723895***, Hallam v.***

for travellers which at least equates or is intended to at least equate with the requirements of the Race Directive. In this regard it bears emphasis that the Act does not differenciate between the level of protection available for each protected category. Thus, the requirements of the Race Directive and the other requirements of EC law are clearly relevant in this case as an interpretative aid when one approaches the issues raised irrespective of whether members of the Traveller Community are covered by the Race Directive or not. As the Race Directive has been transposed into Irish law in a manner which protects race, ethnicity and traveller community in identical terms it must follow that Irish law protects members of the traveller community on terms at least equal to the minimum requirements of the Race Directive. Although the Amicus Curiae considers that membership of the traveller community also constitutes membership of an ethnic group, it is apparent that for present purposes it is only necessary to focus on the fact that whether they are covered by the provisions of the Race Directive or not, the State has decided to legislate for the prohibition of discrimination of members of the traveller community as if they were covered by the requirements of the Race Directive.

37. It is clear from the terms of the Race Directive that its scope is wide ranging and is directed to ensuring the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin in a manner which goes beyond access to employed and self-employed activities and covers areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services (paragraph 12 of the Preamble to the Directive). Article 3 of the Directive defines the scope of the Directive in the following terms:

> "1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
>
> (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
>
> (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
>
> (c) employment and working conditions, including dismissals and pay;
>
> (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
>
> (e) social protection, including social security and healthcare;
>
> (f) social advantages;

Cheltenham Borough Council *[2001] UKHL 15*, ***Dutton*** [1989] 2WLR 17. The ethnicity of Irish Travellers was confirmed in the Central London County Court case of ***O'Leary & Others v. Allied Domecq & Others, unreported 29 August 2000***, which relied on the criteria for an ethnic minority laid down in the *Mandla v Dowell Lee* case. In Northern Ireland the matter has been put beyond dispute by specific legislation. Article 5(2)(a) of the Race Relations (Northern Ireland) Order 1997 says: "In this Order, 'racial grounds' ... includes the grounds of belonging to the Irish Traveller community, that is to say the community of people commonly so called who are identified (both by themselves and by others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland..."

(g) education;

(h) access to and supply of goods and services which are available to the public, including housing.

2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned."

38. The Race Directive is expressed to provide for minimum level of protection which is nonetheless intended to ensure "a common high level of protection against discrimination in all Member States" (Article 28, Preamble) and it is expressly provided that a difference of treatment may be justified "in very limited circumstances...when the objective is legitimate and the requirement is proportionate" and such circumstances should be included in the information provided by the Member States to the Commission (Article 18, Preamble). The Amicus Curiae recalls in this context the now well established canons of interpretation which require that when interpreting legislation which implements EC law national courts are required to interpret such law in the light of the wording and the purpose of the Directive.

39. Turning to the jurisprudence in relation to the prohibition on indirect discrimination in the context of EC law, the submissions of the Amicus in the High Court traced the development in this jurisprudence from its earlier iterations in cases such as ***Giovanni Maria Sotgiu v. Deutsche Bundespost*** judgment of 12 February 1974 (Case 152-73, point 11), where the ECJ made it clear that *the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result* and ***Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*** judgment of 13 May 1986 (Case 170/84, point 31) where the Court found that an exclusion which affects a "far greater number of women than men" was precluded under EC law unless exclusion was based *on objectively justified factors unrelated to any discriminatory grounds to* ***Regina v. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*** (judgment of 9 February 1999, Case C-167/97, points 51, 57, 62, 65 and 77) where the Court identified the importance of statistics in establishing "disparate impact". The jurisprudence continued to develop and in its judgment of 23 October 2003 in ***Hilde Schönheit v. Stadt Frankfurt am Main*** (Case C-4/02) and ***Silvia Becker v. Land Hessen*** (Case C-5/02) where the ECJ referred to the need to establish a "more unfavourable impact". Shortly afterwards, in ***Debra Allonby v. Accrington & Rossendale College and Others, Education Lecturing Services ... and Secretary of State for Education and Employment*** (judgment of 13 January 2004, Case C-256/01), the ECJ reiterated the role of statistics.

40. It is now beyond question that the principle of equal treatment in EC law prohibits not only overt discrimination based on protected grounds but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result. A policy or criterion or practice which applies without distinction to all but is liable to have a greater effect on some who fall within a protected category gives rise to a difference in treatment which results in indirect discrimination. Notably, it is not necessary that only the protected category be adversely affected by the impugned criterion. In this case the High School lays considerable emphasis on the fact that other children without a father who attended the school were in the same position as the Traveller child and had the same chance of succeeding in the lottery for places in the school. However this is to miss the point as regards indirect discrimination. In cases such as ***Bilka Kaufhaus*** where the employer's differentiation as between full-

time and part-time workers was held to constitute indirect discrimination, once it was established that there was a statistical significance between the proportion of women in the part-time group and in the full-time group, it was irrelevant that there were some women in the full time group who enjoyed the benefit of the pension scheme and some men in the part-time group who did not. Thus it is irrelevant that some Travellers previously gained admission to the school and that some non-Travellers were excluded by reason of the outcome of the lottery at the same time as John Stokes.

41. As a child whose father who is a member of the traveller community and therefore did not attend secondary school, John Stokes is undoubtedly a person who falls within a category of person who is statistically less likely to be able to fulfil the entry criterion contained in the Admissions policy of having a father who attended the secondary school. The prohibition on indirect discrimination is not directed towards the individual circumstances of the claimant (as long as he can show that he is a member of a protected class) but rather at the general practice or rule which puts a person belonging to a protected category at a particular disadvantage. The classic example given in training sessions on indirect discrimination is of a height requirement of 6 foot which puts women at a particular disadvantage even though some women would meet this requirement and some men would fail to meet it. It is important therefore to focus at the potential and not the actual effect of such a policy in a proper application of the prohibition on indirect discrimination.

41. The definition of indirect discrimination refers specifically to a neutral provision which places a person at a disadvantage. The disadvantage is in relation to a provision which is applied at the particular school and it is not relevant that he could attend a different school in the town. Had John Stokes been in a position to satisfy the "father rule" he would have been guaranteed a place. 36 students received places under this rule. All remaining applicants, which included John Stokes, were required to compete for a reduced pool of places. Clearly, John's chance of obtaining a place would have been greatly enhanced had a further 36 places been available in the lottery in which he was placed. The School suggests that the "father rule" reduced John Stokes chances of attending the school from 70% to 55% as if this is a negligible difference which does not qualify as placing him at a disadvantage. Effectively it would have meant that his chances of success rose from just slightly above a one in two chance to slightly above a two in three chance – which it is submitted is a significant difference.

42. The School submitted before the High Court that a 15% differential does not establish the necessary evidence to prove "particular disadvantage". Quite apart from the fact that the differential is in reality far more, they did not cite an authority which supports this proposition which it is submitted is plainly wrong in law (for example, the differential was less in ***Regina v. Secretary of State for Employment, ex parte Seymour Smith***). What is required by section 3(1)(c) is that some section of a protected group, even a small section, suffer a particular disadvantage. Under section 3(3A) of the Acts, the Complainant can use statistical data as an evidential tool to prove a particular disadvantage and so shift the burden of proof. It remains possible to establish a case where statistics are inadequate or non-existent, if the complainant can prove that a provision is intrinsically liable to affect his group [in this case Travellers] more than others and there is a consequent risk that it will place his group at a particular disadvantage.

43. In the face of the uncontroverted evidence that members of the traveller community were severely disadvantaged historically in accessing second level education, the

contention on the part of the High School that the policy is equal in application does not withstand scrutiny. It is not equal because non-traveller men do not have the same history of educational disadvantage that traveller men have and therefore the requirement that their children demonstrate their attendance at a school has a great impact on a member of the traveller community.

44. The language of section 3(1)(c) clearly provides that the "person" who must be shown to be at a "particular disadvantage" need not be the claimant but can be a hypothetical person within the protected class. Accordingly, there is no onus on the claimant to show that he personally is a person placed at a particular disadvantage as contended by the School but rather that a person who is a member of the traveller community is placed at a particular disadvantage by the policy. To demonstrate disparate impact or "particular disadvantage", it is only necessary to show that a particular provision, criterion or practice "puts or would put" a person belonging to a particular protected group at a "particular disadvantage" when compared with others. This allows for hypothetical comparisons and does not depend on actual relative disadvantage being established in the particular pool affected by the provision, criterion or practice. The key case in this regard is ***O'Flynn v. Adjudication Officer*** [1998] ICR 608 at [20] and [21] where the ECJ said:

> *"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. It is not necessary to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect."*

45. The point lies in the risk of disadvantage.

46. Collins J. in ***SG v. The Head Teacher & Governess of St. Gregory's Catholic Science School*** [2011] ECHC 1452 states, as cited by the High School in their submissions before the High Court:

> "*The words used by Parliament are 'a particular disadvantage'. The adjective 'particular' is obviously intended to indicate that what is recognised is more than a disadvantage – that would apply if a person was unable to act in a way in which he or she wished to act because, for example, it was considered to be a desirable way of manifesting his or her beliefs. It is clear that more than choice is needed to constitute a particular disadvantage."*

47. Applying this statement of principle in the context of this case rather than by reference to the factual dispute in that case, it follows that a member of the traveller community is placed at a particular disadvantage which is more than non-travellers because his prospect of satisfying the "father rule" in the admissions policy is less. There is no element of choice in this disadvantage and it arises automatically by operation of the policy in the particular context of historical disadvantage which is established in the case of Irish travellers accessing the secondary education system. Indeed, that this is the appropriate approach has been endorsed by the approach of the European Court of Human Rights to this question in the case of ***DH & Ors. v. The Czech Republic*** (Case Application No. 57325/00). The case is important because of the clear analogies which may be drawn with this case bearing as it does on traditional disadvantage in the education context. The applicants in that case maintained that they had been discriminated against because of their race or ethnic

origin in that they had been treated less favourably than other children in a comparable situation without any objective and reasonable justification in being offered places in special rather than mainstream schools. The State contended that this was on the basis of assessed special need but there was an issue in the case as to the neutrality or cultural sensitivity of the assessment techniques used.

48. The Court ruled that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. The Court further confirmed that this does not mean that indirect discrimination cannot be proved without statistical evidence. The Court concluded that where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is potentially discriminatory, the burden then shifts and it not necessary to prove any discriminatory intent on the part of the relevant authorities.

PRELIMINARY ISSUE NO. 1 – JURISDICTION OF SUPREME COURT ON APPEAL FROM THE HIGH COURT

49. A preliminary issue has been identified as to whether the Supreme Court has jurisdiction to hear the within appeal having regard to s.28 of the Equal Status Acts 2000 – 2011. The *Amicus Curiae* submits that this Court enjoys a full jurisdiction in relation to this appeal. At the heart of this question is the proper construction of section 28(3) of the Equal Status Act, 2000 (as amended).

50. Section 28 of the Acts provides:

> 28.(1) Not later than 42 days from the date of a decision of the Director under section 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.
>
> (2) In its determination of the appeal, the Circuit Court may provide for any redress for which provision could have been made by the decision appealed against (substituting the discretion of the Circuit Court for the discretion of the Director).
>
> (3) No further appeal lies, other than an appeal to the High Court on a point of law.

51. The within Appeal comes before this Court having been initiated in the Equality Tribunal, appealed to the Circuit Court, and subsequently appealed to the High Court on a point of law. Although, section 28 in effect provides that the decision of the Circuit Court is final save on a point of law in respect of which there is an appeal to the High Court, no-where is it stated that the decision of the High Court on the point of law referred to it is final. It is submitted that the clear and unambiguous import of section 28(3) of the Act is that insofar as a hearing on all issues on the evidence is concerned, the finding of the Circuit Court is determinative. However, one may appeal on a point of law to the High Court. In the absence of words excluding an appeal to the Supreme Court in respect of the determination of the High Court on a point of law, it then follows that a further appeal lies to the Supreme Court. To construe section 28 otherwise would be to unduly trammel the Appellant's constitutional rights as protected under Article 34.4.3 of the Constitution and to restrict the Appellant's constitutional right of access to the Courts (Article 40.3 of the Constitution).

52. Article 34.4. 3° provides:

> The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law.

53. Whilst Article 34.4.3 permits of prescribed exceptions, the starting position is that the Supreme Court has appellate jurisdiction in respect of all decisions of the High Court. Essentially, therefore the issue raised is as to whether the provisions of s.28 of the Acts should be construed as effecting an exception from the absolute right of appeal provided for by Article 34. This question should be considered having regard also to the personal right of the Appellant of access to the Court guaranteed under the Constitution (Article 40.3) and the principle of equivalence and effectiveness under EC law.

54. As a starting position, it seems appropriate to consider whether section 39 of the Courts of Justice Act, 1936 has any relevance to the issues which arise. Section 39 provides:

> **"39.**—The decision of the High Court or of the High Court on Circuit on an appeal under this Part of this Act shall be final and conclusive and not appealable.

It is submitted that it is clear that the reference to "this part" in section 39 relates this exclusion of a right of appeal to appeals heard under Part IV of the Act and a proper reading of Part IV of the Act makes clear that this Part refers to cases which are determined at first instance in the Circuit Court and have a full re-hearing before the High Court. Appeals in question are defined in section 37 as being heard by way of rehearing of the action or matter. The appeal to the High Court in this case was not such an appeal. The decision of the High Court was not given following a re-hearing of the action in the High Court and these proceedings cannot therefore come within the scope of section 39 of the Courts Act, 1936.

55. It is well established that if it is the intention of the legislature to oust, except from or regulate the jurisdiction of the Supreme Court to hear and determine appeals from a decision of the High Court, such intention must be expressed in clear and unambiguous terms, and that any degree of ambiguity should be construed in favour of an appellant (see for example **Clinton v An Bord Pleanala [2007] 1 IR 272** and **People (AG) v Conmey [1975] IR 341** in this regard). It is striking that s.28(3) makes no explicit reference to the Supreme Court. Had the Oireachtas intended to oust the jurisdiction of the Supreme Court, one would expect to see this expressed in simply and clear terms.

56. The question therefore is whether s.28 of the Acts is sufficiently clear and unambiguous as to operate so as to exclude the jurisdiction of the Supreme Court. It is submitted that there is a heavy onus upon the Respondent to establish that the alleged ouster of jurisdiction contained in s.28 of the Acts is sufficiently clear and unambiguous.

Relevant law

57. In ***The People (at the Suit of the Attorney General) v Conmey*** [1975] 1 IR 341 the issue of jurisdiction arose in the context of an application to the Supreme Court for an

order extending time for lodging and serving a notice of appeal from a decision of the Central Criminal Court. In the course of his judgment, Walsh J stated:

> Before turning to deal specifically with these provisions I wish to express my view that any statutory provision which had as its object the excepting of some decisions of the High Court from the appellate jurisdiction of this Court, or any particular provision seeking to confine the scope of such appeals within particular limits, would of necessity have to be clear and unambiguous. The appellate jurisdiction of this Court from decisions of the High Court flows directly from the Constitution and any diminution of that jurisdiction would be a matter of such great importance that it would have to be shown to fall clearly within the provisions of the Constitution and within the limitations imposed by the Constitution upon any such legislative action.

[at 360]

58. This dictum of Walsh J was followed by the Supreme Court in ***Holohan v Donohoe*** [1986] IR 45 in finding (by a majority) that s.96 of the Courts of Justice Act 1924 as re-enacted by s.48 of the Courts (Supplemental Provisions) Act 1961 was not sufficiently clear and unambiguous in its terms so as to confine the scope of an appeal from a High Court decision reached after a jury trial in a civil case as to restrict the right of the Supreme Court on appeal to enter judgment based on its own assessment of damages.

59. In ***Hanafin v Minister for the Environment*** [1996] 2 IR 321 it fell to be considered whether ss. 55 of the Referendum Act 1994 precluded on appeal to the Supreme Court in respect of a decision of the High Court relating to an election petition. The Supreme Court again followed ***Conmey*** and held that the conferral on it of a consultative jurisdiction under s.55 did not oust its substantive appellate jurisdiction. Hamilton CJ having reviewed the authorities reiterated the applicable principles in the following terms:

> None of these cases affect the fundamental position that if it is the intention of the legislature to oust, except from or regulate the appellate jurisdiction of this Court to hear and determine appeals from the decisions of the High Court, such intention must be expressed in clear and unambiguous terms and it is a matter for interpretation by the Court as to whether or not any provision of any law which purports to except from or regulate the appellate jurisdiction of this Court is effective so to do.

[at 389]

60. O'Flaherty J noted that if the legislature wished to exclude the jurisdiction of the Supreme Court, it was well within its competence to do so in a manner which put the question beyond all doubt:

> If it was the intention of those promoting the referendum legislation to exclude any right of appeal to the Supreme Court, could anything have been more simple than to so provide? Is it seriously to be said that the legislators would not have taken such a simple, direct course — if that truly was what was sought to be achieved? So to suggest hardly makes sense, and since the decisions of the Court in *Buckley v. The Attorney General* [1950] I.R. 67, *McDonald v. Bord na gCon* (No. 2) [1965] I.R. 217 and *Goodman International Ltd. v. Hamilton* (No. 1) [1992] 2 I.R. 542 speak of the respect the organs of State must afford one another, in obedience to that precept I believe that we must not make findings of irrationality against the legislature.

[at 397]

61. The Supreme Court considered whether ss.5(2) and (3) of the Illegal Immigrants (Trafficking) Act 2000 prevented it from hearing an appeal in respect of an application to extend time within which to seek judicial review in ***AB v Minister for Justice, Equality and Law Reform*** [2002] 1 IR 296. In concluding it did not, Fennelly J foregrounded the constitutional rights of litigants to bring an appeal, and reaffirmed the requirement that any purported exclusion of this right must be clear and unambiguous:

> It is not necessary for me to repeat the references made by Geoghegan J. to the decided cases on the interpretation of Article 34.4.3 of the Constitution. These cases show that this court has been correctly vigilant in its interpretation of this important constitutional guarantee of access to the court, whose establishment is mandated by the Constitution as the final appellate court. This is not to preserve some institutional prerogative of the court itself, but to protect the constitutional rights of litigants to bring an appeal against judicial decisions affecting them. The notion that a double degree of jurisdiction is an important part of the normal judicial system is widespread in modern legal systems. It is not necessarily a fundamentally guaranteed right (see *Toth v. Austria* (1991) 14 E.H.R.R. 551). It is, however, recognised throughout the legal structure of this State. It should not be lightly encroached upon or invaded by ambiguous language. The least that is required is that, if the right is to be excluded, this should be done by clear and unambiguous words.

[at 325]

62. In ***Clinton v An Bord Pleanála*** [2007] 1 IR 272 the issue of the Supreme Court's jurisdiction arose in the context of the restriction imposed on appeals from High Court decisions by s.50(4)(f) of the Planning and Development Act 2000. The Court held unanimously that this section did not operate so as to confine the appellant to the single point of law which had been certified by the High Court. Significantly, Denham J (as she then was) held that any degree of ambiguity in a statute which regulated the right of appeal from the High Court should be construed in favour of the appellant:

> Of considerable significance in construing s. 50 of the Act of 2000 is the constitutional right of appeal from the High Court to the Supreme Court described in Article 34.4.3 of the Constitution. If there was an ambiguity in a statute seeking to limit the appeal of an applicant from the High Court to the Supreme Court that should be construed in favour of an appellant. [...] In view of the right of appeal from the High Court to the Supreme Court which flows from the Constitution, any limitation of the scope of an appeal has to be clear and unambiguous. In all the circumstances of this case, which includes extant common law, it is not a case where no ambiguity arises. There is a degree of ambiguity.

[at paras.26 - 27]

63. In ***Canty v Ireland & Ors*** [2011] IESC 27 Denham J upheld the finding of the High Court that the words 'final and conclusive' as appearing in s.123(4) of the Residential Tenancies Act 2004 were not unclear and ambiguous and as such excluded a right of

appeal to the Supreme Court:

> The words "final and conclusive", as appearing in s. 123(4) of the 2004 Act, have in my view only one meaning. Such a phrase is not ambiguous and is not capable of having any meaning other than that which the words plainly and unambiguously mean and were intended to mean. On my interpretation of the phrase, the situation is that once the High Court has expressed an opinion on the statutory appeal, then that decision ends the litigation between the parties. This is what I think final, and this is what I think conclusive means: "final", as being in the last stage of the process, and "conclusive" as meaning decisive by way of end.
>
> [per McKechnie J, quoted at para. 8]

64. There is a clear difference between the language of section 123(4) of the 2004 Act under consideration in ***Canty*** and the language of section 28(3) of the Equal Status Act, 2000. The ***Canty*** case illustrates the type of clear and unambiguous ouster of the jurisdiction of the Supreme Court which is necessary to prevail against the general rule provided for in Article 34.3.3.

Jurisdiction of the Supreme Court in related sphere of employment equality

65. In the apparent absence of any authority relating to the jurisdiction of the Supreme Court to hear an appeal under the Equal Status Acts 2000 - 2011, it is respectfully submitted that it is instructive to have regard by way of analogy to the statutory appeals mechanism provided for in respect of appeals from the Labour Court to the High Court in the related sphere of employment equality. It is clear that the Supreme Court has previously regarded itself as having jurisdiction to hear appeals from the High Court in within the relevant statutory framework.

66. In ***Nathan v. Bailey Gibson*** [1992] 2 IR 162 the matter which ultimately came before the Supreme Court had its origins in a decision of the High Court by way of an appeal on a point of law arising from a determination by the Labour Court. In that case the original dispute had been referred to the Labour Court on a point of law in accordance with the provisions of s. 19 of the Employment Equality Act, 1977. The decision of the Labour Court was then appealed on a point of law to the High Court pursuant to section 21(4) of the Employment Equality Act, 1977 and the decision of the High Court on the point of law was then appealed to the Supreme Court.

67. Section 21(4) of the Employment Equality Act, 1977 provides as follows:

> (4) A party to a dispute determined by the Court under subsection (2) or, in the case of such a determination in a matter referred under section 20, the Minister or a person concerned may appeal to the High Court on a point of law.

68. It is noteworthy that although no reference is made to a further appeal to the Supreme Court in section 21(4), in ***Nathan v. Bailey Gibson*** the case proceeded in the normal way and no jurisdictional issues appear to have been raised. Similarly in ***O'Leary v. Minister for Transport & Communication*** [1998] 1 IR 558 the decision of the High Court on a point of law (which had originally been referred from the Labour Court as the arbiter of fact) was appealed to the Supreme Court. No jurisdictional issues appear to have been canvassed and the Supreme Court delivered a written judgment on the point of law thus referred.

Effectiveness and equivalence of EU law remedies

69. It is submitted that since the Acts implement EU law, the principles of the equivalence and effectiveness are engaged. Both of the Directives which the Acts seek to implement (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services) provide at Chapter II thereof for remedies and enforcement, and more particularly for the defence of rights at Articles 7 & 8 respectively, and affirm the necessity of effective implementation and adequate judicial protection against discrimination.

70. It is well established in the jurisprudence of the Court of Justice of the European Union that the autonomy of domestic courts in enforcing EU law is subject to the principles of adequacy, effectiveness, and equivalence. In particular, the principle of equivalence requires that national procedural rules apply without distinction to actions alleging infringements of Community law and to those alleging infringements of national law (Case C-231/96 ***Edis v Ministero delle Finanze***). In Case C-326/96 ***Levez v Jennings Ltd*** the Court of Justice considered the requirement of equivalence in respect of a claim under the Equal Pay Act 1970 (which implemented EU law) and a similar cause of action in domestic law. In answering the questions referred to it by the Employment Appeal Tribunal, the Court articulated the principles to be applied by the domestic court in determining whether the principle of equivalence had been breached:

> 39 In principle, it is for the national courts to ascertain whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under national law comply with the principle of equivalence (see also, to that effect, *Palmisani*, paragraph 33 [Case C-261/95 *Palmisani v INPS* [1997] ECR I-4025]).
>
> 40 However, the Court can provide the national court with guidance as to the interpretation of Community law, which may be of use to it in undertaking such an assessment.
>
> 41 The principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar (see, mutatis mutandis, paragraph 36 of the judgment of 15 September 1998 in Case C-231/96 *Edis* [1998] ECR I-4951).
>
> 42 However, that principle is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought, like the main action in the present case, in the field of employment law (see, to that effect, *Edis*, paragraph 36).
>
> 43 In order to determine whether the principle of equivalence has been complied with in the present case, the national court - which alone has direct knowledge of the procedural rules governing actions in the field of employment law - must consider both the purpose and the essential characteristics of allegedly similar domestic actions (see *Palmisani*, paragraphs 34 to 38).
>
> 44 Furthermore, whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts (see,

mutatis mutandis, *Van Schijndel and Van Veen*, paragraph 19 [C-431/93 *Van Schijndel and Van Veen v SPF* [1995] ECR I-4705]).

[...]

50 If it transpires, on the basis of the principles set out in paragraphs 41 to 44 of this judgment, that a claim under the Act which is brought before the County Court is similar to one or more of the forms of action listed by the national court, it would remain for that court to determine whether the first-mentioned form of action is governed by procedural rules or other requirements which are less favourable.

71. On the basis of the foregoing, it is respectfully submitted that in determining whether the Court has jurisdiction to hear the within appeal, the Court should consider whether the wording of s.28(3) of the Acts excludes an appeal to the Supreme Court. If there is *any* ambiguity (as opposed to a *sufficient* degree of ambiguity), this should be construed in favour of the Appellant, having regard to the constitutional right of access to the courts, and the right under EU law to an effective and equivalent remedy.

72. It is respectfully submitted that s.28(3) is not clear and unambiguous, and as such does not operate so as to oust the jurisdiction of the Supreme Court to hear an appeal of the decision of the High Court.

73. Having regard to the dicta of O'Flaherty J in ***Hanafin***, the Court is entitled to assume that had the legislature intended to exclude the jurisdiction of the Supreme Court, it could have done so 'simply and directly'. While no particular formula of words can be required of the legislature in giving effect to its intention, it is clear that the question of whether an appeal lies to the Supreme Court from the High Court under the Acts could have been put beyond any doubt, whether by express reference to the Supreme Court in this regard, reference to the High Court on a point of law being 'final and conclusive' (cf. s.42(8) of the Freedom of Information Act 1997), or as being 'final and no appeal shall lie from the decision of the High Court' except in certain specified circumstances (cf. s.50(4)(f) of the Planning and Development Act 2000).

74. It is recognised that the interpretation advanced by the Respondent of s.28(3) is one possible construction; it cannot however reasonably be argued that it is the only such construction. It is submitted that the clause 'no further appeal lies' is equally capable of being interpreted as confining the right of appeal from the Circuit Court to the High Court to an appeal of a point of law, rather than a substantive or *de novo* appeal. It is submitted that it is implicit in the dictum of Denham J ***Clinton*** that no minimum threshold of ambiguity or inclarity is required. Thus while there is a heavy onus on the Respondent in making its preliminary application as to jurisdiction to show that the wording is clear and unambiguous, the Appellant need only show that there is an element of ambiguity. It is submitted that such an element of ambiguity is present in s.28(3) of the Acts, and should be construed in favour of the Appellant having regard to the jurisprudence of this Court relating to Article 34.4. 3° of the Constitution.

75. The jurisdictional issue which it has been suggested arises in relation to this appeal touches on a question which is of the first order of significance. The Appellant's right of access to the Supreme Court on appeal from the High Court enjoys constitutional

protection. Article 34.4 of the Constitution provides that the Supreme Court has appellate jurisdiction from all decisions of the High Court albeit that the Oireachtas has power to make exceptions to this rule or to subject it to regulation. It is respectfully submitted that the question of the Supreme Court's jurisdiction under section 28 must be determined in light of Article 34 of the Constitution, this question also raises to a secondary extent the principle of equivalence and effectiveness in the domestic implementation of EU law. It is of the first importance that section 3(1)(c) of the Act is properly construed. In this context it is relevant that the Act gives effect domestically to obligations under EC law and there are significant implications for the State if section 3(1)(c) is not capable of being interpreted in a manner which gives effect to those obligations. It is almost universally the case that the Supreme Court is the final arbiter on matters of law in this State. As a core requirement of EC law that discrimination be prohibited, the proposition that no appeal lies in this area from a decision of the High Court on a point of law does not sit comfortably with the requirements of equivalence and effectiveness.

76. It is respectfully submitted that in the absence of a clear ouster of the jurisdiction of the Supreme Court to determine this appeal in relation to a point of law in unambiguous terms, this Court should assume jurisdiction to determine this appeal pursuant to the provisions of the Constitution. The case for such an approach by this Honourable Court is the stronger by reason of the fact that this appeal concerns points of law which determine the scope and ambit of protections available under the Equal Status Act, 2000(as amended). It must be recalled that the Equal Status Act, 2000 is a measure introduced by the Oireachtas to provide a legislative framework whereby the equality rights of citizens may be vindicated. It is submitted that it would be strange indeed were the Supreme Court not to have jurisdiction as final arbiter in relation to the proper interpretation of the scope and ambit of provisions of the Equal Status Act, 2000 in the constitutional framework in which the questions raised in these proceedings are presented.

PRELIMINARY ISSUE NO. 2 – TIME ISSUE

77. There are two steps to pursuing a complaint under the Equal Status Act, 2000 (as amended). The complaint must first be notified within two months of the last act of discrimination (but the Tribunal has power to extend time for up to four months on application in this regard or, alternatively, to waive the requirement to notify. Having notified the proposed respondent of the Complaint, the complaint must then be referred to the Tribunal and this referral must take place within six months of the last act of discrimination (and the Tribunal has power to extend for a period of up to twelve months on application in this regard). In this case it appears that the referral to the Tribunal occurred within six months of both the High School’s decision on the internal appeal and the section 29 appeal. The issue raised relates therefore to the notification requirement and not the referral requirement. The High School has sought to make an issue as to the jurisdiction of the Equality Tribunal, on the basis of whether before seeking redress, the High school was given notice of the complaint within 2 months of the last occurrence of the conduct being complained of, as required by Section 21(2) of the Equal Status Acts (as amended). The Amicus Curiae considers that this submission is wrong in law because the notification requirement does not go to jurisdiction.

78. As the Amicus understands matters, the Claimant’s solicitor adverted to a potential time issue when referring the complaint within six months of the conclusion of the internal appeal process and expressly sought an extension of time in the event that it was considered by the Tribunal that one was necessary. It appears that the Tribunal did not respond to this correspondence and it is implicit from this that the Tribunal

considered that no issue arose because the Tribunal assumed jurisdiction and proceeded to investigate the complaint. Furthermore, no time issue was raised by the High School before the Tribunal in the course of the exchange of written submissions, the conduct of the investigation and hearing so it is apparent that the High School either did not advert to any time issue or did not consider that a time issue of substance arose.

79. Had the Tribunal considered that there was a time issue or had an issue been raised by the High School such as to warrant a determination from the Tribunal before an investigation could properly proceed, a number of events would have ensued as a matter of course:

A. The Director could have heard submissions as to whether this was a continuing discrimination with the effect that the time for notification and referral had not run (section 21(11) (as inserted by section 54 of the Equality Act, 2004). Given that the policy continues to apply and has ongoing effects, it is reasonable to expect that any such submission would have been successful and there is authority[3] which supports a finding that no time issue arises in such circumstances; **or**

B. The Tribunal could have considered whether there were grounds for extending the time within which notification of a complaint could be made (pursuant to section 21(3)(a)(i) of the Equal Status Act, 2000 (as substituted by section 54 of the Equality Act, 2004);[4] **or**

C. The Tribunal could have considered whether there were grounds for dispensing with the notification requirement (section 21(3)(a)(ii) of the Equal Status Act, 2000 (as substituted by section 54 of the Equality Act, 2004). Again, the existence of an appeal mechanism which meant that the decision was not final or effective until the conclusion of the said appeal presents a reasonable basis for a determination by the Tribunal either that time had not run until the decision was made final upon the determination of the appeal or for dispensing with the notification requirement given that the High School were on notice of a complaint in relation to the decision and no prejudice therefore arose from the failure to notify at an earlier stage.

80. Furthermore, had the Tribunal heard submissions in respect of the foregoing and reached a determination that it should not proceed to investigate, the Claimant would then have enjoyed a right of appeal under section 21(7A) of the Equal Status Act, 2000 (as inserted by section 54 of the Equality Act, 2004) both to the Circuit Court and the High Court (on a point of law). The fact that this did not happen and that the time issue was belatedly invoked in an attempt to preclude the grant of relief under the Act, meant that the Claimant was deprived **both** of (i) the right to be heard as to why the complaint should be investigated notwithstanding a mooted time issue, and (ii) the right to appeal against any negative determination made following on from such submissions.

81. When this issue was first raised in the High Court, the amicus took the general position that it was not for the Authority as *Amicus Curiae* to get involved with the detail of any

---

[3] See, for example, ***Cast v. Croyden College*** [1998] IRLR 320

[4] The test for establishing if reasonable cause is shown was set down by the Labour Court in employment context in ***Cementation Skanska v. A Worker*** (Determination No.0426). Precedents available from the Equality Tribunal confirm that the power to dispense with the notification requirements is exercised even where the obstacles to notification are not insurmountable or related to circumstances outside the control of the complainant – see, for example, the Direction issued by the Equality Tribunal in the case of ***O'Herlihy v. Mater Misercordiae*** University Hospital (ES/2010/0029) and if a time issue was considered to arise in this case, a strong argument exists that the power to dispense with the requirement should be exercised.

time argument raised by a party to the proceedings – the concern of the *Amicus Curiae* was with the substantive issues and the implications those issues carried for the application of the Equal Status act. However, the *Amicus Curiae* did make some very general points including:

- The Act is a remedial piece of social legislation and should be construed accordingly. It was intended to provide a remedy and a forum within which that remedy could be pursued. The procedural provisions should not be interpreted in an inflexible manner so as to shut people out from a remedy they would otherwise be entitled to seek;
- The alleged discrimination was continuing - the claimant had not obtained a place in the school and remained on a "waiting list" to which the admission policy applies. The discrimination was not therefore a one-off act in refusing his application for admission but continues in his continued exclusion from the school. If this characterization of the situation is accepted then the time point is irrelevant since no time limit could have expired.

82. The Court recalled the parties following the conclusion of the case seeking supplemental submissions in relation to the issue of time limits and the implication of any conclusion that the relevant date of refusal of admission was the conclusion of the internal appeal process i.e. 8th (or perhaps 12th) February, 2010. At that time the Amicus prepared a short supplemental written submission. The Amicus took the position that failure to comply with a notification requirement under the Act does not present a jurisdictional issue at all in the circumstances of this case in reliance on a recently decided case in the High Court in the case of ***Barska v. Equality Tribunal***. In that case the Court considered the effect of a failure on the part of an applicant to make application to the Director of the Equality Tribunal for a resumption of the hearing of a case following mediation as required by section 78(7) of the Employment Equality Act, 1998. The Court found that the Tribunal had jurisdiction to extend the 28 day time limited referred to in that section (although no such power was expressly provided for) and that it was open to the Director to consider the facts of the individual case in deciding whether to extend time to allow the case to be heard by the Director following mediation. The Learned President found:

> "I am able to reach the interpretation of section 78(7) in light of EU law as I have done, because the terms of the section do not purport to deprive the Director of jurisdiction unless there is an application to resume the case made within 28 days of the notice referred to in the section".[5]

83. The Amicus Curiae considers that an analogy may be drawn between the time limit in section 78(7) of the Employment Equality Act, 1998 and section 21 of the Equal Status Act, 2000 on the basis that section 21 does not provide for an ouster of the Tribunal's jurisdiction where there has been non-compliance with the notification time limits therein specified but specifically allows for the extension of time and for dispensing with the requirements as to time in section 21.

84. Section 21(2) imposes a requirement that a complaint should be notified to the respondent within two months of the date on which the discrimination last occurred. It is noted that under section 21(3) the time for giving such notice can be extended; or the requirement waived by the Director. Accordingly, the failure to give notification within two months does not deprive the Tribunal of jurisdiction but requires the Tribunal to make a decision which considers:

---

[5] **Barska v. Equality Tribunal** [2011] IEHC 239

A. Whether the discrimination is ongoing or when the last discriminatory act occurred;
B. In the case of ongoing discrimination, no time issue arises;
C. If the discrimination is not ongoing and the last act occurred more than two months before a complaint was notified to the Respondents, the Tribunal must consider whether it should extend time or waive the requirement to give notice.

It is submitted that the issue of notice is a procedural issue and not a jurisdictional issue in that notwithstanding when notice of complaint was given, the Equality Tribunal had jurisdiction to deal with a claim for redress in respect of conduct occurring within 6 months of the date of referral of a complaint, which period was extendable up to 12 months under Section 21(6). No time issue is taken in relation to the referral of the complaint to the Tribunal.

CONCLUSION

76. It is respectfully submitted that s.28(3) is not clear and unambiguous, and as such does not operate so as to oust the jurisdiction of the Supreme Court to hear an appeal of the decision of the High Court. It is submitted that the Supreme Court should proceed to hear the appeal in respect of the decision of the Learned High Court and if satisfied that he has erred in his approach to "particular disadvantage", as it is submitted he has, that the Court should then proceed to consider for the first time the important questions of particular disadvantage, objective justification, legitimate aim, necessary and appropriate as they appear in section 3(1)(c) together with the question of overarching importance namely, the remedies available under the Equal Status Act, 2000 (as amended). The *Amicus Curiae* submits that the admissions policy based on pedigree has not been objectively justified by the Respondent and impacts to a disproportionate and unnecessary extent on the rights of the Appellant. It is submitted that the policy is discriminatory. The *Amicus Curiae* would welcome the opportunity to assist the Court in providing some clarity is this important area of law.

December 13, 2012

Siobhan Phelan B.L.

Nuala Butler SC