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Stokes v Christian Brothers High School:
An exercise in splendid isolationism?

Shivaun Quinlivan*

1. Introduction

This article will examine the case of *Stokes v Christian Brothers High School Clonmel*.¹ The particular focus of the article is to question the failure to assess the prohibition on indirect discrimination within the overarching context of our European obligations, particularly our obligations in relation to the Racial Origin Directive² and the Framework Employment Directive.³ Prior to discussing the *Stokes case* the article provides a brief overview of the jurisprudence on indirect discrimination particularly as applied in the context of sex discrimination. To a large extent the Court of Justice of the European Union (CJEU) has fashioned the parameters of the concept which first received legislative recognition in the Burden of Proof Directive.⁴ By necessity the evidential barrier developed in respect of gender discrimination had to be altered on the introduction of Article 19 Treaty on the Functioning of the European Union (TFEU) (ex Article 13 Treaty Establishing European Community (TEC)), which broadened the prohibited grounds of discrimination to include sexual orientation, religion or belief, disability, racial and ethnic origin and age. Traditionally the CJEU relied heavily on the use of statistical data to show a disparate impact. It is unlikely that those same statistics exist or can be collated in respect of grounds such as sexual orientation or racial origin. The Article 19 TFEU Directives introduced a new definition of indirect discrimination with a lower evidential barrier and, more fundamentally, one that is not reliant exclusively on statistical data. The Equal Status Acts 2000-2014 incorporated this new definition of indirect discrimination into Irish law.

Indirect discrimination is a notoriously complex concept and one that is not without its difficulties. The very nature of the concept is riddled with contradictions. The identifiable strength of indirect discrimination is its willingness to address systemic or structural discrimination, but then it only guarantees an individual right. Thus the individual litigant

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¹ *Mary Stokes (on behalf of her son John Stokes) v Christian Brothers' High School, Clonmel* [DEC-S2010-56]; *Christian Brothers Clonmel v Stokes* [2011] IECC 1; *Stokes v Christian Brothers High School Clonmel* [2012], [2015] IESC 13; See also, Mel Cousins, 'Education and the Equal Status Acts: Stokes v Christian Brothers High School Clonmel' (2015) 38 DULJ 157 which was published after this article was submitted for publication. Both articles address the same case.

² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; See generally on these directives Sandra Fredman, 'Equality: A New Generation?' (2001) 30 *Industrial Law Journal* 145; Mark Bell, *Anti-Discrimination Law and the European Union* (OUP 2002); Richard Whittle, 'The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Rights Perspective' (2002) 27 *European Law Review* 303; Gabriel N Toggenburg, 'The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe' (2001) 1 *European Yearbook of Minority Issues Online* 231.

⁴ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1998] OJ L14/6.

may highlight systemic discrimination on the grounds of gender,⁵ ethnic origin,⁶ or religion⁷ but the court response will be individualistic by its nature. Schiek contends that we have overburdened the prohibition of indirect discrimination ‘with the expectation of achieving all the substantive aims of discrimination law and policy at large’.⁸ In effect an indirect discrimination case highlights the structural nature of discrimination but it cannot bring about the necessary change to tackle that identified structural discrimination. However, identifying structural discrimination may well assist in dismantling such discriminatory practices. While there is this fundamental problem at the heart of the concept, it is by no means the only problem associated with this concept. A more practical problem relates to the failure of the Irish superior courts to consider any analysis of this concept within the context of our European obligations primarily under the European Union and to a lesser extent under the European Convention on Human Rights.

2. Indirect Discrimination

2.1 *History of Indirect Discrimination*

From the outset the European Communities sought to prohibit indirect discrimination in their equality directives. The Equal Treatment Directive of 1976⁹ provided at Article 2 that:

For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

This Directive failed to define indirect discrimination and consequently the CJEU ultimately determined the contours of this concept on a case-by-case basis. The seminal decision is that of *Bilka-Kaufhaus*¹⁰ which established a formulation for indirect discrimination that has endured with some minor modifications. In this action the defendant, a department store, excluded part-time employees from its occupational pension scheme, which affected a far greater number of women than men. The CJEU held that there are two elements to an indirect discrimination case. First, an apparently neutral provision had a disparate impact on women workers. Second, such an action would be discriminatory unless it was capable of being objectively justified by factors that are unrelated to a discriminatory ground. The CJEU in *Bilka-Kaufhaus* introduced a three part test to assess whether an indirectly discriminatory action is capable of being

⁵ *Sheehy Skeffington v National University of Ireland Galway* DEC-E2014–78.

⁶ *Oršuš and Others v Croatia* App no 15766/03 (ECtHR, 16 March 2010); *Hornáth and Kiss v Hungary* App no 11146/11 (ECtHR, 29 April 2013); *Sampanis v Greece* App no 32526/05 (ECtHR, 5 June 2008); *DH and Others v The Czech Republic* App no 57325/00 (ECtHR, 13 November 2007).

⁷ *Thlimmenos v Greece* App no 34369/97 (ECtHR, 6 April 2000).

⁸ Dagmar Schiek, Lisa Waddington, Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart 2007) vol 4, 333.

⁹ Council Directive 76/207/EEC of 9 February 1976 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 [1976] OJ L39/40.

¹⁰ Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607.

objectively justified, namely: (1) whether the measure taken by the employer corresponds to a real need on the part of the undertaking, (2) is appropriate with a view to achieving the objective in question, (3) and is necessary to that end.¹¹ This definition received legislative recognition in the Burden of Proof Directive in 1997.¹² Article 2(2) provides:

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

The necessity to show a disparate impact on a protected group has proven difficult. The Directive states that such disadvantage must impact a *substantially higher* proportion of people of a particular sex to establish indirect discrimination. Initially much of the case law on indirect discrimination related to the position of part-time workers who were denied a variety of employment benefits as a result of being a part-time worker. As the evidence indicated in a number of cases that women were much more likely to be part-time workers, consequently there was relatively little analysis of the requirement necessary to establish what amounts to a disparate impact.¹³ Commentators have suggested that in order to establish a case of indirect discrimination ‘probing factual analysis and in particular, recourse to detailed statistical analysis’¹⁴ is necessary. It is evident that the use of statistics is decisive in the CJEU’s approach to indirect discrimination on the grounds of sex.¹⁵ While reference is made to the necessity for statistical evidence, the CJEU do not appear to have set any particular threshold to establish that indirect discrimination has in fact occurred. Advocate General Léger addressed this point in the *Nolte* case and opined that:

In order to be presumed discriminatory, the measure must affect ‘a far greater number of women than men’¹⁶ or ‘a considerably lower percentage of men than of women’¹⁷ or ‘far more women than men’.¹⁸

Consequently, the proportion of women affected by the measure must be particularly marked. Thus, in the judgment in *Rinner-Kühn*, the Court inferred the existence of a discriminatory situation where the percentage of

¹¹ *ibid* para 37.

¹² Dir 97/80/EC (n4).

¹³ In *Schönheit v Stadt Frankfurt am Main and Silvia Becker v Land Hessen Joined Cases C-4/02 and C-5/02* [2003] ECR ECJ I– 12575 it was established that 87.9% of part time employees were women. Similarly in *Gerster v Freistaat Bayern, Case C-1/95* [1997] ECR I– 5253 (ECJ) 87% of part time workers were women.

¹⁴ Mary Finlay, ‘Indirect Discrimination and the Article 13 Directives’ in Cathryn Costello and Eilis Barry (eds), *Equality in Diversity: The New Equality Directives* (Irish Centre for European Law 2003) vol 29, 138.

¹⁵ For a detailed discussion of this, see Dagmar Schiek and others, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Pub 2007) vol 4, 323–475.

¹⁶ Case C-171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG* [1989] ECR 2743.

¹⁷ Case C-184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297; Case C-33/89 *Kowalska v Freie und Hansestadt Hamburg* [1990] ECR I-2591.

¹⁸ Case C-343/92 *De Weerd, née Roks, and Others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Ors* [1994] ECR I-571.

women was 89%. In this instance, *per se* the figure of 60% ... would probably be quite insufficient to infer the existence of discrimination.¹⁹

The emphasis in the law on demonstrating that the relevant proportion of people impacted is *substantially higher* than those not adversely impacted lends itself to the production of statistical data to support a claim of indirect discrimination. This seems to be the logical conclusion one must come to when assessing the case law on indirect discrimination as it applies to sex.

Collecting statistical evidence on the basis of sex is relatively straight forward, but gathering such evidence for other protected grounds is impractical at best and probably impossible in some contexts.²⁰ The introduction of Article 19 TFEU (ex Article 13 TEC) provided the legal basis for the introduction of legislation to prohibit discrimination on grounds other than sex. The European Union introduced two new Directives prohibiting discrimination on these new grounds, the Racial Origin Directive²¹ and the Framework Employment Directive.²² The new protected grounds include racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2.2 'New' Directives

Both the Framework Employment Directive and the Racial Origin Directive prohibit indirect discrimination in broadly similar language. Article 2(2) of the Racial Origin Directive states:

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.²³

Traditionally, as is evident from both the case law of the CJEU and the Burden of Proof Directive, the requirement was to prove disadvantage for 'a substantially higher proportion' of people from a protected group. The new prohibition has arguably lowered that evidential barrier requiring instead that a 'particular disadvantage' be

¹⁹ Case C-317/93 *Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-4625, Opinion of AG Léger, paras 57–58.

²⁰ For a discussion of this as it applies to the ground of sexual orientation, see Mark Bell 'Equality Dialogues: Comparing the Framework Directive with the Regulation of Sexual Orientation Discrimination in Ireland' in Costello and Barry (n14) 330.

²¹ Dir 2000/43/EC (n2).

²² Dir 2000/78/EC (n3).

²³ *ibid* art 2(2)(b) provides:

[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

established. Schiek argued that ‘this difference was introduced in order to avoid the necessity to establish statistical evidence, especially for sensitive areas such as sexual orientation or race’.²⁴ Tobler also suggests that statistical data is not necessary to prove indirect discrimination under either the Racial Origin Directive or the Framework Employment Directive and notes that ‘in practice identification of a precise level of disparate impact will not be necessary where no statistical proof of such an effect is required’.²⁵ Instead of statistical data it is necessary to demonstrate disadvantage by individual members of a protected group attributable to membership of such a group. Tobler suggests, for example, that an employment rule requiring all staff to be clean shaved would disadvantage members of certain religions such as Sikhs, as male Sikhs do not shave. Thus, she contends that the requirement raises a presumption of indirect discrimination on the grounds of religion; this requirement may of course be capable of objective justification. While there is clear evidence of a move away from exclusive reliance on statistical data, the Racial Origin and Framework Employment Directives do not prohibit its use as is evident by Recital 15 of the preambles to the Directives.²⁶

2.3 *Equal Status Acts 2000-2014*

Section 3(1)(c) of the Equal Status Acts 2000-2014 was introduced by section 48 of the Equality Act of 2004. The Equality Act of 2004 was introduced to amend both the Employment Equality Act 1998 and the Equal Status Act 2000 to ensure that those Acts complied with the Racial Origins Directive and the Framework Employment Directive. Section 3(1)(c) of the Equal Status Acts 2000-2014 now states that discrimination shall be taken to occur *inter alia*:

where an apparently neutral provision puts a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

It is apparent from the wording of this provision that the definition of indirect discrimination contained in the Equal Status Acts is very clearly based on the definitions within the European Directives.²⁷ As the Equal Status Act definition was introduced to comply with our European requirements it would seem logical for the Irish Courts to be guided by the jurisprudence of the CJEU in their interpretation of this provision.

It is evident that it will still be possible to establish disparate impact by relying on statistical data. What is the position where such statistical data is either not available or

²⁴ Schiek and others (n8) 359.

²⁵ Christa Tobler, ‘Limits and Potential of the Concept of Indirect Discrimination’ Anti-discrimination Thematic Reports (European Network of Legal Experts in the Non-discrimination Field, 12 October 2008) 30.

²⁶ Dir 2000/78/EC (n3) rec 15 and Dir 2000/43/EC (n2) rec 15 state:

The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.

²⁷ See also, Judy Walsh, *Equal Status Acts 2000-2011 Discrimination in the Provision of Goods and Services* (Blackhall Publishing 2012) 154–56 on this point.

readily available? Additionally what other form of evidence will help to establish a ‘particular disadvantage’? This issue was central in the *Stokes* case.²⁸

3 *Stokes v Christian Brothers High School Clonmel*

3.1 *Facts and Background*

In the case of *Stokes v Christian Brothers High School Clonmel*,²⁹ the complainant was a member of the Traveller community suing on behalf of her son, who attended the local primary school and applied for admission to Clonmel Christian Brothers High School. The school was oversubscribed and had established selection criteria for admittance. One of the criteria gave priority to a boy ‘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’. The applicant could not satisfy the sibling requirement as he was the oldest child in the family, nor could he satisfy the parental link as his father, in common with most Travellers of his generation, had not attended this or any secondary school. The school policy, at that time, was that where places remained after those who complied with the criteria were granted a place, the remaining school applicants were offered places on the basis of a lottery. The applicant was not successful in the lottery and alleged that the selection criteria for admission adopted by the School were indirectly discriminatory to members of the Traveller community. In effect, he alleged that the selection criteria included an apparently neutral provision that operated to the particular disadvantage of the applicant as a member of the Traveller community given that most Travellers in previous generations did not attend second level schools.

3.2 *Equality Tribunal*

The applicant initially succeeded in the Equality Tribunal.³⁰ The Equality Tribunal accepted that the operation of the policy to favour sons of past students disadvantaged Travellers more than non-Travellers. The Tribunal then held that it was then necessary to establish whether the complainant was actually put at a particular disadvantage. In order to establish a particular disadvantage the Tribunal assessed the applicants chances of securing a school place applying the “parent rule” and then what his chance were, were the rule not in place. Where the rule was applied the applicant had a 55 per cent chance of securing a school place, when the rule was not applied his chances increased to 70 per cent. This difference, it was held, suggested that the applicant was placed at a particular disadvantage. On finding that the applicant was placed at a particular disadvantage it fell to the School to prove that this rule was objectively justified by a legitimate aim and that the means of achieving that aim are appropriate and necessary.

²⁸ *Mary Stokes (on behalf of her son John Stokes) v Christian Brothers’ High School, Clonmel* (n 2); *Christian Brothers Clonmel v Stokes* (n 2); *Stokes v Christian Brothers High School Clonmel* (n 2), (n 2) For further discussion of this case see; Olivia Smith, ‘Perpetuating Traveller Children’s Educational Disadvantage in Ireland Legacy Rules and the Limits of Indirect Discrimination’ (2014) 14 *International Journal of Discrimination and the Law* 145; Mel Cousins, ‘Travellers, Equality and School Admission: Christian Brothers High School Clonmel v. Stokes’ (SSRN Scholarly Paper, 2 May 2012); Gerry Whyte, ‘Litigating the Right to Inclusive Education under Irish Law’ (on file with the author 2014); Darius Whelan, ‘Traveller School Admissions Appeal Should Have Considered Wider Human Rights Issues’, *The Irish Times* (26 February 2015).

²⁹ *A Mother and Son v A Secondary School* (n1); *Christian Brothers Clonmel v Stokes* (n1); *Stokes v Christian Brothers High School Clonmel* (n1).

³⁰ See generally, Cousins (n 2); Smith (n 29); Walsh (n 28).

The High School contended that the rule supported the family ethos within education, in particular that it strengthened bonds between the parents as primary educators of a child and the school. This the Tribunal accepted was a legitimate aim, however, the Equality Tribunal held that the imposition of a blanket priority was not a proportionate or necessary response and therefore found that the school had indirectly discriminated against the applicant. The High School appealed this decision to the Circuit Court.

3.3 *Circuit Court*

Teehan J in the Circuit Court upheld elements of the decision of the Equality Tribunal and held that the ‘parental rule’ was an ostensibly neutral provision which was in fact discriminatory against Travellers. The rationale being that the very low levels of educational achievement by members of the Traveller community meant that they were considerably less likely to be able to comply with this particular rule. Teehan J held that the apparently neutral ‘parental rule’ was in fact indirectly discriminatory. He then assessed whether that rule was capable of being objectively justified. To determine whether it was capable of such justification Teehan J did not expressly refer to the decision in *Bilka-Kaufhaus* but did set out the three-part test necessary to make that assessment. Teehan J noted that the school had, as a stated goal, ‘supporting the family ethos within education’ and while not linked in their goals to the ‘parental rule’, Teehan J stated:

I find that the overall aim of the Board in introducing the ‘parental rule’ is entirely in keeping with this goal and the ‘characteristic spirit of the school’ ... The Appellant has thus objectively justified to the satisfaction of this Court that the aim of the Board in this regard was wholly legitimate.³¹

Additionally he held that the measure adopted was both appropriate and necessary. It was established in the case that the School had been oversubscribed for some years and had used a number of different entrance criteria with varying levels of success. The school had tried entrance exams, applied a lottery to all applicants and at one point given priority to students where there were ‘exceptional circumstances’. Thus on the basis of trial and error the school had decided on the ‘parental rule’ and as they reviewed the entrance criteria on an annual basis Teehan J held that they had struck the correct balance and it was therefore appropriate. Additionally the principal of the school did provide evidence of the link between the school and past pupils, in particular he referred to a past pupil’s union which provided financial assistance to the school and assisted the school in a variety of ways providing bursaries and assisting students in financial difficulty.³² On this basis Teehan J held that the parental rule was a ‘necessary step in creating an admissions policy which is proportionate and balanced’.³³ The case was appealed to the High Court.

3.4 *High Court*

In the High Court McCarthy J accepted that members of the Traveller community had not participated for the most part in secondary education. He further noted that ‘[i]t is

³¹ *Christian Brothers Clonmel v Stokes* (n1) para 17.

³² *ibid* para 19.

³³ *ibid*.

against that background of grave educational deprivation that John Stokes' father did not enjoy secondary education. John Stokes has broken that cycle³⁴

McCarthy J then went on to assess what was meant by 'particular disadvantage'. In doing so he referred to the various definitions of 'particular' given in the Oxford English Dictionary which included interpretations like 'peculiar, restricted to'. He then stated:

I do not believe that the disadvantage suffered by travellers (in common with all other applicants who were not the sons of past pupils) pertains or relates to a 'single definite person ... or persons as distinguished from others' or 'distinguished in some way among others of the kind: more than ordinary; worth notice, marked; special.' The disadvantage relates to persons in addition to travellers and is not peculiar or restricted to travellers, and does not distinguish them among others of the kind (ie 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.³⁵

A number of commentators have questioned McCarthy J's analysis of this decision. Whyte on this case stated:

McCarthy J's reasoning here is flawed insofar as he focuses 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. It is a given that everyone in the adversely affected class is affected in the same way – if they were affected differently on one of the prohibited grounds of discrimination, that would constitute direct discrimination. 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.³⁶

Essentially McCarthy J wanted the claimant to be able to show a disadvantage that was greater than that suffered by others disadvantaged by the rule: in effect a race to the bottom of disadvantage.

In contrast to the position adopted by McCarthy, it is notable that in the recent European Court of Human Rights (ECtHR) Grand Chamber decision of *Horváth and Kiss v Hungary*³⁷ this issue was addressed in the context of educational rights of members of the Roma community under Article 14 ECHR. The applicants, two Hungarians of Roma origin, were assessed and diagnosed as having mental disabilities. As a result of this diagnosis they were educated in a remedial school for children with mental disabilities. The remedial schools offered a more basic curriculum and consequently their students

³⁴ *Stokes v Christian Brothers High School Clonmel* (n1) para 22.

³⁵ *ibid* para 25.

³⁶ Whyte (n27).

³⁷ *Horváth and Kiss v Hungary* (n6).

have more limited life options. Most particularly as a result of being placed in the remedial schools, the applicants did not progress to complete the Baccalaureate programme which limited their access to higher education and employment. The applicants to the action contended that their education in a remedial school represented ethnic discrimination in the enjoyment of their right to education. The applicants alleged indirect discrimination and in addition that the tests were culturally biased by putting Roma children at a particular disadvantage. The most recent statistical evidence available in the city of Nyíregyháza was that Roma students represented 8.7% of the entire school population but made up 40-50% of the special school population. The respondents to the action denied discrimination and contended that if their treatment had been different from other non-Roma children it had an objective and reasonable justification. They argued that the tests administered measured the effect of cultural deprivation regardless of origin. Further they contended that the relevant procedural safeguards were in place, albeit not followed in the applicant's cases. The ECtHR found a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No.1. The ECtHR noted that Roma children were over-represented in remedial schools as a result of systematic misdiagnosis of mental disability. This policy exerted a disproportionately prejudicial effect on the Roma, a particularly vulnerable group. Further the Court noted that this disproportionate effect is noticeable even if this policy or testing has a similar impact on other socially disadvantaged groups as well.³⁸ This element of the decision is important as there was no necessity for the applicants to show that the disproportionate effect was more significant for the Roma than other groups, what Timmer describes as a 'vulnerability competition'.³⁹ It was sufficient that there was a disproportionate impact, thus avoiding the spectre of the race to the bottom, arguably what McCarthy J's judgment does in the *Stokes* case. Consequently, it is respectfully submitted, that Whyte's analysis of indirect discrimination is more in line with our European human rights obligations than that adopted by McCarthy J.

McCarthy J's analysis further suggests that there is some necessity for indirect discrimination to be intentional, so that in this instance the complainant would have to establish that it was intended to affect Travellers in particular. Again this fails to look to either the purpose or the wording of the legislation. The law does not attempt to regulate people's attitudes but rather their actions. Thus there is no necessity for there to be an intention to discriminate. On this point the Fundamental Rights Agency suggests that it is only necessary to prove 'the existence of differential treatment, on the basis of a prohibited ground, which is not justified. ... there is no need to prove that the perpetrator is motivated by prejudice – thus, there is no need to prove the perpetrator has "racist" or "sexist" views in order to prove race or sex discrimination'.⁴⁰

Further, as Cousins highlights, McCarthy J 'parsed the definition of indirect discrimination set out in the Equal Status Act as though it was purely national legislation'.⁴¹ In doing so he failed to consider the relevance of any prior decisions on indirect discrimination from any source, and failed entirely to consider the impact of EU

³⁸ *ibid* para 110.

³⁹ Alexandra Timmer, 'Horváth and Kiss v Hungary: A Strong New Roma School Segregation Case' *Strasbourg Observers* (6 February 2013) <<http://strasbourgobservers.com/2013/02/06/horvath-and-kiss-v-hungary-a-strong-new-roma-school-segregation-case/>> accessed 21 November 2014.

⁴⁰ Fundamental Rights Agency, 'Handbook on European Non-Discrimination Law' (March 2011) 127 <<http://fra.europa.eu/en/publication/2011/handbook-european-non-discrimination-law>> accessed 21 November 2014.

⁴¹ Cousins (n27).

law on the implementation of this provision particularly as it applies to race and ethnic minorities. This case was appealed to the Supreme Court.⁴²

3.5 *Supreme Court*

The Supreme Court found for the Christian Brothers High School, but in so doing they departed from McCarthy J's reasoning. Two members of the Supreme Court, Hardiman J with McKechnie J concurring, contended that in fact no appeal lay to the Supreme Court. Hardiman J argued that section 28(3) of the Equal Status Acts 2000-2014 did not allow for an appeal other than an appeal to the High Court on a point of law.⁴³ However, the majority, Clarke J with Murray J and O'Donnell J concurring, held that an appeal did lie to the Supreme Court. Clarke J delivered the majority judgment. It is not intended to address this element of the judgment but to focus on the issue of indirect discrimination.

In this action Clarke J held he was not satisfied that the approach of McCarthy J was correct. He held that the legislature had chosen to prohibit indirect discrimination against members of the Traveller community and stated:

The fact that similar discrimination, or disadvantageous treatment, might also apply to others in an unprotected category does not affect the question of whether that same treatment, applying to members of the Travelling Community, might not, after proper analysis, be properly regarded as giving rise to a finding of indirect discrimination.⁴⁴

Clarke J then set out how section 3(1)(c) of the Equal Status Acts 2000-2014 as inserted by section 48 of the Equality Act 2004, should operate. The first element must be that there is disadvantage on the basis of a neutral provision. That disadvantage can be established by 'comparing the differential effect of the relevant measure on the competing categories of persons'.⁴⁵ He contended that to determine whether such disadvantage occurred required an analysis of the measures and its impact on the various categories of people, stating that '[s]uch an exercise necessarily carries with it some degree of statistical analysis'.⁴⁶ While it is undoubted that the use of statistical data is of assistance, the Racial Origin Directive does not require reliance on statistics.

On the phrase 'particular disadvantage' Clarke J held that the phrase should not be looked at in isolation but in the totality of the definition of indirect discrimination. He stated that the term 'particular' means that 'it must be established that the extent of any disadvantage is significant or appreciable'.⁴⁷ To determine whether the disadvantage is significant will normally require a 'sufficiently large number of persons to form a realistic view as to whether the protected group is truly at a measurable disadvantage by reference to its counterpart'.⁴⁸ In the instant case Clarke J questioned whether looking at the intake

⁴² *Stokes v Christian Brothers High School Clonmel* (n1).

⁴³ Interestingly, Hardiman J did not raise this argument in *Equality Authority v Portmarnock Golf Club* [2009] IESC 73, the only other case under the Equal Status Acts that was appealed to the Supreme Court.

⁴⁴ *Stokes v Christian Brothers High School Clonmel* (n1) para 8.2.

⁴⁵ *ibid* para 8.6.

⁴⁶ *ibid*.

⁴⁷ *ibid* para 9.2.

⁴⁸ *ibid* para 10.6.

for one academic year was sufficient. In addition he inquired as to whether the appropriate question was asked in this case. The specific admission criteria that were the subject matter of this case granted preferential treatment to those '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'. Clarke J held that the Tribunal and the Circuit Court addressed the wrong question; it was not sufficient to address the impact of the 'parent rule' in isolation it was the 'cumulative effect of those alternative qualifying requirements on a potential applicant [that] ... must be assessed'.⁴⁹ In fact this question was not put and as a result no analysis of the correct question was undertaken. Consequently, Clarke J held that the results to the correct question were not available to the court, as the correct statistical calculation had not been carried out. In addition, he stated that for the results of any such analysis to be meaningful, it 'would have been necessary to look at figures over a sufficient number of years to be able to reach a reasonable conclusion on the extent of the effect of the rule as a whole ... on relevant members of the Travelling Community'.⁵⁰ As a result Clarke J concluded:

That is not to say that the answer to the question of whether there is a particular disadvantage potentially present in respect of a combined sibling and parental rule, so far as Travellers are concerned might not be answered in the affirmative. The difficulty is that the evidence and materials to allow such a conclusion to be reached on the facts of this case were just not present.⁵¹

On that basis Clarke J held that there was not sufficient evidence and materials before the Equality Tribunal and the Circuit Court to enable a proper assessment to be carried out. Consequently, for different reasons than McCarthy J, he upheld the finding of the High Court. In effect Clarke J held that, as the proper question had not been asked in the decisions of the Equality Tribunal and the Circuit Court, these bodies had erred in law.

It is to be welcomed that the Supreme Court held that McCarthy J erred in law in his analysis of what constituted indirect discrimination under the Equal Status Acts 2000-2014. What is less positive is that the Supreme Court has, in effect, set a high evidential barrier to prove 'particular disadvantage'. Clarke J held that national statistics that indicated that Travellers in general were less likely to complete secondary education was not sufficient to indicate 'particular disadvantage'. Instead what was required were statistics covering a number of years and ones that were specific to the Clonmel area. It is questionable whether such statistics, as the Supreme Court suggests are necessary, are actually available to any would-be potential litigant. The Supreme Court held that the Equality Tribunal asked the wrong question, and in effect assessed the wrong material thereby erring in law. This begs the question if this case has ever been properly heard. If it has not been properly heard should it not be remitted to the Equality Tribunal?

⁴⁹ *ibid* para 11.3.

⁵⁰ *Stokes v Christian Brothers High School Clonmel* (n1) para 11.5. In contrast, see the position adopted by the House of Lords on this matter in *R v Secretary of State For Employment, Ex Parte Seymour Smith and Another* [2000] 1 All ER 857 (HL), [2000] ICR 244, [2000] 1 WLR 435.

⁵¹ *Stokes v Christian Brothers High School Clonmel* (n1) para 11.10.

Whelan points out that the Supreme Court, under other employment legislation, has remitted a case to the lower tribunal for a re-hearing.⁵²

A further and a significant concern is that the Supreme Court assessed section 3(1)(c) of the Equal Status Acts 2000-2014 in splendid isolation without reference to equality jurisprudence from other jurisdictions, and most importantly from the CJEU. In effect, the Supreme Court considered ‘this to be an issue of statutory interpretation and [interpreted] the 2000 Act in isolation from the employment equality legislation and the related European Directives and case law’.⁵³ The Supreme Court and the High Court have assessed the provisions of the Equal Status Acts without reference to a vast body of equality jurisprudence from the European Union. The specific definition of indirect discrimination contained in the Equal Status Acts is taken directly from the Racial Origin Directive and the Framework Employment Directive which makes this omission all the more striking.⁵⁴

Moreover, while not definitively decided it is contended that the Racial Origin Directive was directly relevant to the case in question. The Racial Origin Directive prohibits discrimination on the basis of racial or ethnic origin and it is probable that members of the Traveller community could be considered as having a distinct ethnic origin.⁵⁵ Commentators have suggested that membership of the Traveller Community ‘would appear to fall within a generous understanding of the concept of ethnicity under the Race and Ethnicity Directive’.⁵⁶ This Directive has an unusually broad scope of application and covers education including access to schools. In effect, this Directive prohibits discrimination including indirect discrimination on the basis of ethnic origin in relation to admission to schools. Therefore it is suggested here that the Irish Courts should have been directly guided by the CJEU’s interpretation of this provision. At no point in this case did either the High Court or the Supreme Court refer to our European obligations.

4. Conclusion

The Equality Tribunal has been the primary source of enforcing and therefore interpreting the various equality statutes.⁵⁷ Its expertise and understanding of equality legislation, European requirements and general principles of equality is evident in many of its decisions.⁵⁸ Undoubtedly, having this expertise is of benefit to would-be litigants. However, a potential unintended consequence of corraling expertise into one body is the failure of other bodies, namely the superior courts to develop an equivalent expertise.

⁵² See Darius Whelan, ‘Traveller School Admissions Appeal Should Have Considered Wider Human Rights Issues’, *The Irish Times* (26 February 2015), referring specifically to *National University of Ireland Cork v Abern & Ors* [2005] IESC 40, [2005] 2 IR 577, [2005] 2 ILRM 437.

⁵³ Whelan (n27).

⁵⁴ See also, Walsh (n 28) 175.

⁵⁵ Cliona Kimber, ‘The Directive on Race Discrimination in Ireland: Reform or Radical Changes’ in Costello and Barry (n14).

⁵⁶ Finlay (n14) 147.

⁵⁷ For a detailed discussion of the case law of the Equality Tribunal and the challenges facing that Tribunal, see David Fennelly, ‘Selected Issues in Irish Equality Case Law 2008–2011’ (The Equality Authority, November 2012).

⁵⁸ See for example, *A Complainant v An Employer* DEC-E2008–68; *Millman v Blackrock Medical Services (Cavan) t/a Dial A Medic (in liquidation)* DEC-E2011–150; *Ms Z v A Chain Store* DEC-E2009–111.

This is clearly evidenced in *Stokes v Christian Brothers High School Clonmel*.⁵⁹ It is respectfully submitted that both the High Court and the Supreme Court have failed to interpret our equality provisions in light of our European obligations, and have also failed to consider recognised equality principles in their interpretation of these Acts.⁶⁰ This in turn further limits the potential of the Equal Status Acts to re-shape the legal landscape. While the Equality Tribunal has developed an expertise in addressing the issue of equality, more often than not that expertise and experience is lost where a case is appealed to the superior courts. The unfamiliarity of the courts with the workings of the equality legislation and equality bodies is evident in the Supreme Court decision in the *Stokes case*. For instance in that case Hardiman J appears to have confused the Equality Authority, a body that was charged with promoting and protecting equality legislation⁶¹ with the actions of the separate and distinct quasi-judicial body, the Equality Tribunal. Hardiman J argued that no appeal lay from the Equal Status Acts to the Supreme Court and stated as part of this proposition that:

All of these hearings were full oral hearings at which both parties were present or represented. The Equality Authority, whose Director made the first-instance decision was represented as *Amicus Curiae* at the third hearing in the High Court.⁶²

Hardiman J no doubt meant the Equality Tribunal when he referred to the Equality Authority but this statement does not inspire confidence in the Supreme Court's familiarity with equality provisions or bodies.

The transformative potential of the Equal Status Acts is evident in a case like *Stokes*: while ostensibly an individual action, it had the potential for significant positive impact for others. The Equality Tribunal in the *Stokes case*, for example, held that a common school admissions policy, namely the parental rule, was indirectly discriminatory. This action clearly had an individual benefit for the litigant, but the impact of such a decision was far reaching in that similar entry requirements would have to be reassessed in light of this finding. The High Court failed entirely to come to terms with equality principles generally and more specifically the concept of indirect discrimination. In a welcome move the Supreme Court overruled the High Court interpretation of indirect discrimination, but in so doing introduced a whole new set of concerns. Clarke J set an onerous evidential barrier for indirect discrimination. He determined that in order to decide whether a protected category had suffered a particular disadvantage the extent of that disadvantage must be 'significant or appreciable'.⁶³ To determine such a disadvantage in this case, a statistical calculation of the figures of applicants to the school over a

⁵⁹ *Stokes v Christian Brothers High School Clonmel* (n1). See also, *Cabill v Minister for Education and Science* [2010] IEHC 227.

⁶⁰ In contrast, see the Circuit Court decision of *Humphries v Westwood Fitness Club* [2004] ELR 296 that upheld the Tribunal's interpretation of the application of the reasonable accommodation duty.

⁶¹ This body, along with the Irish Human Rights Commission, were dissolved and then merged by the Irish Human Rights and Equality Commission Act 2014.

⁶² *Stokes v Christian Brothers High School Clonmel* [2015] IESC 13; to clarify, the Director is the Director of the Equality Tribunal, the Tribunal is a quasi-judicial body that enforces the equality legislation, the Equality Authority, in contrast, is the body charged with promoting and protecting the equality legislation. In fulfilling that function, the Equality Authority takes cases to the Tribunal, submits *amicus curiae* briefs and runs awareness raising campaigns, among other actions. What is important to note is that the Equality Tribunal and the Equality Authority are two distinct and separate bodies.

⁶³ *ibid* para 9.2.

number of years was required, and an assessment of the effect of that rule on the *relevant members* of the Traveller Community. Clarke J held that national statistics indicating educational completion rates of members of the Traveller Community were not sufficient to indicate ‘particular disadvantage’. Instead what was required were statistics covering members of that community specific to the Clonmel area. This is an onerous barrier for any potential litigant, and it is doubtful whether such statistics even exist. The availability of statistics on grounds such as sexual orientation or disability would, it is contended, be even harder to acquire. Thus a potentially transformative decision lost all impact on reaching the superior courts. Smith, referencing the work of Hamilton Krieger suggests:

That where transformative laws seek changes that sharply conflict with normative systems that continue to enjoy significant popular support, dominant norms may subtly reassert themselves within the legal regime designed to replace them.⁶⁴

Whether this is what happened in *Stokes* is open to interpretation. What is beyond question is that the courts have not purposefully interpreted the Equal Status Acts, and failed to consider our European obligations thus limiting the potential for this important legislation to be transformative.

⁶⁴ Smith (n27) 157.