Neutral Citation [2008] IEHC 464

THE HIGH COURT

2007 52 CA

BETWEEN

PATRICK KELLY

PLAINTIFF

AND

THE NATIONAL UNIVERSITY OF IRELAND, ALSO KNOWN AS UNIVERSITY COLLEGE, DUBLIN

DEFENDANT

AND

THE DIRECTOR OF THE EQUALITY TRIBUNAL

NOTICE PARTY

Judgment of Mr. Justice William M. McKechnie delivered on the 14th day of March, 2008:

1. The plaintiff in this case is a qualified teacher and resides at 11 Deansrath Avenue, Clondalkin, Dublin 22.

2. The defendant is an educational establishment descended from the body founded in 1854 as the Catholic University of Ireland, re-formed in 1880 and chartered in its own right in 1908. The university is a constituent university of the National University of Ireland. The Universities Act 1997 renamed the university as "National University of Ireland, Dublin", and the Natinal University of Ireland, Dublin (Change of Name) Order 1998 (S.I. 447/1998) renamed the university as "University College Dublin - National University of Ireland, Dublin". At all material times it was offering a course leading to a Masters in Social Science (Social Worker) mode A for the academic period 2002 – 2004.

3. The notice party is the statutory appointee of a body established by the Employment Equality Act 1998, namely the Equality Tribunal. That body has the powers, functions and duties assigned to it by virtue of the provisions of the aforesaid Act, together with additional powers granted to it under the Equal Status Act 2000.

4. On the 23rd of December 2001, the plaintiff submitted his completed application form to University College Dublin ("UCD") seeking admission to the aforesaid course for the cycle in question. Having been interviewed in February 2002 as part of the selection process, he was informed by letter dated the 15th March 2002 that he was not being offered a place on the course. Being dissatisfied with this decision and with the follow on correspondence between himself and the college, he made a formal complaint in late-April 2002 of gender discrimination to the Director of the Equality Tribunal. He did so pursuant to s. 7 of the 2000 Act and based his claim on alleged breaches of ss. 3(1)(a) and 3(2)(a) thereof. A Mr. Hugh O'Neill, an Equality Officer with the notice party, was deputed to investigate and determine this complaint. He did so following an oral hearing on the 22nd of September 2006, and committed his decision to writing on the 2nd of November 2006. He concluded that the plaintiff had failed to establish *prima facie* discrimination on gender grounds.

5. Given the issue which this Court is concerned, it is not necessary to set out in any detail the precise nature of the complaints made by Mr. Kelly or UCD's detailed response to them. However a brief description of a general nature is required. Apparently, in February 2002, 93 candidates were interviewed for this course, 87 female and 6 male. A Professor Gabriel Kiely (male) and a Ms. Elaine Purcell (femail), who interviewed the plaintiff, were obliged to complete a "selection interview guide", which has been described as a "scoring sheet". Apparently Mr. Kelly did poorly in this process. In response, relying on the numerous reasons set out (and repeated) in much of the documentation, including an affidavit sworn on the 6th of November 2006, he takes indignant issue with both the process and the result. In any event, after the interview and selection process had been completed, the top 50, two of whom were male and placed first and second, were offered immediate places on the course. A further 24, including two other males and the plaintiff (who was rated 65th overall) were placed on a waiting list. Subsequently by letter dated the 19th of August 2002, Mr. Kelly was offered a place on the course which he declined, offering as one of the reasons, the fact that he had been accepted on an equivalent postgraduate Social Work course at Trinity College, Dublin. Arising out of the entire process, both procedural and substantive, the basis of Mr. Kelly's complaint, which in essence is one of gender discrimination, is that at all times he was better qualified than the least qualified female candidate who was offered a position on round one.

6. In his initial complaint he alleged discrimination in the following respects:-

> "1. In a course for which the overwhelming number of applicants were women, no demonstrable effort was made to address the gross under-representation of men;
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> 2. At the time of his interview for a place on the course he suffered hostility bias and resentment due to his gender;
>
> 3. There was a failure on the part of the relevant authorities at The University to demonstrate adherence to the principles of equal opportunities and positive discrimination, constituting a breach of European Union law, as interpreted by the European Court of Justice;
>
> 4. Because of his gender he was not treated fairly at the time of his interview for the course and was the victim of prejudice."

These grounds were later added to by way of a ten page written submission which is annexed as appendix A to the decision of the Equality Officer.

7. Some days after the decision of this officer, the plaintiff issued a notice of motion under O. 57A r. 6(1) of the Circuit Court Rules appealing that decision to the Circuit Court which is provided for by s. 28 of the Equal Status Act 2000. A trial date of the 14th of June 2007 was subsequently set for this appeal. In the meantime however, he issued a further motion dated the 4th of January 2007, in which he sought from UCD copies of certain specified documents, again under O. 57A but this time under rule 6(6) of the Circuit Court Rules. By the issue date of this motion the plaintiff had been informed by letter of the 21st of December 2006, from Mr. Eugene O'Sullivan's solicitor for UCD, that the defendant body had retained the application forms of 49 of the 93 applicants above-mentioned and had disposed of the other applications. What Mr. Kelly therefore sought was firstly copies of "the retained applications", secondly copies of the documents "appended to or included with" the "retained applications", and thirdly copies of the "scoring sheets" of the 49 candidates, whose application forms had been retained. In a subsequent affidavit sworn by one Suzanne Quin, Head of the School of Applied Social Science at UCD, she averred at para. 3 thereof that application material was only retained in respect of those candidates who actually commenced the course and that in accordance with the college's records retention policy, the material which had been submitted by the other candidates was destroyed in March 2006. Nothing, however, turns on the precise date upon which

the material was disposed of or on the correctness or otherwise of this policy.

8. The disclosure application was argued before the Circuit Court, having previously been in a list for the County Registrar. The President of that court refused the application on the 12th of March 2007 and by notice dated the 14th of March 2007, Mr. Kelly appealed to this Court against that order. For the following reasons, neither that appeal nor the substantive appeal against the decision of the Equality Officer have as yet been determined by the courts.

9. On the 23rd of April 2007, Mr. Kelly appeared before this Court and sought to have three questions, to which a fourth was added at a subsequent date, referred to the European Court of Justice under Article 234(1) and (3) of the EC Treaty. These questions are as follows:-

> 1. Does Article 4(1) of Council Directive 97/80/EC entitle an applicant for vocational training who believes that he or she has been denied access to vocational training because the principal of equal treatment was not applied to him or her, to information on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training, so that the applicant can, "establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination"?
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> 2. Does Article 4 of Council Directive 76/207/EEC entitle an applicant for vocational training who believes that he or she has been denied access to vocational training "on the basis of the same criteria" and discriminated against "on grounds of sex" in terms of accessing vocational training to information held by the course provider on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training?
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> 3. Does Article 3 of Council Directive 2002/73/EC prohibiting "direct or indirect discrimination on the grounds of sex" in relation to "access" to vocational training entitle an applicant for vocational training who claims to have been discriminated against "on the grounds of sex" in terms of accessing vocational training to information held by the course provider on the respective qualifications of the other applicants for the course in question and in particular, the applicants who were denied access to vocational training?
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> 4. Does the nature of the obligation under Article 234(3) EC differ in a member state with an adversarial (as opposed to inquisitional) legal system and, if so, in what respect?

It is in respect of this reference request that this Court now gives judgment.

10. Council Directive 76/207/EEC of 9th of 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' (the "Equal Treatment Directive"), introduced "the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training…" (Article 1). Article 2 defined the principle of equal treatment as meaning that "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly…" (Article 2). Article 4 requires member states to take all necessary measures to ensure that "…vocational training, advanced vocational training and retraining shall be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex" (Article 4(c)). That directive was subsequently amended by Council Directive 2002/73/EC, which took effect only as and from the 23rd of September 2002.

11. The second Directive referred to is Council Directive 97/80/EC of 15th December 1997, 'on the burden of proof in cases of discrimination based on sex' (the "Burden of Proof Directive"), and in particular Article 4(1) thereof which reads:

> "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.".

12. This Directive has ostensibly been given effect to in Irish law by the European Communities (Burden of Proof in Gender Discrimination Cases) Regulations 2001 (S.I. 337/2001), but only in respect of certain Acts of the Oireachtas, which do not include the Equal Status Act 2000.

13. The plaintiff relies upon the Equal Treatment Directive and the Burden of Proof Directive, as conferring upon him a right, by virtue of Community law, to have sight of the documents referred to at para. 7 of this judgment. He claims that having this information, which relates to the qualifications and suitability of the successful applicants, is critical so that he can establish his allegation of discriminating conduct, or at least can establish facts to which Article 4(1) of the Burden of Proof Directive could then apply. This right, he asserts on the one hand, is separate and distinct from his appeal presently before this Court, but on the other, if established, is such as must have a direct influence on domestic law. The latter appeal on the disclosure application has its foundation in domestic law, whereas the Directive point is based on Community law. Accordingly, Mr. Kelly submits that this Court is duty bound, by virtue of Article 234 of the EC Treaty, to refer the above questions to the European Court of Justice ("ECJ") for a preliminary ruling from that Court.

14. The plaintiff's substantial argument on this application is strikingly simple. He asserts that this Court is the court of final instance in his appeal against the order of the Circuit Court, which it will be recalled was made on foot of the disclosure application; that being so, it is submitted that in accordance with Article 234(3), this Court has no discretion, but must refer the suggested questions to the ECJ for its opinion thereon. In furtherance of his claim, the plaintiff has filed several books of legal submissions supported by authorities, articles, opinions and publications. These run to several hundred pages and it would be neither feasible nor desirable, or indeed necessary, to substantially repeat those submissions or the authorities in this judgment. This because in my view, the issue raised can be disposed of by reference to the material above mentioned, as well as the cases hereinafter discussed.

15. In addition to his principal request, Mr. Kelly has made two subsidiary arguments which conveniently can be dealt with at this point. The first submission, which I reject, is to the effect that once a party raises a question of Community law before a court acting as a court of final instance, that Court must make the reference as sought; it has no discretion to do otherwise. Arising out of a similar or comparable submission, the ECJ in *CILFIT v. The Minister for Health* [1982] ECR 3415 took the opportunity of clarifying what the true position was. As part of its decision the Court dealt specifically with this point at para. 9, where it stated:

> *"… Article [234] does not constitute a means of redress available to the parties to a case pending before a national*

court or tribunal. Therefore the mere fact that a party contends that the dispute gives rise to a question concerning Community law does not mean that the Court or Tribunal concerned is compelled to consider that a question has been raised within the meaning of Article [234]. On the other hand, a national Court or Tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion."

Therefore no party to an action has the right to insist upon a reference being made or to assert a right of veto against the making of such a reference.

16. The second point is the suggestion that para. 3 of Article 234 is entirely unrelated to the preceding paragraph. Whilst there are significant differences, as noted *infra*., both have in common the requirement that the court of final instance must consider that the views of the ECJ are *necessary* in order to enable it to give judgment (emphasis added). Therefore, unless the domestic court felt unable to give a decision without making a reference, it would not do so. But where such conclusion is reached a reference must be made.

17. The defendant, UCD, has made two submissions in response, both in support of its opposition to the making of any reference. The College's views can be summarised as follows:-

(1) In considering this application, the exact wording of Article 234 shows that the following four requirements must be satisfied before this court should accede to the request made:-

(a) The questions must relate to provisions of Community law upon which the European Court has jurisdiction to give a ruling,

(b) The questions must relate to the interpretation and/or validity of those provisions,

(c) The questions must have been raised before a national court or tribunal, and

(d) A decision on the questions must be necessary so as to enable the national court or tribunal to give judgment.

(2) Where a court, before which the above requirements are satisfied, is a court of final instance, then a reference must be made subject only to the *acte clair* principles. These principles, which describe a number of circumstances in which a reference, even under para. (3) of Article 234, is not mandatory, takes its name from the decision of the ECJ in *CILFIT v. The Minister for Health* [1982] ECR 3415. Relying upon this decision it is suggested that the plaintiff's request for a reference should be refused as he has failed to surmount the criteria specified in that case.

(3) In particular it is said:

(i) that, in the context of this case, the Court envisaged in Article 234(2) is not this court, but the Circuit Court, as that court has *seisin* over the substantive appeal (*Fratelli Pardini v. Ministero del Commercio con L'estero* [1988] ECR 2041);

(ii) that the reference is unnecessary as any ruling would have no impact on the outcome of the case; and,

(iii) that as the interpretation of community law is so obvious on the points at issue, no benefit could be derived from such a reference (*CILFIT v. The Minister for Health* [1982] ECR 3415).

(4) It is further claimed that the Equal Status Act 2000 is purely a domestic piece of legislation from which no question of Community law could arise: whereas if the discrimination claim has been brought under s. 12 of the Employment Equality Act 1998 (which it was not), some question of Community law could possibly have arisen. Moreover, the course in question was not in fact a vocational course, and therefore the Equal Treatment Directive is inapplicable.

(5) Neither does a reference have to be made when it could be regarded as frivolous or vexatious, an example of which would be where the issue in question can be determined solely by reference to domestic law (see *Riordan v. An Taoiseach* [2000] 4 IR 537).

(6) Finally, the defendant also claims that the principle of confidentiality as understood in both domestic and European case law, makes it clear that in any event the plaintiff's request for sight of all applications of the successful parties in unredacted form cannot succeed.

18. Article 234 of the EC Treaty reads:-

(1) "The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide."

(2) "Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request a Court of Justice to give a ruling thereon."

(3) "Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of

Justice."

Purely for convenience I have numbered the paragraphs in the Article as (1), (2) and (3).

19. Before I look at these provisions in detail I should say a word about the relationship between Community law and national law. As a matter of general principle there is no doubt but that Community law constitutes an autonomous system of law and that in all respects it is a system which is superior to any domestic system of a Member State. In any case of conflict, inconsistency, or discord, national measures must give way. This means that where conflict exists:

i) Community law takes precedence over domestic law;

ii) Community law renders automatically inapplicable any relevant national provision;

iii) Community law prohibits the adoption of any new measures which are incompatible with it; and finally,

iv) A national court, in order to give full effect to this principle, must set aside conflicting provisions, whether passed before or after the Community measure.

20. These principles are non-controversial and well established (see *Stato v Simmenthal* [1978] ECR 629). These provisions have been supplemented by what might be described as subsidiary rules, established by the ECJ over time. One such rule emerged from the *Marleasing* case (*Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1991] 1 ECR 4135) and is now known as the "Marleasing principle" or the "principle of conforming interpretation". This means that a national court has an obligation to interpret domestic legislation "so far as possible" in a manner both compatible with and in conformity to European law. This phrase "so far as possible" has been the subject matter of several decisions. Broadly speaking this interpretive method cannot be stretched to a point which involves a departure from the fundamental or cardinal feature of the provision in question. Subject however to this qualification, the Marleasing principle pervades all pieces of domestic law which necessarily are or ought to be influenced by Community law (see *Commissioners for Her Majesty's Revenue and Customs v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29 and *Pfeiffer v Deutsches Rotes Kreuz* [2005] ICR 1307).

21. As can therefore be seen, Article 234 effectively has three parts to it. Para. (1) outlines the parameters of the Court's jurisdiction to give a preliminary ruling. Para. (2) confers a discretion on a national body to make a reference if it considers it necessary "to enable it" to give judgment on an issue before it. Para. (3) is similar to para. (2), but with two vital differences: firstly it refers to a court against which there is no judicial remedy under national law (court of final instance); and secondly, once the qualifying criteria exist, the national court must make such a reference – it has no discretion in so doing.

22. To come within this Article, a plaintiff must meet the positive requirements which are inherent in its provisions, and must also disapply all of the exceptions underlining the mandatory element of para. 3 thereof. In the first instance, this means:

1) that the suggested questions must relate to the validity and interpretation of acts of the institutions of the Community;

2) that such questions are raised in a case pending before the referring national court;

3) that such court considers that a ruling from the ECJ on such question(s) is necessary so as to enable it to give judgment in the case pending before it; and,

4) that such court is a court of final instance in that there is no judicial remedy against its decision under national law.

23. In *CILFIT v. The Minister for Health* [1982] ECR 3415 the disputed question, which arose in proceedings between wool importers and the Italian Minister of Health, concerned the payment of a fixed health inspection levy in respect of wool imported from outside the Community. The point in question depended on whether "wool" was included within a list of certain specified products, with the Minister arguing that the correct interpretation of the domestic measure was so obvious that a reference to the ECJ was not required. In the course of its judgment the court set out the essential purpose of the Article, as being to establish a uniform interpretation of Community law in all Member States, and to that effect para. 3 of Article 177 was designed to prevent the emergence of national judgments which differed from one Member State to another (para. 7). It then continued by laying down some general principles, which cumulatively are now known as the *acte clair* doctrine; these remain applicable to this day.

24. The *acte clair* principles are designed to ensure that notwithstanding what appears to be the mandatory wording of Article 234(3), a national court will not have to make a reference where the opinion of the ECJ can have no utility in the case or issue pending before it. To that end a series of cases, including, but not limited to *CILFIT*, have declared that a reference is not necessary:

1) where a ruling could have no impact or affect on the outcome of the case (see *Weinand Meilickev. ADV/ORGA F.A. Meyer AG* [1992] ECR I-4871; *Corsica Ferries Italia Slr v. Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783; *Monin Automobiles-Maison de Deux-Roues* [1994] ECR I-195);

2) where the true meaning of the provision in question is "so obvious as to leave no scope for any reasonable doubt", a conclusion to be arrived at only when the same meaning would be equally obvious to courts of other Member States (see *CILFIT*);

3) where the provision has been interpreted previously by the court, disregarding the nature of the earlier proceedings, and irrespective of whether or not the question raised is identical to the previous question decided upon (see *CILFIT*; *Da Costa en Schaake NV v. Nederlandse Belastingadministratie* [1963] ECR 31; *Foglia v. Novello II* [1981] ECR 3045); and,

4) where the ruling is sought only for the purpose of obtaining an advisory opinion on general or hypothetical questions (see *Foglia v. Novello II* [1981] ECR 3045; *Criminal Proceedings against Gasparini and others* [2006] ECR I-9199).

25. There can be no doubt but that Directives of the Council, are acts of the Community Institutions, and therefore are within sub-paragraph (b) of Article 234(1), which it should be noted embraces not only the validity of an act, but also its interpretation. Equally so, there can be no dispute but that this Court, which is established by law and has constitutional status, is a Court as envisaged by Article 234. Therefore what must be considered is whether the other requirements of the Article are satisfied and, even if they are, whether there are any countervailing reasons against such a reference.

26. At the outset it can immediately be said that the reference application cannot be classified as being frivolous or vexatious, no matter how broad such a phrase is interpreted. Secondly this court has not been referred to any previous decision of the ECJ on this or any similar or analogous point. Thirdly, in light of the presenting circumstances, it cannot be said that the suggested questions seek an advisory opinion on general or hypothetical issues (see *Mangold* [2005] ECR I-9981 and *Adeneler v. Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057). And finally, in my view it cannot be concluded, with any degree of certainty, that the true meaning of the measures in issue are so obvious, to all Courts of the Member States, as to make a reference superfluous.

27. Furthermore, I do not feel that I have to make any decision as to whether or not the course to which Mr. Kelly sought admission was a course of "vocational training" for the purposes of s. 12 of the Employment Equality Act 1998. As a result, I do not have to decide whether the views of the Equality Officer in this regard are correct. The reason for this is that in my view it is at least arguable and perhaps strongly so, that as a matter or European law, a postgraduate course in Social Work is "vocational training" for the purposes of Council Directive 76/207/EEC. In *Gravier v. City of Liège* [1985] ECR 593 the ECJ, when defining or describing "vocational training", said the following at para. 30:-

> *"It follows… that any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education."*

See also *Blaizot v. the University of Liège* [1989] 1 CMLR 69; in particular paras. 19 and 20 of the court's judgment. Given the nature of Mr. Kelly's application, it is sufficient in my opinion for him to establish that the relevant course is arguably a course "of vocational training" for the purposes of European law, whatever this phrase might mean in domestic law. When established, any "interest qualification" requirement of Article 234 is thus satisfied.

28. In addition, the defendant argues that the complaint of gender discrimination instituted by the plaintiff has no connection with European law, and accordingly this Court lacks jurisdiction to make a reference even if it was otherwise minded to so do. This argument is to the effect that the Equal Treatment Directive (Council Directive 76/207/EEC) was given effect to by the Employment Equality Act 1998 and not by the Equal Status Act 2000. As the application was made under s. 7 of the latter Act, all issues theretofore are purely of a domestic nature and do not touch upon and are otherwise not connected to any Directive.

29. I agree that only the 1998 Act gave effect to the Equal Treatment Directive. I also agree that the Burden of Proof Directive was only incorporated into domestic law in 2001 by the European Communities (Burden of Proof in Gender Discrimination Cases) Regulations 2001, (S.I. 337/2001), and did not cover the Equal Status Act 2000. However, this is not determinative of the matter for two reasons. Firstly, where the 2000 Act was not covered by the implementing Regulation, there may be a question as to whether the Directive was properly transposed into Irish law. Secondly, the Court must, where a Directive touches on a matter, interpret any national legislation in a manner consistent with that Directive (the *Marleasing* principle). In those circumstances, there may be a question of Community law, for the purposes of Article 234, with regards to how and if the Burden of Proof Directive affects the Equal Status Act 2000, and if it was properly transposed into Irish law. An Article 234 reference may therefore still be required, notwithstanding the fact that the Act under which the plaintiff has moved does not specifically refer to any Community legislation.

30. It is unclear whether the defendant accepts that this Court, in the applying context, is a court of final instance: on the one hand it seems to so accept: on the other it seems not to. The defendant supported the latter viewpoint by suggesting that this court is not the court which ultimately will give judgment on the appeal from the decision of the equality officer, and so it does not require any opinion from the ECJ to determine those issues. For this reason, it is therefore not the court of final instance on the issue before it. In this regard, it relies upon the case of *Fratelli Pardini v. Ministero del Commercio con L'estero* [1988] ECR 2041, which I will come back to later in the judgment.

31. In assessing the status of the Court at this stage of the appeal process, it is important to identify precisely what relief Mr. Kelly is seeking before me, and which provisions of domestic law he is invoking. Among the most contentious documents in issue are the personal statements of the successful applicants who commenced the course. That such documents are relevant and material to the substantive appeal cannot be disputed. Ms. Quin, on behalf of UCD has stated in evidence that those statements are "*part of the documents that make up the total application for the Master of Social Science (Social Work) Course*". She also explained that:

> *"applicants for the course are requested to provide two personal statements in response to the following question 'How did your interest in social work arise?' and 'What particular qualities and personal experience which you posses do you consider would be of help to you in this field of work?' These are open questions and candidates make their own decisions as to the content of their responses."*

In a letter written by Miss Richardson in January 2002, who was then the course Director, she said "*Selection for the course is based on the candidate's completed application form, personal statements, references and performance at interview*." There cannot be an argument therefore on the relevance of said documents for comparative purposes, as it has always been the plaintiff's case that he was better qualified than the least qualified female who obtained a place in the first round. Whilst it is impossible to re-create that part of the process which related to the interview and how that impacted on the eventual outcome, it cannot be doubted however but that the personal statements must have been an influential part of it, and thus of the success or failure of each applicant.

32. As stated above, the provisions governing the substantive appeal, i.e. the re-hearing on facts and law against the decision of the Equality Officer, are to be found in s. 28 of the Equal Status Act 2000. That section designates the Circuit Court and not this Court as the appellate court. Section 28(3), however, states that:

> *"(3) No further appeal lies, other than an appeal to the High Court on a point of law."*

It is therefore clear that this Court could never have seisen of the appeal in the sense stated and indeed that would remain the situation even if the Circuit Court had already disposed of the appeal. However, the questions sought to be referred have been raised before this Court on an appeal from the Circuit Court rejection of the disclosure application. Such an appeal, which is permitted under Part IV of the Court of Justice Act 1936, is heard by way of re-hearing (s. 37), with the decision of the High Court thereon being "*… final and conclusive and not appealable*" (s. 39). Therefore this Court is the court of final instance on the disclosure application: there is no judicial remedy available in national law against such a decision.

33. The only submission to the contrary is that the Circuit Court is the court seised of the appeal proper. No reliance is placed on the provisions of s. 28(3) of the 2000 Act: therefore it is unnecessary to comment on the effect (if any) of the restricted and limited nature of that form of appeal. I am unaware as to whether the plaintiff relied upon the Directives in the application under appeal: if he

did, it is clear beyond question that this court would be the final court with regards to document disclosure: Mr. Kelly either by issue estoppel, abuse of process or otherwise would not be allowed to re-open that issue in the substantive appeal. The matter would have been dealt with at first instance and finally disposed of on appeal. If he did not rely upon those Directives, one could potentially argue that he should raise this issue in the appeal proper, and if dissatisfied, attempt to re-litigate the point via s. 28(3) of the Equal Status Act 2000. That approach would be both most unsatisfactory and circuitous. Unsatisfactory in that, unless successful in the application, the full appeal on the facts and merits would proceed without reference to such documents. If thereafter the appellate court should grant disclosure, a mechanism would have to be found, which is not immediately apparent, to have the case entirely re-heard in the Circuit Court. Neither possibility should be allowed to occur. In my view the effect of the legal regime is that the issues relating to the disputed documents cannot be re-litigated elsewhere. The plaintiff either succeeds or fails in this court. There is therefore no judicial remedy against this Court's decision on the production of the contested documents. Consequently I am satisfied that for the purpose of the disclosure application, this Court is a "*Court*" referred to in Article 234(3).

34. The case of *Fratelli Pardini v. Ministero del Commercio con L'estero* [1988] ECR 2041 has been relied upon by the respondent as supporting the submission that no reference should be made unless the referring court requires an answer so as to determine an issue before it. In *Fratelli*, proceedings were instituted by way of an interlocutory application seeking as its sole object interim measures in respect of a dispute which arose between the company and the Italian Ministry of Foreign Trade ("*Ministero del Commercio con l'Estero*"). Having granted the interim measure, the court nevertheless made a reference to the ECJ. As a result, the Commission expressed doubts about the ECJ's jurisdiction to give a ruling on the questions raised; given the fact that the proceedings before the requesting court were concluded. According to the argument, any such opinion could have no bearing on that court, but could only have an influence, if any, on the substantive proceedings, which on the relevant date had yet to be commenced. When commenced, the substantive proceedings would be brought before a Court or Tribunal different to that of the requesting court.

35. Having referred to the wide discretion vested in the national courts as to when and at what stage of the process a reference may be made, the ECJ at para. 10 said:-

> *"In that respect it is not possible to uphold the interpretation put forward by the plaintiff in the main proceedings that the concept of a court or tribunal for the purposes of Article [234] covers all the courts or tribunals amongst which the various functions leading to a final decision on the merits are distributed, regardless of which judicial bodies are seised at various stages of a single dispute. It follows from both the wording and the scheme of Article [234] that only a national Court or Tribunal which considers that the preliminary ruling requested 'is necessary to enable it to give judgment' may exercise the right to bring a matter before the court. That right is therefore limited to a Court or Tribunal which considers that a case pending before it raises questions of Community law requiring a decision on its part." (emphasis added)*

Therefore the opinion of the ECJ could be of use to it.

36. There is no doubt but that *Fratelli* is authority for the proposition that not every court which might be involved at some stage, in a single case process, can be regarded, merely by virtue of that fact, as being a court within Article 234(3). A court which was "*functus officio*" or one which at a future date might be accessed, could not be so classified.

37. Incidentally, what saved the Pretore in *Fratelli* was his power to review. This had come about by default, in that the requesting court had erroneously failed to follow certain procedural rules, and as a result had retained a function, albeit a limited one, in that it could recall the parties at any time in order to confirm, vary, or discharge the *interim* order. If however he had become *funtus officio* the result would clearly have been different.

38. It could not be said that this Court is *functus officio*, or that its involvement, is hypothetical or prospective only. Clearly, neither is so: the application is currently pending before it. True it is not the substantive appeal, but in my view that is irrelevant: this because it is the appeal proper regarding the disclosure application. A judgment, indeed the final judgment on it, has to be given, not by the Circuit Court but by this court. Therefore I am seised of this appeal, the result of which could be influenced by Community law: more specifically by the opinion of the Court of Justice on the questions raised. This is subject only to what is stated at para. 40 *infra*. Consequently I cannot see how *Fratelli* is of assistance to the defendant. In fact, in my view it is supportive of the conclusion herein reached.

39. It has also been claimed that the application pending is truly an interlocutory matter and therefore a reference would be inappropriate; I cannot agree that this is so. In *Hoffmann-La Roche AG v. Centrafarm Vertribsgesellschaft Pharmazeutischer Erzeugnisse* [1977] ECR 957 the Court stated at para. 6:

> *"The third paragraph of [Article 234] of the [EC] Treaty must be interpreted as meaning that a national court or tribunal is not required to refer to the court a question of interpretation or of validity mentioned in that article when the question is raised in interlocutory proceedings for an interim order …, even where no judicial remedy is available against the decision to be taken in the context of those proceedings provided that each of the parties is entitled to institute or to require proceedings to be instituted on the substance of the case and that during such proceedings the question provisionally decided in the summary proceedings may be re-examined and may be the subject of a reference to the Court under [Articles 234]."*

For the reasons given there cannot be a re-opening of the disclosure issue in the appeal proper. I am therefore satisfied that the present application cannot be described as interlocutory in nature.

40. There is however one problem facing the plaintiff which renders his present application premature. It is this: the ultimate purpose of relying upon the Directives is to obtain the contested documentation in unredacted form; if such documents should otherwise became available, a reference would serve no purpose and would have no utility to this Court. Until the disclosure appeal is presented to and ruled upon by this Court it will not be possible to say, even *prima facie* or provisionally, whether, as a matter of domestic law, the decision of the Circuit Court was or was not correct. It may be that this Court would take a view contrary to that of the lower Court and as a result order the production of the disputed documents. If that occurred, a reference would be entirely unnecessary. In my view therefore, the appeal must be presented before this Court, as otherwise it will not know whether a reference is or is not required. For that reason the application is premature at this point in time and its final determination must therefore await the appeal process. However, I would note, albeit obiter, that I am satisfied that should the disclosure of the contested documentation be refused, a reference to the ECJ may be appropriate.