THE SUPREME COURT

Record No. 246 / 2010

BETWEEN:

KIM CAHILL

APPELLANT

AND

THE MINISTER FOR EDUCATION AND SCIENCE

RESPONDENT

OUTLINE SUBMISSIONS ON BEHALF OF THE APPELLANT

Word Count: 12,337

Filed by Irish Human Rights and Equality Commission, 16-22 Green Street, Dublin 2 on behalf of the Appellant

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1. INTRODUCTION

Background

The Appellant is dyslexic and sought "reasonable accommodation" in connection with her disability when doing her Leaving Certificate in 2001. Measures considered suitable to accommodate the Appellant's disability, as confirmed in expert evidence before the Circuit Court, included extra time, a separate room and allowances for grammar and/or spelling mistakes. The Appellant had no choice, however, as to the form of "reasonable accommodation" made available to her by the Respondent. Certain forms of accommodation which would otherwise have assisted her, such as the provision of extra time (which had been available for her Junior Certificate), were not available. Indeed the final decision on her eligibility for "reasonable accommodation" was only made after the examination had taken place. This meant that the system operated by the Respondent was not capable of providing accommodations touching on the conditions in which the examination was conducted as the final decision post-dated the examination when it was too late to adopt a measure which affected examination conditions. The "reasonable accommodation" available to the Appellant and granted to her following internal appeal and after the examinations had concluded was in the form of an exemption from assessment in spelling and grammar in her language exams including an exemption from assessment of punctuation in English. The exemption carried with it, however, a notation on the Appellant's Leaving Certificate to the effect that the exempted parts of the exams had not been assessed.

The Complaint

The Appellant was very embarrassed and distressed by the presence of a notation on her Leaving Certificate which she felt put persons seeing it on enquiry as to what it meant and notified persons (including prospective employers), otherwise unaware of the fact that she had a disability, of that fact thereby interfering with her privacy and exposing her to further potential discriminatory conduct.[1] She duly brought a complaint to the Equality Tribunal on the basis that she had been discriminated against by the act of requiring a notation on her Leaving Certificate to flag the fact that she had received an accommodation. The essence of the complaint made was that the insertion of a notation is discriminatory contrary to sections 3 and/or 5 of the Equal Status Act, 2000 [hereinafter "the Act"] and that there has been a failure to provide reasonable accommodation to her as a person with a disability contrary to section 4 of the Act.

The Evidence

The logic for the notation, as given in evidence on behalf of the Respondent, is that the exemption related to areas of competence under examination which the Appellant was not

[1] She gave graphic evidence of the fact that on Leaving Certificate results day *"she received comments and questions as to why there were stars besides some of [her] subjects because nobody else had them*." (Day 3, p. 6) She told the Court that she had to explain herself to her friends and she found the whole experience "*probably the most embarrassing day of her life*." (Day 3, p. 7).

then examined on.[2] The position of the Respondent was that in the absence of notation, the result on the certificate might "mislead".[3] The Appellant addressed this by contending that the proper and intended effect of "reasonable accommodation" is to provide a level playing field, or to neutralize to the extent possible or practicable, the effect of a disability whilst still providing for participation. Thus, the need for notation on the grounds advanced by the Respondent does not arise in the case of a properly constructed "reasonable accommodation" devised in a manner which allows the person with a disability to participate in the examination process in as near to equal a way as possible by removing obstacles to the assessment of ability and knowledge. Expert evidence was called on her behalf to satisfy the Tribunal and again before the Circuit Court that measures which were properly calibrated to provide "reasonable accommodation" have the effect of allowing participation in the examination in a manner which does not affect the result of the examination. Evidence was also called as to the discriminatory impact of the presence of the notation on the Leaving Certificate.[4] A very useful summary of the evidence is provided in the decision of the Learned Circuit Court Judge who anticipated that the issue of law would require further deliberation.[5]

Decisions on the Complaint

The Equality Officer accepted that the Appellant had been less favourably treated than students without a disability sitting the same examination by reason of the notation on her Leaving Certificate. She rejected the argument that **Section 4(5)** of the **Act**, being without prejudice to **Section 7(2)(a)** of the **Education Act, 1998,** rendered immune from **Section 4(1)** the manner in which the Minister chose to provide accommodation for students with a disability. The Equality Officer also rejected the Respondent's reliance on **Section 5(2)(h)** which allows for differences in treatment by way of positive discrimination to promote the special interests of certain categories.

The case was appealed by the Respondent to the Circuit Court and after 8 days of evidence and submissions, judgment was delivered by Judge Hunt on 19th October 2007. Judge Hunt approached the matter by initially deciding that the Respondent was exempt from the requirement to provide reasonable accommodation under **Section 4(1)** of the **2000 Act** in relation to the exercise of her discretion in providing for students with a disability or special educational needs by virtue of **Section 4(5)** and the reference to **Section 7(2)(a)** of the **Education Act, 1998** therein. In reality that finding would have disposed of the case in its entirety save that the Judge noted that this point was not very strongly argued (i.e. by the Respondent) so he went on to consider whether the provision of an exemption coupled with an annotation was in fact "reasonable accommodation" under **Section 4(1).**

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[2]Indeed, on the Respondent's own logic, had different forms of "reasonable accommodation", such as the provision of extra time or a separate room, been offered or available to the Appellant, the need for notation would not arise at all as these forms of accommodation would not have involved an exemption from assessment of any element of the examination. The fact that these forms of accommodation were not available and the only available accommodation was one which the Respondent contended required notation, is itself, evidence capable of supporting a conclusion that there has been a breach of the requirements of the Act.

[3] See Dr. Braden, Day 4, pages 119-120.

[4] See the evidence of Siobhan Stack who despite the fact that she had received an A in Junior Certificate Irish, received a letter from a particular Irish language course refusing admission to a course on the basis that her grade was not a "standard Junior Certificate" grade (Day 4 at pages 9-11).

[5] Day 9, Judgment of Judge Hunt.

This element of his Judgment is core to this appeal because he defines the notion of reasonable accommodation in a very limited manner. He notes initially at page 94:

> "*Reasonable is not defined in the section, save that sub-section 2 provides some assistance in discerning the possible ambit of the phrase by, in effect, providing that it may be reasonable to refuse to provide an accommodation to such needs where such a provision would give rise to more than a nominal cost*".

He goes on to point out that the costs in this case would be unlikely to be more than nominal. However, he then states:

> "*The concept of reasonableness in providing accommodation does not command the Minister to reach a standard of perfection, but rather leaves a measure of discretion or appreciation in deciding how these obligations are to be discharged. That measure of discretion or appreciation also has an echo in the language of the Education Act 1998. I believe that reasonableness implies that whatever decision was reached by the Minister, it must be based on the application of reason to the evidence and information available to those charged with devising a reasonable scheme of accommodations. Such a decision must not be at variance with reason and common sense. It should not be based on irrelevant considerations nor should it be directed at an improper motiv*e".

Judge Hunt then went on to deal with **Section 5** of the **2000 Act** and held that as the Appellant had failed to establish discrimination under **Sections 3** and **4,** she had also failed to establish discrimination under **Section 5(1)** (which relates specifically to the provision of goods and services to the public). However, he noted that even if he were wrong on that:

> "*The system adopted by the Department would be saved by an application of the provisions in Section 5(2)(h) of that Section which exempts sub-section 5 (1) from application to differences in treatment provided for the principal purpose of promoting a bona fide purpose in a bona fide manner with special interests of a category of persons*".

He felt that this was:

> "*exactly what the Department attempted to do*".

In this way, in arriving at his decision that the Appellant had not been discriminated against and that there had been no breach of the requirement to provide reasonable accommodation, the Circuit Court Judge made findings of law concerning the scope and ambit of protections available under the Act, against which the Appellant in turn appealed to the High Court by way of an appeal on a point of law, culminating in the judgment now appealed from.

2. JUDGMENT UNDER APPEAL

The appeal came before Judge deValera in the High Court in April, 2009. As an appeal from the Circuit Court to the High Court lies only on a point of law under **Section 28** of the Act, the appeal before the High Court was argued on a purely legal basis without any further evidence being heard. During the course of the hearing, as recorded in the Judgment, the Respondent identified elements of the decision of the Circuit Court Judge and excluded others as representing the legal test applied by the Circuit Judge. Ultimately, judgment was delivered on the 11th of June, 2010. The appeal was dismissed and the decision of the Circuit Court Judge affirmed on the basis that there had been no error of law by the Circuit Court Judge but without identifying the precise ambit and scope of the legal tests which the High Court found had been applied, properly, by the Circuit Court Judge.

The High Court Judge approaches the whole question of discrimination against the Appellant from the perspective of the integrity of the examination system. From the outset he takes the approach:

> "*…that one cannot have an exemption of the type sought and obtained by the Appellant in this case without some indication that such an exemption had been given. Such a scenario would be unacceptable.*"

From this starting point, the Judge then decided all of the issues against the Appellant. However, he did so in a very terse manner and the logic and rationale of his approach, other than to rely on the need to protect the integrity of the examination process, is difficult to identify. In relation to the key issue of "reasonable accommodation" he expresses the view on a number of occasions that the annotation of the Appellants leaving certificate was "*a reasonable approach to take to the issue of accommodation generally*" (page 20); "*the annotation was reasonable*" (page 21) and the practice of the Department (in annotating) is "*reasonable in this regard*" (page 22). He does not explain what he means by "reasonable" in the particular context.

He goes on to state with reference to the case law on constitutional equality that:

> "*nowhere in that case law is there any suggestion to the effect that equality rights must be absolutely guaranteed without limitation in the name of reasonableness even in cases where the requirements of reason and common sense require the taking of some action which may not be to the complete satisfaction of the person asserting them..... It appears to me to be a question of balance and that the contention advanced on the part of the Appellant invites the Court to embrace an unreasonable definition of "reasonable accommodation" which tips the balance too far in favour of the Appellant to the detriment of other parties with a legitimate interest in the fair and equitable administration of the leaving certificate examination"*.

Finally he concludes that Judge Hunt did not err in law in his decision. It is apparent from his endorsement of Judge Hunt's approach (although Judge Hunt's detailed analysis is not reflected in the High Court Judgment) and his repeated reference to "*reason and common*

sense" that de Valera J is effectively applying the same judicial review type reasonableness standard to the determination of whether "reasonable accommodation" has been provided.

De Valera J. makes no express decision on the issues of whether the Minister is exempted from the obligations of **Section 4(1)** by virtue of **Section 4(5)** or whether **Section 5(2)(h)** exempts the Minister from the obligation imposed by **Section 5(1).** It seems, however, that Judge Hunt's decision on these matters can be regarded as upheld by the High Court by virtue of the bare assertion that:

> "*I am equally satisfied that the learned Circuit Court Judge did not err in law in his thorough assessment of the meaning of "less favourable treatment" <u>or in any other respect</u> as advanced on behalf of the Appellant*".

In circumstances where even the Respondent sought to identify portions of the judgment as representing the test applied by the Circuit Judge to the exclusion of other elements, the failure of the High Court Judge to identify what the Court considered to be the correct legal test in upholding the decision of the Court below is unsatisfactory. The judgment actually delivered fails to decide, in a manner capable of being restated or understood with any precision, the questions of law which arose for its consideration and had the effect of affirming the decision of the Circuit Court Judge without elaborating in a separate fashion on the points of law which arose for consideration by the Court.

3. LEGAL ISSUES

It is submitted that it is important that the true meaning and effect of **sections 3, 4** and **5** of the Act be established authoritatively. The manner in which these sections have been interpreted by the Circuit Court, as affirmed by the High Court, serves to severely curtail the scope and effectiveness of the protection against discrimination provided in Irish law in a manner which it is submitted is unwarranted by the statutory language and context and having regard to the fact that the legislation was introduced against the background of a strong constitutional protection of equality rights. The particular legal issues of concern on this appeal are the proper interpretation of "*less favourable treatment*" under section 3, the scope of substantive protections available in the duty to provide "*reasonable accommodation*" under **Section 4(1)**; whether the Minister is exempt from the obligation to provide reasonable accommodation by virtue of **Section 4(5)** and whether the Minister, as the provider of a service to the public, is exempt from the obligation of non-discrimination under **Section 5(1)** by reason of **Section 5(2)(h).**

A separate preliminary issue identified by the Respondent as to the availability of an appeal to this Court from a decision reached by the High Court on a point of law under section 28 of the Act has been disposed of by the decision of this Court in the intervening period in ***Stokes v. Clonmel Boys School & Ors***.[6] In circumstances where this Court has found that it enjoys an appellate jurisdiction from the decision of the High Court, it no longer seems necessary to address this question by way of submission.

[6] Stokes v The Christain Brothers High School Clonmel & Anor, 2015 [IESC] 13.

4. SUBMISSIONS

Statutory Provisions

The Appellant contends that the Respondent was in breach of **sections 3(2)(g)** (the "disability ground") and **5(1)** by providing less favourable treatment on grounds of disability.

Section 3(1) provides that discrimination shall be taken to occur where a person is treated less favourably than another person is, has been, or would be treated in a comparable situation on any of the discriminatory grounds in the following terms:

> ***3.****—(1) For the purposes of this Act, discrimination shall be taken to occur where—*
>
> *(a) on any of the grounds specified in subsection (2) (in this Act referred to as "the discriminatory grounds") which exists at present or previously existed but no longer exists or may exist in the future, or which is imputed to the person concerned, a person is treated less favourably than another person is, has been or would be treated,*
>
> *(b) (i) a person who is associated with another person is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated, and*
>
> *(ii) similar treatment of that person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination,*
>
> *or*
>
> *(c) (i) a person is in a category of persons who share a common characteristic by reason of which discrimination may, by virtue of paragraph (a), occur in respect of those persons,*
>
> *(ii) the person is obliged by the provider of a service (within the meaning of section 4 (6)) to comply with a condition (whether in the nature of a requirement, practice or otherwise) but is unable to do so,*
>
> *(iii) substantially more people outside the category than within it are able to comply with the condition, and*
>
> *(iv) the obligation to comply with the condition cannot be justified as being reasonable in all the circumstances of the case.*

This section makes it clear that what is central to an assessment of whether discrimination is taken to have occurred is the impact on the person of the measure in question and not the fact that the treatment is the same as that afforded or meted out to others. This is consistent with

an understanding of anti-discrimination law which provides that discrimination may sometimes arise from treating people in different situations the same.[7]

It was further contended that the Respondent breaches **section 4(1)** by reason of a failure to provide reasonable accommodation within the meaning of the Act. **Section 4(1)** provides:

> ***4.***—*(1) For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.*

It is further clear from **section 4(6)** that the section is intended to apply to providers of services in the education context (educational establishments are specifically referred to) and that the provision of services is to be widely construed as including "*making provision for or allowing such treatment or facilities*". In relation to **section 4(1)** of the Act, the Circuit Court Judge (apparently affirmed on appeal) indicated considerable doubts as to whether or not in fact the complaint in this case was admissible under that section by reference to **section 4(5)** which states:

> *"this section is without prejudice to the provisions of sections 7(2)(a), 9(a) and 15(2)(g) of the Education Act 1998", insofar as they relate to functions of the Minster of Education & Science, recognised schools and boards of management in relation to students with a disability".*

The High Court Judge cites **section 7** of the Education Act, 1998 which elaborates on the functions of the Minister for Education and Science and at **section 7(2)(a)** provides that:

> *"Without prejudice to the generality of sub-section 1, each of the following shall be a function of the Minister to provide funding to each recognised school and centre for education, and to provide support services to recognised schools, centres for education, students, including students who have a disability or other special education needs and their parents, and as the Minster considers appropriate and in accordance with this Act".*

"*Support Services*" are defined under **section 2** of the Act as including: (*a*) assessment of students; (*b*) psychological services; (*c*) guidance and counselling services; (*d*) technical aid and equipment, including means of access to schools, adaptations to buildings to facilitate access and transport, for students with special needs and their families; (*e*) provision for students learning through Irish sign language or other sign language, including interpreting services; (*f*) speech therapy services; (*g*) provision for early childhood, primary, post-primary, adult or continuing education to students with special needs otherwise than in schools or centres for education; (*h*) teacher welfare services; (*i*) transport services; (*j*) library and media services; (*k*) school maintenance services; (*l*) examinations provided for in Part VIII; (*m*) curriculum support and staff advisory services, and (*n*) such other services as are specified by

[7] See, for example, ***Gillespie & Ors. v. Northern Health and Social Services Boards, Department of Health and Social Services Board and Southern Health Board*** [1996] ICR 498.

this Act or considered appropriate by the Minister. Sections **9(a)** and **15(2)(g)** of the Education Act, 1998 make similar provision, complementary to that in **section 4(1)** of the 2000 Act, for special duties towards students with disabilities and special needs. Although the scope of protection available under **section 4(1)** of the 2000 Act is limited by **section 4(2)** which provides for an "other than a nominal cost" defence to a breach of a duty to provide reasonable accommodation claim, this does not avail the Respondent where there is a complaint of breach of duty arising from the discharge of functions under **sections 7(2)(a), 9(a)** or **15(2)(g).**

Section 5 of the Act prohibits discrimination in the provision of services but a number of exemptions are identified in **section 5(2)** including, in relevant part, **section 5(2)(h)** which exempts from the scope of **section 5(1):**

> *"differences in the treatment of persons in a category of persons in respect of services that are provided for the principal purpose of promoting, for a bona fide purpose and in a bona fide manner, the special interests of persons in that category to the extent that the differences in treatment are reasonably necessary to promote those special interests,"*

Section 5(2)(h), in effect, operates to exempt positive discrimination provided for the special interests of persons with a disability from the prohibition against discrimination in the Act.

Applicable Principles of Statutory Interpretation

It was recently accepted by O'Malley J. in ***G v. Department of Social Protection***[8] that having regard to the objectives of the Act, "*it must be acknowledged to be a remedial statute*". She added:

> *"It follows that it must be liberally construed. As described in Dodd on Statutory Interpretation in Ireland (2008 Tottel) at paragraph 6.52: "'Remedial social statutes' and legislation of a paternal character favour a purposive interpretation and are said to be construed as widely and liberally as can fairly be done within the constitutional limits of the courts' interpretive role. This formula has been repeated in a number of cases [citations at fn. 82 p.179]…Remedial social statutes are enactments which seek to put right a social wrong and provide some means to achieve a particular social result."*

Accordingly, the provisions of the 2000 Act should be given a liberal and purposive interpretation in accordance with the principles set out above and as enunciated by Walsh J. in the case of ***Bank of Ireland v. Purcell***.[9] Borrowing from the words of McGuinness J. in ***Western Health Board v. KM***,[10] a remedial social statute should be approached in a purposive manner and should be construed as widely and liberally as fairly can be done in furtherance of the aim of the legislation, in this instance the promotion of real equality in employment and

[8] [2015] IEHC 419
[9] [1989] I.R. 327
[10] [2002] 2 IR 493

the prohibition on discrimination. Addressing provisions of the Race Relations Act, 1996 in ***Anyanwu v South Bank Student Union***[11] Lord Bingham observed:

> "*2. Section 33(1) is to be read in its context, as a provision in an Act passed to remedy the "very great evil" of racial discrimination (as recognised by Templeman LJ in Savjani v Inland Revenue Comrs [1981] QB 458 , 466–467), and it must be construed purposively (see Jones v Tower Boot Co Ltd* [1997] ICR 254 *, 261–262, per Waite LJ).*"

The interpretation adopted by the Courts below is not consistent with this approach to statutory interpretation. It is recalled that the Act also gives effect through legislation to constitutional equality norms (Articles 40.1 and/or 40.3) and rights to equality enshrined in the European Convention on Human Rights (Article 14), both of which also extend the right to equality to encompass the provision of education, and to the protection of the privacy and dignity of the person.

It is well established that the correct approach to take to the interpretation of statutory provisions is to apply them in light of the requirements of the Constitution and/or the Convention. As Keane J. (as he then was) said in the case of ***The Director of Public Prosecutions (Houlihan) v. P.G.***,[12] where he stated at p. 291 with regard to certain provisions of the Children Act, 1908:-

> *"At the same time, as was properly said in the course of argument, they must be applied in the light of the Constitution and, to the extent that it can be done without violence to the language of the enactment, in a manner which reflects the reality of life today."*

The reality of life today, of course, is that there are external pressures from the EU and the Council of Europe to promote equal access to services and opportunities. Article 2 of the TEU, states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. The principle of non-discrimination is also enshrined in Article 10 TFEU. The EU is a signatory of the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) adopted on 13 December 2006, which in Article 7 promotes the rights of children with disabilities and rights of accessibility to services for disabled persons in Article 9 and which Convention Ireland intends to ratify after passing relevant mental capacity legislation. The European Commission's European Disability Strategy 2010-2020, adopted in 2010, builds on the UNCRPD and has as one of its' primary objectives making goods and services accessible to people with disabilities and removing barriers to equal participation The EU legal framework based on the Employment Equality Directive (2000/78/EC) provides protection against discrimination on the grounds of disability in employment, including access to employment, occupation and vocational training. It requires Member States to prohibit direct discrimination, indirect discrimination, harassment, victimization and instructions to

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[11] [2001] ICR 391

[12] [1996] 1 I.R. 281.

discriminate on grounds, *inter alia,* of disability.[13] In ***Mangold v. Helm***,[14] the ECJ referred to the source of anti-discrimination principles being found in various international instruments and the constitutional traditions common to member States and the Directive itself refers to international instruments. The implication of this is that the ratification of the CRPD by the EU must now be read into the Directive as the ECJ seeks to establish consistency between the CRPD and the existing body of EU law. Add to this the prohibition on discrimination in Article 21 of the Charter of Fundamental Freedoms and the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community protected under Article 26 of the Charter and it is clear that EU law requires expansive interpretation of the requirements of the 2000 Act if it is to be fit for purpose in transposing the requirements of EU law. In addition, it is recalled that the Courts have found it appropriate to regard to the UNCRPD in interpreting domestic law. This, for example in the case of ***MX v The HSE***,[15] Mr Justice MacMenamin examined the interpretative assistance that could be provided by the UNCRPD as follows:

> *"Should this Court then have reference to the UNCRPD if not as a rule, then at least as a guiding principle? The values in question here are in no sense contrary to any provision of the Constitution. The UN Convention affirms the contemporary existence of fundamental rights for persons with a mental disorder. Although the UN Convention itself is not part of our law, it can form a helpful reference point for the identification of "prevailing ideas and concepts", which are to be assessed in harmony with the constitutional requirements of what is "practicable" in mind."*

There is a growing awareness that there are different ways of learning and of demonstrating knowledge and accommodations are required in education and in the workplace to vindicate not just equality rights but also rights to bodily integrity and personal autonomy. To borrow again the words of Keane J in ***The Director of Public Prosecutions (Houlihan) v. P.G.*** , the "reality of life today", which includes the introduction of legislative reforming measures such as the Disability Act, 2005 and the Education for Persons with Special Educational Needs Act, 2004, weighs in favour of a broad, expansive interpretation of protections provided for under the 2000 Act.

Section 3 – Meaning of Less Favourable Treatment

The concept of less favourable treatment is central to the definition of discrimination under **Section 3** of the Act. Although the phrase "less favourable treatment" is not itself defined,

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[13] In 2008, on the basis of Article 19 of the TFEU, the Commission proposed an additional equal treatment directive to extending the existing EU anti-discrimination legal framework to areas outside the field of employment. The principle of equal treatment and non-discrimination on the grounds of disability is increasingly mainstreamed in EU secondary legislation. For example Regulation (EU) No. 1177/2010 concerning the rights of passengers travelling by sea and inland waterways requires carriers and terminal operates to establish, or have in place, non-discriminatory access conditions for disable persons and an analogous obligation is contained in Regulation (EU) No. 181/2011 concerning the rights of passengers in bus and coach transport.

[14] C-144/02, 22nd of November, 2002

[15] [2012], IEHC 491.

the fact that the prohibition on discrimination under **Section 5(1)** expressly excludes certain differences in treatment under **Section 5(2)(c), (d), (e), (f), (g), (h), (i)** and **(l)** suggests that other differences in treatment are *prima facie* discriminatory. In his ruling on **section 3** of the Act, the Circuit Court Judge indicated that he was prepared to accept that the Appellant was treated differently as a person with a disability when a notation was placed on her certificates. He also found as a matter of reality that such notations will only appear on the certificates of candidates with a disability such as dyslexia. He considered, therefore, that the sole issue which then arose for him was as to whether this amounts to "*less favourable*" treatment of the Appellant when contrasted with the comparator exam candidates, ie., exam candidates without the same disability. Although finding that the Appellant had been treated differently by reason of the insertion of a notation on her certificate, he concluded that different treatment is not synonymous with less favourable treatment and that she was not treated "less favourably" within the meaning of **section 3**. He states at p. 86 of his judgment:

> *"The objective of equality cannot be served by pretending that different things are the same. It seems to me that the object of equality is served by the prevention of discrimination, and by mandating and directing the taking of all reasonable steps to ensure that the fact of a disability does not prevent a disabled person from participating in all aspects of social, economic and educational life. It seems to me that these notations do not arise because of a disability per se, but because the policy is to notate in circumstances where the core element of a subject is exempted from examination. No notations take place in relation to a disabled candidate, where the consideration afforded to them does not involve the exemption of a core element of the subject.*
>
> *Therefore, in my view, it cannot be said that these notations arise solely because of the existence of a disability. Therefore, the difference in treatment does not appear to me to favour one comparator over the other on the grounds of disability, because it has been done out of a concern as to the integrity of the examination. I accept that the Department has a genuine concern as to the integrity of the examination. I think the integrity of the examination is not served by the failure to notate in relation to the case of a candidate who receives, what we refer to in a shorthand sense as "the Irish bonus". However, that fact does not seem to me to take away or effect my conclusion one way or the other, in relation to the particular system of notation and exemption, which has been impugned by the Claimants in this case.....*
>
> *Less favourable treatment connotes treatment that arises due to a preference, and a preference arising on the basis of a whim, a caprice, unreasonableness, bad faith, illogicality, irrationality, out of direct or indirect prejudice against the disabled. I cannot find any element of these types of things in the treatment afforded in this case. It seems to me that the system arose after a considered rational and reasonable process."*

The Circuit Judge erred in law in concluding that candidates who receive an exemption are treated differently but not less favourably from those who did not, by virtue of the consequent annotation of their certificate of results on the basis that "less favourable treatment" connotes treatment that arises due to a preference, and a preference arising on the basis of a whim, a

caprice, unreasonableness, bad faith, illogicality, irrationality, out of direct or indirect prejudice against the disabled.

In construing the protection available on the basis of "less favourable treatment" in these restrictive terms, the Circuit Judge did not apply the proper meaning of **section 3** of the Act to the facts before him. Nothing in **section 3** suggests that for treatment to be less favourable it must arise out of a preference, whim, caprice, unreasonableness, bad faith, illogicality or prejudice against an individual on one of the protected grounds. The nature of protection provided under section 3 is wide ranging. This is clear from the very wording of the section not least in that it is expressly stated that similar treatment can in certain instances constitute "less favourable treatment". Clearly, therefore, **section 3** is concerned to provide protection in relation to the potential impact or effect of the treatment on the individual rather than on the reason for the treatment. Thus what is important is the impact on a person falling within one of the discriminatory grounds rather than the motivation of the person providing the service. The test applied by the Circuit Court and seemingly affirmed by the High Court was seriously deficient in that it excluded any consideration of the nature of the law or the impact on the individuals concerned.

Although the Respondent argued before the High Court that the Circuit Judge's comments about bad faith were not material and were not determinative of his approach to the meaning of less favourable treatment, the High Court Judge in affirming the decision of the Circuit Court Judge did not expressly state what he understood to be the applicable test nor did he seek to distinguish his rationale from that of the Circuit Court in any way. On its face, therefore, the test as affirmed by the High Court limits the circumstances in which **section 3** of the Equal Status Act, 2000 provides protection to cases where it can be established that the less favourable treatment complained of arises from:

> "*preference arising on the basis of a whim, a caprice, unreasonableness, bad faith, illogicality, irrationality, out of direct or indirect prejudice against the disabled*."

The problem with standardized tests is that they assume that each student taking the test will read and indeed write in the same way but a student who has dyslexia cannot process words in the same way as other students. In applying standardized testing to a student with dyslexia, the Respondent insists on testing disability and not ability. Throughout this case the Appellant has relied on an extract from the Do No Harm - High Stakes Testing and Students with Learning Disabilities, (Disability Rights Advocates, California, 2001 at 9: www.dralegal.org) report which summarizes the position as follows:

> *"Test publishers often have not conducted adequate research on how accommodations affect test validity. As a result, test publishers label a number of accommodations as 'non-standard', or 'modifications' often because it is not clear how they affect test validity. Schools may withhold the benefits of doing well on a standardised exam from a student who uses a non-standard accommodation. However, penalising a student for using a non-standard accommodation is comparable to not allowing them to participate in the test at all. It is unfair and discriminatory to penalise a student with a disability for using a needed accommodation on an assessment simply*

because the test publisher has not conducted the necessary research about the effect of the particular accommodation on the test."

The standardized tests used by the Respondent have not been developed with the needs of the disabled student in mind. The purpose of reasonable accommodation is not to confer an advantage or to exempt a part of the examination. To make a standardized examination system such as the Leaving Certificate fair, the examination or the conditions in which the examination is taken must be adapted to the situation so that, in reality, the barrier to measuring the student's ability is removed or reduced. Were the accommodation properly effected, then there would be no need to annotate the results because the test results would properly measure ability. It is the Appellant's case that the need for annotation on the grounds advanced by the Respondent only exists if there has been no "reasonable accommodation" in the first instance.

Furthermore, placing a notation on an examination certificate perpetrates a whole new act of discrimination. The Appellant's certificate is defaced and her achievements demeaned. The Appellant is further discriminated against in that her right to privacy is not protected in like manner with other students. By annotating the certificate, the Respondent has caused a signal to be sent to the world at large that the she is disabled. As the evidence of Siobhan Stack starkly demonstrated, this has the potential to result in further discriminatory acts being taken and certainly, in the Appellant's case, exposed her to distress and humiliation because the presence of the notation placed others on enquiry as to its meaning and "outed" the Appellant's disability in a manner which also undermined the achievement of her result.

By adopting the notation system of "*reasonable accommodation*", the Respondent forced the Appellant to sit a standardized examination which it contends cannot properly measure her ability as the publication of the results would "conceal" the reality of the test result. To fail to provide an examination system which permits a disabled person's ability to be measured in comparison to others without reference to their disability is discriminatory. It then causes a notation to be inserted on the examination certificate to explain that the Appellant was not tested in various aspects of the subject, thereby suggesting that the result is not as meritorious as the result of a student obtaining the same overall grade but without the notation.

The Respondent contends that the Appellant opted to seek the accommodation, even with the notation and therefore cannot now complain about it. The Respondent's position in this regard neglects the fact that the accommodation is not an optional extra which the student can elect to use or not. The student needs the discriminatory accommodation so that she can have access to the examination, but this does not cure the accommodation of its discriminatory impact. No alternative form of accommodation was made available to the Appellant and she did not have the option of availing of a different form of accommodation (such as extra time) which would not have excluded any aspect of her papers from being assessed. The effect of the notation is to penalize the student for using non-standard accommodation on the presumption that so called "reasonable accommodation" (in the sense envisaged by the Respondent) somehow confers an unfair advantage on the disabled student rather than merely permitting the student to compete on a level playing pitch. If the effect of the accommodation were really to confer an unequal advantage then the accommodation in question is not "reasonable accommodation" within the meaning of the Equal Status Act, 2000. The student

is treated less favourably within the meaning of **section 3**, properly construed, by the insertion of the notation.

Section 4(1) - Reasonable Accommodation

Section 4(1) of the Act requires the Respondent to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service. The purpose of such reasonable accommodation in an examination context is not to confer an unequal advantage on a person with a disability (which seems implicit in the Respondent's understanding of her own scheme) but rather to require the adjustment of the modalities of the examination to enable ability to be accurately recorded and measured regardless of whether the student has a disability.

The Equality Tribunal has interpreted "reasonable accommodation" as requiring the giving of consideration to alternative means of providing access.[16] The failure to find or to consider an alternative to partial exemption plus notation as a means of assessing educational achievement in a language subject constitutes a failure to provide reasonable accommodation. The accommodation fails or is ineffective if notation remains necessary to ensure a level playing field. The provision of an ineffective accommodation amounts to a failure to provide reasonable accommodation.[17]

The Respondent contends that **section 4(1)** of the Act does not apply to educational services provided by him because they are exempted under **section 4(5)** (we address this claim, which is refuted, more fully below). On the basis that reliance on the exemption had not been very strongly put and on the basis that he could be incorrect in holding that in fact **section 4(1)** should not be considered, and in deference to the considerable evidence and arguments that were made in relation to this aspect of the case, the Circuit Court Judge nonetheless considered whether or not the system of notation in question falls foul of the provisions of **session 4(1)** and observed as follows:

> *"The concept of reasonableness in providing accommodation does not command the Minister to reach a standard of perfection, but rather leaves a measure of this discretion or appreciation in deciding how these obligations are to be discharged. That measure of discretion or appreciation has an echo in the language of the Education Act 1998. I believe that reasonableness implies that whatever decision is reached by the Minster, it must be based on the application of reason to the evidence and information available to those charged with devising a reasonable scheme of accommodation. Such a decision must not be at variance with reason and commonsense, and it should not be based on irrelevant considerations nor should it be directed to an improper purpose. The essence of the Claimants' attack on the system, devised by the Department in this context, is the fact that notations are coupled to the accommodations, which the Department are obliged to provide by the terms of Section 4(1). In other words, that the presence of the notations has the*

[16] See ***A Complainant v. Bus Eireann*** DEC-E2003-04.

[17] See ***A Motor Company v. A Worker*** EED026 where an ineffective accommodation was found to amount to a failure to provide a reasonable accommodation.

> *effect of depriving the accommodations provided of the "reasonable" quality provided by section 4(1) of the Act. In addition, they say that the requirements of the Act can only be met by providing accommodation in all cases, including those where exemptions are granted in relation to a core element, without any subsequent notation.*
>
> *Unfortunately, I cannot accede to this argument….I believe that the decision was based on a reasoned and reasonable process, wherein all of the arguments and evidence on both sides of the issue were canvassed."*

It is clear from the foregoing that in interpreting and applying the concept of "*reasonable accommodation*" within the meaning of the Equal Status Act, 2000, the Circuit Court Judge treated the concept of "reasonable" accommodation under the Act as equivalent to the standard of "reasonableness" as it applies to judicial review. This approach seems to have been also followed by the High Court. The application of this standard – which is regarded as rigorous in the context of judicial review – is wholly inappropriate in the context of a remedial social statute.

In the context of judicial review the standard of "reasonableness" is predicated on the administrative decision maker having a special expertise and skill in the area under decision (eg. a planning authority) so that a court should be reluctant to interfere with its decision on the facts or merits. Thus the margin of appreciation allowed to an administrative decision maker is broad. Instead a court should only interfere if there has been a clear error of law, a failure to consider relevant matters or a consideration of irrelevant matters or if the decision is manifestly unreasonable in being at variance with reason and common sense. Further, a statutorily appointed decision maker is usually impartial as regards a decision under challenge as it will not have had a vested interest in the outcome of the decision making process either way.

Both this standard and the purpose of this standard are completely divorced from the objectives of the Act, i.e. the promotion of equality between people, including persons with a disability, and completely divorced from the perspective of the individual to whom such accommodations are to be provided. Further there is no logical basis for treating every provider of goods and services as having a particular skill or expertise in equality matters when in fact the truth is that they will likely have no such experience. Equally, a service provider cannot be equated with an independent, statutorily appointed decision maker. The obligation to make reasonable accommodation represents at very least an inconvenience for the service provider. It is invariably simpler for a service provider only to provide services in a standard manner. Absent the statutory obligation, most service providers would not choose to make reasonable accommodation so as to enable persons with a disability to avail of their services.

Thus, a legal standard importing a considerable margin of appreciation appropriate for independent decision makers, is manifestly not what was intended by the Legislature in requiring service providers to make reasonable accommodation for disabled persons. In conflating the test for reasonableness in administrative decision making as a ground for judicial review with the substantive protection which requires that "reasonable

accommodation" be made for persons with disabilities, both the Circuit Court and the High Court in affirming the Court below, made a serious and substantial error of law.

The most worrying aspect of this conflation is that it is generally accepted as a matter of administrative law that it is extremely difficult, if not impossible, to establish that a decision is "unreasonable" by the application of an unreasonableness test. Effectively, the decision has to be one such that no other education authority could ever have reached it or one which is entirely unsupported by the evidence (even if the weight of the evidence all tends in the opposite direction). Were this indeed the test for establishing a breach of **section 4(1)** of the Act, it would be difficult if not impossible for any individual making a claim under the Act to establish that "reasonable accommodation" has not been provided once any accommodation at all has been provided by the entity against whom the claim is being made.

It is a very troubling consequence of the decision under appeal that this restrictive interpretation of "*reasonable accommodation*" becomes binding for all purposes at all levels of equality decision making. In essence, the interpretation adopted by the Courts below, renders the provision almost meaningless in terms of substantive protection. Yet the interpretation adopted appears entirely unsupported by authority and is not compatible with the social, reforming purpose of the Equality Act nor with the substantive requirements of EC law which the Act seeks to implement in the State. In this regard it is recalled that the Employment Equality Directive requires (article 5) that employers must provide reasonable accommodation for disabled persons to enable a person with a disability to have access to employment and advance within it. Article 5 of the Council Directive 2000/78/EC requires, within the context of employment and occupation, that: "*employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer*".[18] Similarly, the UN Convention on the Rights of Persons with Disabilities which the EU has ratified and which Ireland is expected to ratify shortly, provides for reasonable accommodation at Article 5(3). Article 5(3) requires State Parties to take all appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. The significance of Article 5(3) is that it clearly extends beyond the strict employment context to the education context.

Although there is no definition of what is meant by "reasonable" for the purpose of **section 4(1)**, it manifestly cannot bear the meaning contended for by the Respondent and adopted by the Circuit Court Judge and the High Court Judge in turn. **Section 4(1)** was intended to provide for something tangible and substantive in terms of service provision through the adaptation of facilities and the like and is not a mere restatement of when a decision may be challenged for unreasonableness because it is perverse or is not rationally based on the evidence. The word "reasonable" is used in an entirely different context and it requires to be interpreted in light of the particular statutory context in which it appears. Again, it is significant in this regard that it appears in remedial social legislation the purpose of which is to prohibit discrimination and promote equality. Further, it is important that this statutory

[18] See further in relation to the "duty to accommodate", Whittle, "The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective", 27 European Law Review (2002), p. 303

regime prohibits discrimination against a constitutional framework which adopts the protection of equality rights as a core constitutional value. The true meaning and effect of what is reasonable falls to be derived from core constitutional values and the requirements of domestic and international equality law and not from the fall-back position that a decision is determined to be "unreasonable" only in the sense of administrative law.

The Appellant has derived assistance as to the correct approach to the substantive protection available under **section 4(1)** from the approach of the Courts in the UK to the duty under the Disability Discrimination Act, 1995 (and, more recently, the Equality Act, 2010) to make "reasonable adjustments". The duty to make "reasonable adjustments" imposes positive obligations on employers, service providers, public authorities, and others to take action to modify tangible and intangible barriers to equal participation for disabled people in those areas of life covered by the Disability Discrimination Act. Although the language used is slightly different these differences are marginal and the context in which it is used is identical.

The proper interpretation of the requirement to make "reasonable adjustments" in the delivery of goods and services has been the subject of judicial scrutiny in a number of cases in the UK. In ***Roads v. Central Trains,***[19] Lord Justice Sedley stated:

> *"...the policy of the DDA is not a minimalist policy of simply ensuring that some access is available to the disabled: it is, so far as reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public (paragraph 30)"*

This sets a high threshold for service providers to reach in making their services accessible. It requires the service provider to show that the adjustments they have provided make the service as accessible as possible by disabled people as it is by for non-disabled people. Similarly, in ***Acrhibald v. Fife Council*** [2004] UKHL 32, the House of Lords considered the requirement to make reasonable adjustments under the DDA, 1995. Baroness Hale of Richmond stated that the duty under the Act was:

> *"to take such steps as it is reasonable in all the circumstances of the case for the employer to have to take...to the extent that the duty to make reasonable adjustments requires it, the employer is not only permitted but obliged to treat a disabled person more favourably than others" (paras 65-68).*

In ***Royal Bank of Scotland v Ashton***,[20] Langstaff J said this:

> *"Thus, so far as reasonable adjustment is concerned, the focus of the Tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a*

[19] [2004] EWCA Civ. 1541
[20] [2011] ICR 632.

> *reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."*

More recently, the EAT concluded in ***Perry Motors Sales Limited v. Evans***[21] that:

> *"The duty to make reasonable adjustments pursuant to section 20 of the Equality Act 2010 arises where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The duty is then to take such steps as are reasonable to avoid the disadvantage."*

From the foregoing, it is clear that the duty to make reasonable adjustments under equivalent UK legislation has been interpreted expansively to promote maximum accessibility. Under UK law, it is not simply open to the service provider to make such accommodations but is required. If equivalent provision relating to reasonable accommodation is to mean anything under our domestic code, it must be construed not as permitting a service provider to choose from a range of rational (as in not perverse) options but instead as creating a duty to proactively and positively promote accessibility.

Further, it may assist the Court in interpreting the requirements of "reasonable accommodation" under **section 4** of the Act to consider the meaning which has been given to this expression under European law. The EU Directive establishing a general framework for equal treatment in employment and occupation of 2000 (Directive 2000/78/EC) contains a provision (article 5) which obliges employers to take appropriate measures to enable a person with disabilities to participate in employment or training, unless such measures would impose a disproportionate burden on the employer. An attempt is made at paragraph 21 of the Preamble to the Directive to flesh out what "reasonableness" requires in the following terms:

> *"To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance."*

Waddington argues on the basis of the foregoing that if an accommodation is theoretically possible, the Directive only permits a restraint of the duty to accommodate if the making of the accommodation would impose a "*disproportionate burden on the employer"*.[22] It appears clear that this concept builds on a concept of "*substantive equality*" which not only demands

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[21] [2014] UKEAT 0275_14_1711

[22] See Lisa Waddington, Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice (Brussels: E.U. Network of Experts on Disability Discrimination, 2004). See also extracts from Bamforth. Malik, O'Cinneide, Discrimination Law: Theory and Context (Thomson: Sweet & Maxwell)

abstention from discrimination, but implies an obligation to take differences into account and to take positive measures to bring about equality.[23] Goldsmith summarizes as follows:

> *"we can say that the obligation to provide a reasonable accommodation is, as such not revolutionary, but very much in line with two interrelated doctrines of substantive equality and positive obligations".*

Similarly, the Convention on the Rights of Persons with Disabilities (adopted on 13th of December, 2006) includes an obligation to provide reasonable accommodation in the concept of discrimination on the basis of disability and defines reasonable accommodation as:

> *"necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms"(Article 2).*

The focus in European and international law on a disproportionate burden on the employer is interesting because it suggests the balancing exercise is limited to assessing whether the measures required to facilitate access are unduly onerous for the employer to provide. In this case the Respondent has never suggested that the provision of accommodation for dyslexic students is a disproportionate burden. The notation of certificates does not serve to reduce or ameliorate the burden on the Respondent - if anything it adds to it by requiring that the certificates of certain students be identified and treated differently to others. Instead the justification proffered for the notation is entirely unrelated to any burden that might arise from having to make reasonable accommodation.

What is abundantly clear from the foregoing is that if "reasonable accommodation" for the purpose of Irish anti-discrimination legislation is interpreted in a manner which gives effect to the requirements of EU law and in a manner consistent with international law protections, then it must have a substantive meaning which promotes equality and cannot merely be construed as requiring that there is a rational basis for the decision taken as the Learned Trial Judge in this case finds.

It is helpful to note that the issue of the link between the requirements of administrative law and the requirements of equality law has in fact been considered elsewhere. In ***Multani v. Commission Scolaire Marguerite-Bourgeoys*** [2006] 1 S.C.R. 256 (a case concerning a prohibition against wearing a kirpan by a Sikh child to school), the Canadian Supreme Court were called upon to review the school's policy as against the equality provisions of the Canadian Charter. An issue in the proceedings was whether the appropriate approach was to review the decision having regard to the requirements of administrative law or the requirements of the Canadian Charter. By a majority, the Court found that in the case at bar, it was the compliance of the commissioners' decision with the requirements of the *Canadian Charter* that was central to the dispute, not the decision's validity from the point of view of administrative law. Since the complaint was based entirely on freedom of religion, the Supreme Court found (by a majority) that the Court of Appeal had erred in applying the

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[23] See Goldsmith, Reasonable Accommodation in EU Equality Law in a Broader Perspective (2007), ERA Forum 8:39-48 at 40

reasonableness standard to its constitutional analysis. The administrative law standard of review was found not to be relevant.

There are strong resonances between ***Multani*** and the challenge made in this appeal to the reasoning of the Circuit Court as affirmed by the High Court. In this case, the Appellant never challenged the competence of the Minister to make the decision which is challenged from an administrative law standpoint. What is in issue is the protection against discrimination provided for under the Equality Acts and not the reviewability of the decision on administrative law grounds. In her judgement in ***Multani***, Charron J. had this to say:

> *"... the fact that an issue relating to constitutional rights is raised in an administrative context does not mean that the constitutional law standards must be dissolved into the administrative law standards. The rights and freedoms guaranteed by the Canadian Charter establish a minimum constitutional protection that must be taken into account by the legislature and by every person or body subject to the Canadian Charter. The role of constitutional law is therefore to define the scope of the protection of these rights and freedoms. An infringement of a protected right will be found to..... Since, as I will explain below, it is the compliance of the commissioners' decision with the requirements of the Canadian Charter that is central to this appeal, it is my opinion that the Court of Appeal's analysis of the standard of review was inadequate and that it leads to an erroneous conclusion."*

More recently, the Canadian Courts have considered the requirements of "*reasonable accommodation*" in ***Jodhan v. AG for Canada*** [2011] 2 FCR 355. There the Court found that that substantive equality, as guaranteed by subsection 15(1) of the Canadian Charter, often requires specifically distinguishing disabled from non-disabled individuals. "*Reasonable accommodation*", a term the Court described as "*used in relevant case law*" was said to refer to the positive steps or "*special measures*" that a government must take to ensure the substantive equality of disabled individuals guaranteed to them by subsection 15(1) of the Charter. The idea of "*reasonable accommodation*" encompasses two elements: the first is the demand that section 15 makes for "positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public"; the second is associated with the need to limit the respondent's obligation to accommodate to only those accommodations that are "*reasonable*". "*Reasonable*" in this context has been interpreted to mean to the point of "undue hardship". In a section 15 inquiry, the first step must be to determine what reasonable accommodations would be necessary to ensure substantive equality. This, it is submitted, is the approach which ought to have been adopted in this case.

Whether the Minister is Exempt – Section 4(5)

The Circuit Court went on to find that **section 4(5)** of the Equal Status Act, 2000 operates to exempt the Minster for Education and Science from the scope of the Act in relation to the exercise of her discretion under **section 7(1)** of the Education Act, 1998 in providing for students with a disability or other special educational needs from the operation of **section 4(1)** of the Act. Recalling the interpretation of "support services" provided for in **section 2** of the 1998 Act, the implications of the decision of the Courts below on **Section 4(5)** is that it effectively exempts the provision or lack of provision of all and any educational services

under the control of the Respondent to persons with a disability from the ambit of the Act. It would follow that a failure to provide basic equipment necessary for a child to access learning such as a hearing aid or a braille machine could not be challenged as a breach of a duty to provide reasonable accommodation.

Although de Valera J makes no express finding on the issue of whether the Minister is exempted from the obligations of **Section 4(1)** by virtue of **Section 4(5),** a consequence of his decision affirming the decision of the Circuit Court generally is that the position of the Circuit Court judge to the effect that **section 4(5)** operates to exempt measures directed towards the students with disabilities from the scope of the Act now represents the jurisprudence of the High Court. This finding dramatically curtails the effectiveness of the Equal Status Act, 2000 in protecting against discrimination in education and it is contended represents an error of law in interpreting the meaning and scope of **section 4(5)** of the Act. It is surely unthinkable that a child who requires a basic piece of equipment to access educational facilities available to other non-disabled students would be excluded from the remit of the Act, including the specialised Tribunal established to determine such complaints and the remedies that follow under the Act. This could not have been the intention of the Legislature when enacting **section 4(5)** and indeed would be entirely inconsistent with the stated purpose of the Act.

A clear question of statutory interpretation arises as to whether **Section 4(5)** should be read as an exemption for the Minister from the requirement to provide reasonable accommodation., It would be very surprising to see the Minister exempted from the provisions of the Equal Status Act in terms of providing reasonable accommodation to disabled students and certainly were this the intention of **section 4(5)** of the Act one would expect to see the exemption carefully set out in precise terms. It must be recalled that the Act provides in very specific terms for a prohibition on discrimination by educational establishments making it all the more difficult to understand, from the perspective of the scheme and purpose of the Act, why the Minister would be exempt in terms of the provision of support services. It is noteworthy in this regard that while the Circuit and High Courts have interpreted **section 4(5)** as exempting the Minister from the scope of the Act, the section itself does not speak in terms of an exemption nor of the provisions of **Section 4(1)** not applying to the Minister in exercising the functions identified. Instead it states that it is "without prejudice" to those functions.

The interpretation of the section favoured by the Courts below represents such a radical curtailment of the scope of protections provided for in **section 4(5**), which was intended as a reforming measure designed to promote equality, as to require clear and unambiguous language. However, there is nothing in the Act to suggest that services provided by the Respondent are to be held immune from complaint while those of other Ministers are not and nothing in the Act requires an interpretation of **section 4(5)** which exempts support services funded by the Respondent from the remit of the Act. **Section 4(5)** bears the alternative, and surely more likely, interpretation that **section 4(5)** should not be interpreted as diluting the separate provision for support services contained in **section 7(2)(a)** of the Education Act, 1998.

Properly construed s**.7(2)(a)** of the Education Act, 1998 enables and mandates the provision of support services to persons with disabilities. It creates a positive duty on the Respondent. The fact that **section 4(5)** is expressed to be "*without prejudice*" to **section 7(2)(a)** is intended, it is submitted, to reflect that **section 4(5)** does not dilute the duties contained in

section 7(2)(a). In this regard, it is noted that there is no *"greater than nominal cost*" defence available under **section 7(2)(a)** as there is under **section 4** and accordingly, the duty to provide support services for disabled persons under section **7(2)(a)** is arguably couched in stronger terms than the duty to provide reasonable accommodation under the 2000 Act.

The intention of the Legislature in stating in **section 4(5)** that the reasonable accommodation provision is "without prejudice" to the provisions of section **7(2)(a)** was to ensure that the protection available under section **7(2)(a)** for enforcing rights to educational support services ought not be rendered less effective by the defence of "greater than nominal costs" available under **section 4** of the Act in a manner which would weaken the positive duties on the Respondent under **section 7** of the 1998 Act. That this is the true and proper interpretation of **section 4(5)** is borne out by the fact that it is said to be without prejudice only to **section 7(2)(a)** whereas **section 7** contains many other provisions relating to educational service provision including monitoring and assessment of same over and above the particular service provision identified at **section 7(2)(a).** Indeed, **section 7(1)** of the Education Act, 1998, which is clearly not captured by **section 4(5)** of the 2000 Act provides that it is a function of the Respondent to ensure that there is made available to each person resident in the State, including a person with a disability or who has other special educational needs, support services and a level and quality of education appropriate to meeting the needs and abilities of that person and to plan and co-ordinate such support services. Surely if **section 4(5)** were intended to have the effect contended for by the Respondent and endorsed by the Courts below, it would have referred not only to **section 7(2)(a)** but also to **section 7(1)(a)** and **(c).** It bears emphasis that "assessment" is expressly a function mentioned again in **section 7** and so construing section **7(2)(a)** as an exemption would be ineffective in removing assessment from the remit of the 2000 Act were this the real statutory intent of **section 4(5).**

Our submission that the interpretation of **section 4(5)** of the Act favoured by the Courts below is wrong in law is supported by the contents of **sections 9(a)** and **15(2)(g)** of the Education Act, 1998 which on the logic of the Respondent's submission are also "exempted" from **section 4** of the 2000 Act. **Section 9(a)** of the Education Act, 1998 refers to the functions of schools in identifying and providing for the needs of students with disabilities and with special needs. **Section 9(a)** complements the duty to provide reasonable accommodation. With respect to the Respondent and to the Courts below, the Legislature cannot have intended that **section 4(5**) would operate to dis-apply the duty to provide reasonable accommodation to provision for educational needs of children with special needs and disabilities, when the Education Act expressly identifies as a function of the Respondent the making of proper provision for such students. The only logical conclusion is that the reference to **section 9(a)** of the Education Act, 1998 in **section 4(5)** of the Act was intended to underpin rather than to undermine protection available in respect of the provision of education services and to strengthen that protection. Similarly, **Section 15(2)(g)** sets out that it is a function of school Boards to use the resources provided to the school from monies provided by the Oireachtas to make reasonable provision and accommodation for students with a disability or other special educational needs, including, where necessary, alteration of buildings and provision of appropriate equipment. This provision of the Education Act, 1998 falls to be construed together with **section 4(1)** of the Act as strengthening the requirement to provide "reasonable accommodation" rather than as undermining it by removing the Respondent altogether from the remit of the 2000 Act.

Consequently the reference to "*without prejudice*" in **section 4(5)**, interpreted in line with the purpose of the Act, is intended to ensure that the functions or duties of the Minister under **Sections 7(2)(a), 9(a)** and **15(2)(g)** of the Education Act, 1998 are not diluted by the cost provisions of **Section 4(2)**. This enables an interpretation to be given to both provisions (i.e. **Section 4** of the Equal Status Act and **Section 7** of the Education Act in relation to support services including assessment of examinations) which is consistent with the object and intent of the legislation in which those provisions appear. Having regard to other legislative reforming measures, such as the Disability Act, 2005 and the Education for Persons with Special Educational Needs Act, 2004, it makes no sense to interpret **section 4(5)** of the Act in a manner which exempts education services from the remit of the duty to provide reasonable accommodation under Irish law. This is particularly so in light of the close nexus between examination assessment and access to employment and the requirement to provide reasonable accommodation under the Employment Equality Directive.

Whether Section 5(2)(h) of the Act operates to Exempt Notation

In relation to **section 5(1)** of the Act of 2000, the Circuit Court Judge (affirmed by the High Court) concluded, in the light of his findings in relation to **section 3** and **section 4**, that there was no breach of the prohibition on discrimination contained in **Section 5**. This approach, it is submitted, is tainted by the failure to approach the earlier questions correctly. Notwithstanding these findings however he proceeded to posit that even if he was wrong in his view that there was no breach, the system adopted by the Respondent would be saved by an application of the provision in **section 5(2)(h)**, which he considered exempted **sub-section (5)(1)** from application to differences in treatment, provided for the principal purpose of promoting a *bona fide* purpose in a *bona fide* manner the special interests of a category of persons. In so deciding, he reversed the findings of the Equality Officer on this point.

In effect, the Courts below found that a provision designed to allow differential treatment to promote the special interests of a category of persons (who are presumably normally likely to be the subject of discrimination) could be relied upon to discriminate against the very category of persons whose interests the action was designed to promote. There is an inherent illogicality in this conclusion. In circumstances where measures under European Law, such as the Employment Equality Directive, permit positive action in the form of specific measures to prevent or compensate for disadvantages linked to disability, it is seriously questionable whether the approach of the lower courts in this jurisdiction would be considered compatible with the requirements of EC law. The more straightforward reading of the provision would be to the effect that in cases where positive discrimination occurs for a *bona fide* purpose, those who do not fall into the category benefitting cannot complain of discrimination.

Accordingly, the proper application of this section, it is submitted, would permit the Respondent to provide an accommodation without a notation because this would be special treatment designed to promote the special interests of a category of people in a *bona* fide manner. The insertion of the notation does not promote the special interests of a category of person. The Respondent argues that it does because without the notation the accommodation could not be provided but this is to mischaracterize the issue in this case. It is not the accommodation which is challenged but the notation and the fact that one is not available without the other. The whole thrust of the Appellant's case was that she needed the waiver in order to access the examination (noting that there were no other accommodations available to

her) but that what is required is a waiver without a notation and the inclusion of the notation is discriminatory. It is the waiver which benefits the students (and therefore is covered by section **5(2)(h))** and not the notation. The notation provides no benefit and is not a preferential treatment which **section 5(2)(h)** was designed to exempt from the application of **section 5(1).**

5. CONCLUSION

This Court is asked to confirm that the scope of protection available under **section 3** of the Act should be construed as protecting not only against less favourable treatment which is motivated by "improper" considerations but also as protecting against the effect or impact of a policy, however well-meaning or intentioned.

This Court is also asked to find that the protection provided for under **section 4(1)** of the Act is substantive and cannot properly be equated with the requirements of reasonableness in an administrative law context but derives more from the principles of constitutional law and the duty to vindicate fundamental rights and to protect against unjust attack.

Furthermore, we urge this Court to find that **section 4(5)** of the Act, interpreted in line with the purpose of the Act, is intended to ensure that the functions or duties of the Minister under **Section 7(2)(a)** of the **Education Act** are not diluted by the cost provisions of **Section 4(2)** and does not have the effect of exempting the Respondent from the requirement to provide reasonable accommodation.

Finally, we ask this Court to read **section 5(2)(h)** of the Act as having the effect that in cases where positive discrimination occurs for a *bona fide* purpose, those who do not fall into the category benefitting cannot complain of discrimination.

In conclusion, it is submitted that had the correct approach to the interpretation and application of the relevant provisions of the Act been taken in the Courts below, the decision on the facts established in evidence and on the law might well have been different and therefore should not be allowed to stand.

SIOBHAN PHELAN SC

NUALA BUTLER SC

8 December 2015