Neutral Citation [2015] IEHC 419

THE HIGH COURT

[Record No.2012/150 CA]

IN THE MATTER OF THE EQUAL STATUS ACTS 2000 – 2011

BETWEEN

G.

PLAINTIFF/APPELLANT

AND

THE DEPARTMENT OF SOCIAL PROTECTION

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 7th day of July, 2015

Introduction

1. This appeal concerns a claim of discrimination, on grounds of disability, gender and family status, in the context of the birth of a child by a surrogacy arrangement. The appellant in the case says that she is the genetic mother and primary carer of a child born as the result of a surrogacy arrangement necessitated by her medical condition. She did not qualify for either maternity benefit (not having been pregnant and given birth) or adoptive benefit (since, being the registered mother of the child on its birth certificate, she has not sought to adopt it). Her claim is that she has been discriminated against by virtue of the respondent's refusal to grant her a payment equivalent to those benefits. The case turns on the correct interpretation of the relevant anti-discrimination legislation.

2. The appeal is against the order of the Circuit Court (Her Honour Judge Lindsay) made on the 5th July, 2012, upholding a decision of the Equality Tribunal that the complaint of the appellant fell outside the scope of the Equal Status Act, 2000 as amended (hereafter "the Act").

Background facts

3. In 2006, the appellant was diagnosed with cervical cancer while pregnant. She had to undergo a hysterectomy, as a result of which she is unable to support a pregnancy. It is common case that her condition is a disability within the meaning of s.2 of the Act, which includes in the definition of disability *"the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body"*. The appellant is otherwise fertile as is her husband.

4. The appellant and her husband subsequently entered into a surrogacy arrangement in a foreign jurisdiction. The arrangement complied with the law of that state, which provides for detailed regulation of surrogate pregnancies and births. The gametes of both the appellant and her husband were carried by the surrogate mother, who gave birth to a baby in January, 2011. The appellant and her husband are the registered parents of the child under the law of the state in question, while the surrogate mother is not identified on the child's birth certificate.

5. Some months before the birth, the appellant made enquiries of the respondent as to the availability of maternity leave. She was informed that, under current legislation, she would have no statutory entitlement to maternity leave and as a result, no entitlement to maternity benefit.

6. An application to the appellant's employer for special leave from her employment (equivalent to that available for adoptive leave) after the birth of the child was successful insofar as the employer was happy to grant the leave, but it could not offer paid maternity leave and told her that she would have to seek payment for such leave from the Department of Social Protection directly.

7. On the 6th January, 2011, the Equality Authority wrote, on the appellant's behalf, to the Department of Social Protection, requesting it to use its discretion to give a payment for leave comparable to that of a working, adoptive mother. It was acknowledged that the type of leave being granted by the employer had no statutory basis such as that set out in either adoption or maternity protection legislation. The case made was that the appellant was entitled not to be discriminated against by virtue of the Employment Equality Act (in particular ss. 2, 6 and 8) and the Equal Status Acts. The payment was sought on the basis that it was available to every other working mother who had a child either naturally or by adoption.

8. On the 20th January, 2011, the Department of Social Protection replied, setting out the qualification conditions for adoptive benefit and maternity benefit. Adoptive benefit required, *inter alia*, proof of adoption by way of a certificate of placement or a declaration of suitability issued by An Bord Uchtála. Eligibility for maternity benefit required certification by a medical practitioner as to the confinement of the mother. In the circumstances, neither benefit was payable, and to make a payment outside the statutory framework would, according to the Department, be *ultra vires*.

9. On the 15th March, 2011, a notification was sent to the respondent, in the form prescribed by the Act, setting out the basis on which the appellant considered herself to be treated less favourably than others contrary to the Act. The appellant said that, as she had neither given birth to nor adopted her child, she could not comply with the statutory regulations for maternity or adoptive benefit. She was, however, a mother with a newborn child to care for and she submitted that she was comparable to both a working natural mother and a working adoptive mother.

10. The notification invoked the rights of the appellant under Article 41 of the Constitution (the obligation of the State to protect the family, the importance of the life of women within the home and the obligation of the State to ensure that mothers are not obliged by economic necessity to work outside the home).

11. On the 22nd March, 2011, the respondent replied, stating that its earlier correspondence did not constitute a formal disqualification for benefit, as no formal application had been received from the appellant for either maternity benefit or adoptive

benefit. It was suggested that it was open to the appellant to lodge a late claim for these benefits. The letter also suggested that the appellant could contact her local Community Welfare Officer and apply for supplementary welfare allowance.

12. In response, it was pointed out that any application for either benefit would have to fail. The appellant had not been pregnant and did not give birth, and so could not obtain the requisite certificates from her employer and a medical practitioner. She and her husband had not adopted their child but were registered as its birth parents in accordance with the law of the state where the child was born. Nor was she eligible for supplementary welfare, since she was on leave from her employment. What she was seeking was a payment *equivalent* to the statutory benefits provided to natural and adoptive mothers.

13. The Department of Social Protection replied by letter dated 11th May, 2011, reiterating that it could not act outside the legislation, and that a decision could not be made in the absence of any claim for a benefit or other payment.

14. Separately, the appellant's employer informed the Department of Social Protection on 8th June, 2011, that it considered the application for maternity benefit to be the appropriate application and filled in this form without completing the section in relation to certification.

15. On the 23rd June, 2011, the Equality Authority, on behalf of the appellant, filed a complaint before the Equality Tribunal.

The statutory context

16. Section 2(1) of the Act defines the concept of a "service" as follows:

> *"In this Act, unless the context otherwise requires –*
>
> *… "service" means a service or facility of any nature which is available to the public generally or a section of the public and, without prejudice to the generality of the foregoing, includes –*
>
> *(a) access to and use of any place,*
>
> *(b) facilities for –*
>
> > *i. banking, insurance, grants, loans, credit or financing,*
> >
> > *ii. entertainment, recreation or refreshment,*
> >
> > *iii. cultural activities, or*
> >
> > *iv. transport or travel.*
>
> *(c) a service or facility provided by a club…*
>
> *(d) a professional or trade service,*
>
> *but does not include pension rights (within the meaning of the Employment Equality Act, 1998) or a service or facility in relation to which that Act applies."*

17. Section 3 (as amended by the Equality Act, 2004) provides in relevant part as follows:

> *"(1) For the purpose of this Act discrimination shall be taken to occur –*
>
> *(a) 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 grounds specified in subsection (2) (in this Act referred to as the "discrimination grounds") which –*
>
> > *(i) exists,*
> >
> > *(ii) existed but no longer exists,*
> >
> > *(iii) may exist in the future, or*
> >
> > *(iv) is imputed to the person concerned…*
>
> *(b) omitted*
>
> *(c) 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 or necessary."*

18. Discrimination under s. 3(1)(a) is generally referred to as "direct discrimination", while s.3(1)(c) is regarded as "indirect discrimination".

19. "Provision" is defined in s.2 (as amended) as meaning

> *"a term in a contract or a requirement, criterion, practice, regime, policy or condition affecting a person".*

20. The discriminatory grounds relied on in this case are set out in s. 3(2) and arise, as between any two persons, on the basis

(a) that one is male and the other is female (the "gender" ground),

(c) that one has family status and the other does not or has a different family status (the "family status" ground) and

(g) that one is a person with a disability and the other either is not or is a person with a different disability (the "disability" ground).

21. "Family status", for the purposes of this case, means being pregnant or having responsibility, as a parent or as a person *in loco parentis*, in relation to a person who has not attained the age of 18 years.

22. Section 4(1) deals with the requirement to provide "reasonable accommodation" in the context of disability as follows:

> *"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."*

23. "Refusal" includes a deliberate omission. A refusal or a failure to provide the special treatment or facilities in question will not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost.

24. Section 5(1) of the Act prohibits discrimination in the following terms:

> *"A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public."*

25. Section 14(1) provides that nothing in the Act is to be construed as prohibiting, inter alia, the taking of any action required by or under any enactment (including measures under European Union law).

The complaint to the Equality Tribunal
26. The appellant's complaint alleged unlawful discrimination on the grounds of disability (including a failure to provide reasonable accommodation), family status and gender, contrary to s. 5(1) of the Act.

27. The case in relation to the appellant's disability was based on the fact that, by reason of her medical condition, she could not have a family by natural means. In relation to family status, she argued (without prejudice to her contention that, as a matter of law, she was the mother of the child) that she was at least in the position of being in loco parentis, but was being treated differently from other women responsible for newborn children. On the gender issue, it was submitted that her situation was such as could only arise in respect of a woman.

28. It was submitted that because of the manner of the child's birth, the appellant was unable to fulfil the strict conditions of the statutory regime. In respect of the maternity benefit, the appellant was unable to obtain a medical certificate of pregnancy because she was not, and could not become, pregnant. In respect of adoptive leave, the appellant could not obtain evidence of adoption because she did not adopt her child. It was stressed that:

a. She was the biological and genetic mother of the child and, like natural and adoptive mothers, she was primarily responsible for the care and nurture of the baby during the post-natal period;

b. Her employer granted her leave in connection with the birth of her child; and

c. She fulfilled the relevant PRSI contribution conditions under the statutory scheme.

29. The appellant therefore argued that she had been treated less favourably than mothers in a comparable position who are deemed eligible to benefit under the Maternity Protection Acts and the Adoptive Leave Acts. It was submitted that this had caused financial strain and distress to her and her family.

30. It was also contended that the respondent had failed to provide her with reasonable accommodation in accordance with section 4(1) of the Act insofar as there had been a failure or refusal to do all that was reasonable to accommodate the appellant's needs, by providing special treatment or facilities, in circumstance where without such special treatment or facilities it was impossible for her to avail of the service provided by the respondent.

31. The appellant argued that the primary consideration underlying the statutory regime was the facilitation of full-time care of the child by his or her primary carer during the critical period of time following his or her introduction to the family. This was said to be a reflection of the importance attached by the State to the special bond created between the child and the primary carer at this time.

32. The respondent submitted that statutory schemes such as maternity and adoptive leave were not "services" within the meaning of the Act. It was therefore argued that the service sought by the appellant did not exist, and that she was expressly seeking a benefit to be extended to her on a discretionary basis, thereby asking the Tribunal to create a new statutory entitlement. It was submitted that it was not within the respondent's power to offer a discretionary payment.

33. The respondent also contended that the complaint raised issues of constitutional law relating to the definition of motherhood, which lay outside the jurisdiction of the Tribunal.

Decision of the Equality Officer
34. In a decision issued on the 18th November, 2011, the Equality Officer dismissed the appellant's complaint.

35. Referring to the burden of proof under the Act, the officer noted that it was for the complainant to set up, in the first instance, a *prima facie* case by establishing facts upon which she could rely in asserting that she had suffered discriminatory treatment.

36. The equality officer did not accept the respondent's submission that the statutory schemes administered by it were not services, ruling that s.2(1) did not set out an exhaustive list of services and that financial services or facilities were clearly contemplated. However, she went on:

"I do accept that the language used in 'available to the public or a section of the public' is clear using every day language and therefore, in the context of statutory entitlements, applies to actual schemes that are in place. It is clear that the service that the complainant is seeking – maternity leave for a mother who has not carried her own child or adoptive leave for a person who has not adopted her child – does not exist in the statutory scheme and therefore this Tribunal has to find that the complainant has not been refused such a service within the meaning of those Acts.

I accept that the facts of this case do present a compelling complaint. However, I find that the Irish legal system operates a default legal assumption that the person giving birth to a child is the child's legal mother. There is no legal recognition of surrogacy in this jurisdiction and it is clear that this is a matter that will raise a number of complex issues for the legislature to consider in due course. These considerations are not, however, a matter for this Tribunal with its limited jurisdiction. I find that almost all legislation addressed to the regulation of society resorts to some form of classification and such can be used as a classification of inclusion or exclusion for various legislative purposes. There is nothing, in accordance with section 14(1) of these Acts that entitles this Tribunal to find such classification as invidious, unfair or discriminatory. In deciding, as a matter of policy, to establish a special scheme for Maternity and Adoptive Leave, the Oireachtas necessarily had to define the scope and limits of its application. I am satisfied that the definitions currently contained in the statutes do not recognise the situation that the complainant finds herself in and in such circumstances the respondent had no option but to turn down her application."

37. On the issue of reasonable accommodation, the Equality Officer found that to offer to the appellant special treatment by way of making a payment to her would have been *ultra vires* the powers conferred upon the respondent by statute.

Decision of the Circuit Court
38. The hearing before the Circuit Court appears to have been conducted on the basis of the same arguments as those put before the Equality Officer. The decision of Judge Lindsay, delivered on the 5th July, 2012, affirmed the finding of that officer.

39. The learned judge approached the matter on the basis that she had firstly to decide whether the appellant had a disability. Finding that she had, the next issue was whether there had been discrimination. The test was formulated as follows:

"Has the appellant been treated less favourably than a natural mother or an adoptive mother on the grounds that she is not able to have a child and yet she is now responsible for a child which has been born to a surrogate mother and to whom she is the biological mother?"

40. In relation to the issue of reasonable accommodation she asked whether it was open to the Minister to make special arrangements, and whether not doing so was an act of discrimination.

"Therefore there are two matters that I must decide firstly was the appellant treated less favourably than another person is or would be treated in a comparable situation and secondly is it open to the Minister to make a special arrangement.

The Minister in his defence has stated that he is administering a scheme, in other words a specific benefit for specific persons as is prescribed for him in the [Social Welfare Act, 2005].

41. Having considered the long title of the Act, the learned judge found that the purpose of the legislation was to promote equality and prohibit discrimination.

"However, there is no legislative provision for surrogacy in Ireland. The Appellant's situation was not envisaged when the Equal Status Act became law. The Act is quite specific it covers situations where there is discrimination of those within the scope of the Act and not those outside it. Although there may be discrimination in the ordinary meaning of the word and the Minister's decision may seem unfair and unjust he is confined by the terms of the Act and any benefit given to the Appellant would be ultra vires. He does have discretion to make a special provision…but to exercise this discretion would be beyond the defined scope of the Act.

42. She therefore answered the questions posed by finding that the appellant had not been treated less favourably within the meaning of the Act and that any action by the respondent by way of special provision would be outside the scope of the Act and, accordingly, would be *ultra vires.*

Appeal to the High Court
43. Under s.28(3) of the Act, the appeal to this court is on a point of law only. There was, in any event, no dispute between the parties on any factual matter.

44. The points of law raised on behalf of the appellant are pleaded as follows:

a. that the learned trial judge erred in law in concluding that, because there is no legislative regulation of surrogacy in Ireland, the appellant's complaint did not come within the scope of the Act;

b. that the learned trial judge erred in law in concluding that, because surrogacy had not been envisaged when the Equal Status Act became law, the appellant's complaint did not come within the scope of the Act;

c. that the learned trial judge erred in law in the manner in which she concluded that the appellant had not been less favourably treated within the meaning of the Equal Status Acts 2000-2011; and

d. that the learned trial judge erred in law in the manner in which she concluded that the taking of any action by the respondent by way of special provision would be beyond the defined scope of the Act and, consequently, ultra vires the powers of the respondents.

45. The grounds pleaded in support of these propositions included a contention that the learned Circuit Judge had erred in identifying the issues as she did. It is argued that the correct approach is to ask, firstly, whether the appellant has been treated less favourably on a discriminatory ground; secondly, whether (in the case of disability) the appellant has been discriminated against by reason of the failure to make reasonable accommodation including the provision of special treatment or facilities; and thirdly, whether, in the event of a finding that discrimination has occurred, relief can be ordered against the Minister having regard *inter alia* to s.14(1) of the Act.

46. The suggestion is made that the Circuit Judge failed to engage with the central argument in the case,

> *"…namely that a discriminatory exclusion from the scope of [the Social Welfare Acts] may itself constitute discrimination within the meaning of the Equal Status Acts 2000-2011."*

47. In written submissions for the court, the parties adopted much the same arguments as they had at the earlier hearings. However, it became apparent during the hearing that the respondent had shifted position somewhat. It was now accepted that the Department does provide a service, with the service in question being described as the operation of the statutory code for the provision of benefits and allowances. The focus of the respondent's case on this aspect moved to an argument that there had been, as a matter of law, no discrimination against the appellant. Reliance was placed on a number of United Kingdom authorities not previously referred to in submissions.

48. As a matter of fairness, the court adjourned the hearing to give an opportunity to the appellant to consider and respond to this new line of argument. Further oral and written submissions were accordingly made. The appellant maintains an objection to permitting the respondent to put forward a wholly new argument not made at the previous hearings. She says that it was not seriously in dispute, before either the Equality Tribunal or the Circuit Court, that she had been treated less favourably and that the respondent should not be permitted to argue, in this the third stage of the process, that there was no discrimination.

49. However, the appellant's supplemental submissions do engage with the merits of the respondent's arguments.

50. The appellant also puts forward an alternative basis for her own case based on the concept of indirect discrimination. She says that at all times her case was that she had been discriminated against within the meaning of s.3 of the Act and that she is therefore entitled to make an argument based on s.3(1)(c).

51. The respondent, in turn, has objected to what is perceived as being a new argument, where the complaint at the earlier hearings had been based on a claim of direct discrimination.

52. After the conclusion of the adjourned hearing, the Supreme Court delivered judgment in the case of *M.R. and D.R. & Ors. v An t-Ard Chláraitheoir & Ors* [2014] IESC 60 and this court afforded the parties an opportunity to file written submissions in relation thereto.

53. This being an appeal on a point of law, the Court has no jurisdiction to determine an issue of law not argued in the court below – see *Vavasour and The Employment Equality Agency v Northside Centre for the Unemployed Ltd. & ors* [1995] 1 I.R. 450, recently approved by the Supreme Court in *National Asset Management Agency v. Commissioner for Environmental Information* [2015] IESC 51. However, as the latter judgment makes clear, the application of this principle may depend on the formulation of the issue by the parties.

Submissions on behalf of the appellant

54. On behalf of the appellant, Ms. Butler S.C. says that the scheme as drawn up and as operated by the respondent is discriminatory. If that is so, then it is not an answer to her claim to say that she is not eligible under the scheme. There is no factor bringing the issue within the terms of s.14 of the Act, since there is no statutory provision prohibiting the making of a payment to her.

55. It is submitted that the burden on the appellant is to show that she has been discriminated against by reference to a person in a comparable – not identical – situation.

56. The appellant compares herself with a mother who has given birth naturally and submits that if she did not suffer a disability and was able to support a pregnancy in the ordinary way, then, having regard to the fact that she fulfils all of the other relevant statutory conditions, there is no question but that she would be entitled to payment for maternity leave in accordance with the Maternity Protection Acts.

57. It should be noted that in submissions it was maintained by the appellant (on the basis of the High Court decision in *M.R.*, and before the delivery of the Supreme Court judgments in that case) that she was the child's mother as a matter of law. However it is a core part of her case that she does not need to establish that status, since she is, in any event, *in loco parentis*.

58. A comparison is also made with an adopting mother prevented through disability from producing gametes for gestational surrogacy. Like such an adopting mother, the appellant has not undergone pregnancy but she has responsibility for care of the child following its birth and on a permanent basis into the future. If the appellant's disability was that she was infertile, and her only possibility of becoming a mother was through the process of adoption, she would be entitled to payment for leave from employment under the Adoptive Leave Acts.

59. The appellant relies on *Murphy v Slough Borough Council* [2004] I.C.R. 1163 (also a case involving surrogacy, where the applicant had been refused paid leave by her employer) and the reasoning therein of Silber J. in the Employment Appeals Tribunal:

> *"…the applicant has been treated less favourably than others who gave birth in the conventional way to their own children; "the reason" for the treatment accorded to the applicant related to her disability namely her inability to have children. For those reasons we consider that… the decision not to give the applicant paid leave was "for a reason which relates to the disabled person's disability".*

60. It is submitted that the court should adopt the line of reasoning followed in this case, which involves stepping back from the "immediate" (or "intermediate") reason (non-eligibility under the statutory criteria) and looking for the "ultimate" reason for the treatment of the complainant (the inability to meet the statutory criteria by reason of disability). However, it is also submitted that the court should treat other UK authorities on the issue with caution, noting that the legislation is not framed in the same terms.

61. The appellant alleges that, contrary to s.4 of the Act, the respondent has discriminated against her on the ground of disability insofar as it has refused or failed to do all that is reasonable to accommodate her needs by providing special treatment or facilities in circumstances where, without such special treatment or facilities, it is impossible for the appellant to avail of the service in question. The appellant's case is that the service provided by the respondent is payment for leave from employment upon becoming a mother.

62. The appellant acknowledges the need for evidence of motherhood. In cases of natural birth or adoption this is provided, respectively, through medical certification of pregnancy or a certificate of placement. She submits that the refusal of the respondent to consider or accept alternative evidence of the condition of motherhood results in discrimination against her on account of her

disability. In relation to the issue of reasonable accommodation, the appellant points to the fact of her insurance contributions and submits that to accommodate her within the payment regime would not impose any financial burden on the respondent additional to that which would apply if she were capable of pregnancy or had adopted a child. She says that by failing or refusing to find a suitable administrative arrangement which could accommodate her, the respondent has failed to give effect to the spirit of the statutory regime and to ensure full compliance with it.

63. The fact that the respondent administers a large number of payment schemes without any statutory foundation is highlighted for the purpose of demonstrating that discretionary payments are not necessarily *ultra vires* the respondent. The schemes referred to deal with a disparate range of areas but, by way of example, the appellant points in particular to the Back to Education allowance. Eligibility for this scheme requires the applicant to be in receipt of jobseekers' benefit or allowance – but these are, under the statutory criteria, available only to persons seeking work. The terms of the scheme permit recipients to retain their benefit while in full-time education. It is, therefore, open to the respondent to put in place a non-statutory payment for a person who does not meet the criteria for the parallel statutory payment.

64. The appellant emphasises in argument that her challenge does not have the consequence, as contended for by the respondent, of setting aside or invalidating an existing legislative choice. She submits that she is not seeking any broader finding than one to the effect that she has been discriminated against within the meaning of the Equal Status Acts.

65. It is also contended that, contrary to the analysis and conclusion of the learned Circuit Court judge in this case, the consideration that surrogacy arrangements of this kind may not have been contemplated when the Equal Status Act became law is an irrelevant and incorrect basis for holding that it could not be applicable. It is said that the Act is intended to apply across a broad range of human activity, and that it does not matter whether a particular field has or has not already been made the subject of regulation.

66. It is submitted that the issues giving rise to the situation under consideration affect the appellant only because she is a woman and that therefore she is discriminated against on the ground of gender.

67. In relation to the "family status" aspect, the appellant submits that she is a person with responsibility for a person under 18 years of age and she is being treated less favourably than other persons with a different family status, in particular those who are or were pregnant and who are thus capable of carrying and giving birth to their children. Such persons are entitled to maternity benefit, but the appellant has no entitlement to that or any similar benefit such as adoptive benefit.

68. In submissions relating to the applicability of s.(3)(1)(c), the appellant says that a condition (the requirement of certification of pregnancy or adoption) has been applied to her, by virtue of "an apparently neutral provision", with which, because of her disability, it is not possible to comply. She is therefore placed at "a particular disadvantage". On this argument, the consideration that other women who suffer from no disability might choose to avail of surrogacy has no relevance. Such women would be able, if they wished, to comply with the condition but she has no choice.

69. Ms. Butler stresses that she does not seek to attack the validity of the social welfare provisions in question, or to interfere with the rights thereby accorded to other women, or to use the Act as if it had the status of the Constitution. Nor does she ask the court to engage in a quasi-legislative exercise. Even if the court finds that the respondent had no power to make a payment to the appellant, that does not mean that she is not entitled to redress for having been discriminated against. The Act envisages an award of compensation where that has occurred.

Submissions on behalf of the respondent

70. On behalf of the respondent, Mr. Durcan S.C. started with the proposition that under Irish law the mother of a child is the woman who gave birth to it. The fact that the law of the state in which the child was born considers the appellant to be the mother does not alter that position.

71. It is submitted that, as a Government Department, the respondent is bound by the Social Welfare Acts as enacted. The Minister must act within the four corners of the Acts, and there is no payment under them to which the applicant is entitled. Section 14 is applicable in this context.

72. As already noted, the respondent, in this court, altered its previous position somewhat. It was accepted that a service is provided. However, where the appellant characterises the service in question as being the provision of payments for leave for mothers of newly-born and newly adopted children, the respondent submits that the proper analysis is this: the respondent provides statutory benefits and allowances, in accordance with a statutory code. The "service" it provides is the operation of that code. The respondent says that the definition of the service is crucial, to avoid the risk that a court might end up ordering the provision of a new service. It is contended that that is, in reality, what the appellant is seeking.

73. It is submitted that Irish law, as reflected in the legislation, supports mothers and adoptive mothers in particular circumstances. However there would be a policy choice involved in deciding to subvent persons who go through a surrogacy process. There are distinctions between the adoption and surrogacy processes – the former is subject to a clear statutory regime nationally and internationally, while the Oireachtas has made a choice not to make provision in relation to surrogacy.

74. In answer to the suggestion that the Minister could set up a non-statutory scheme, Mr. Durcan said that there would have to be "considerable doubt" as to whether that would be lawful having regard to the choices already embodied in the legislation. Secondly, he pointed to the fact that the payments in question are benefits (as opposed to allowances), with entitlement being based on contributions. He suggested that it would be unfair to other contributors if any payments were made other than in accordance with statutory conditions.

75. Mr. Durcan then went on to deal with the submissions made by the appellant as to the proper approach to analysing a claim of discrimination. It is now submitted that the court should not adopt the reasoning in *Murphy v Slough Borough Council*. This is on the basis that the EAT in that case was following the decision of the Court of Appeal in *Clark v. Novacold Ltd* [1999] I.C.R. 951, which was subsequently criticised by the House of Lords in *Lewisham London Borough Council v Malcolm* [2008] 1 A.C 1399, and is no longer good authority.

76. In any event, it is submitted that the English authorities deal with "disability-related" discrimination, while the statutory definitions are different in this jurisdiction. When considering whether a person has been discriminated against within the meaning of s.3 of the Act, the question is whether there was discrimination "on the ground of" disability, and that requires intent. The "reason" for the treatment must be the "fundamental reason" and must be discriminatory in itself. Here, the fundamental reason has nothing to do with disability, which is irrelevant to the decision that a woman with a child born through surrogacy is not eligible for a benefit. There is,

therefore, no discrimination. The result can only be different if the *Murphy v Slough Borough Council* or *Novacold Ltd* line of analysis is followed, as opposed to Malcolm.

77. The respondent contends that the appellant is not in a situation comparable in law with that of a woman who gives birth by way of pregnancy and confinement. This is because the latter is given special protection by both Irish and EU law. Similarly, Irish law gives special protection to adoptive mothers, in circumstances where adoption is closely controlled by law. No such protection is afforded in surrogacy cases.

78. It is not accepted that any question of discrimination on grounds of gender arises. It is possible for men to have children by surrogacy also, but in no circumstances would a man qualify for the statutory benefit.

79. The argument in relation to family status is also rejected on the basis, again, that it was not the reason why the appellant could not obtain benefit. Any person exercising parental responsibility would be refused if the child came into his or her care on foot of a surrogacy process. The payment in all cases (for maternity benefit) is conditional on pregnancy and birth. There is no equivalent payment available to persons in loco parentis.

80. Again, it is not accepted that the reason for refusal was the disability of the appellant, since any parent who has a child by surrogacy will be refused whether disabled or not. Therefore, the fundamental reason for the treatment was not the prohibited ground.

81. On the question of "reasonable accommodation", the respondent says that the obligation is to take measures that will allow a disabled person access to existing benefits and that it cannot apply so as to require the provision of new ones. It is also inapplicable to a situation where the respondent is obliged to pay benefit to persons who meet the statutory criteria, and does not pay it to those who do not. This course of action is prescribed by statute, and the Act cannot be relied upon to invalidate other legislation.

82. The respondent says that the word "provision" as used in s.(3)(1)(c) cannot be interpreted to include a statutory provision which the Minister is obliged to implement, with the effect that it would be ignored or rendered inoperative if found to be discriminatory. The concept of indirect discrimination therefore has no application. To hold otherwise would be to breach the separation of powers, in that the court would in effect be legislating for rights which the Oireachtas has chosen not to create.

The Supreme Court decision in M.R and Others v An t-Ard Chláraitheoir [2014] IESC 60

83. The parties filed written submissions in relation to the Supreme Court judgments in *M.R. and D.R & Others v An t-Ard Chláraitheoir and Others* [2014] IESC 60. This case concerned a claim that the genetic mother of two children born through a surrogacy arrangement should be officially registered, under the provisions of the Civil registration Act, 2004, as their mother. She succeeded in the High Court but the Supreme Court unanimously allowed the appeal, holding that the law as it stands does not permit of an interpretation of the word "mother" as meaning other than the woman who gave birth

Submissions on M.R. on behalf of the respondent

84. It is noted throughout the judgments that the Oireachtas has not to date legislated for surrogacy. The respondent submits that the same situation pertains in relation to any issue arising from a surrogate birth, including the payment of maternity benefit. It is submitted that the remedies sought before this court would result in the High Court "legislating" for such rights where the Oireachtas has not chosen to do so, and would involve a breach of the separation of powers. It is also submitted that the judgments make it clear that the courts must respect and implement the legislature's policy choices in this area.

85. The respondent refers to the following extracts from the judgments.

86. At paragraphs 111-113 Denham C.J. said:

> *"There have been statutory developments in other jurisdictions to address issues which arise where there has been assisted human reproduction. Legislatures have recognised the need to address issues that now arise as a result of scientific and medical developments enabling children to be born in circumstances such as surrogacy. Neither the Status of Children Act, 1987 nor the Civil Registration Act, 2004, nor any legislation in Ireland currently addresses the issues arising on surrogacy birth of children. Any law on surrogacy affects the status and rights of persons especially those of the children; it creates complex relationships and has a deep social content. It is thus, quintessentially a matter for the Oireachtas."*

87. Clarke J. said at paragraphs 2.3-2.5 of his judgment:

> *"The sole and exclusive executive power to make legislation under the Constitution is conferred on the Oireachtas. (Article 15.2.1). In that context there are limits to the extent to which it is constitutionally appropriate for the courts to engage in a reinterpretation of the common law where such interpretation might cross the line into legislation and thus infringe the constitutionally protected role of the Oireachtas. The application of underlying existing common law principles to new circumstances is one thing. The development of substantially new principles or policies is another. Thus the way in which law can change is by means either of a legitimate and permissible evolution of existing common law principles to meet new circumstances and conditions as part of the inherent evolution of the common law, by express legislation, or by means of constitutionally mandated changes resulting from the role of the courts as interpreters of the Constitution."*

He continued at paragraph 25:

> *"Short of the existing law being found to be in breach of the Constitution, the only proper role of the courts is to play their appropriate part in the evolution of the common law in its application to new conditions and circumstances or to interpret legislation. Even where it is clear that the existing law is no longer fir for purpose it may well be the only solution that lies in legislation. This will particularly be so where any solution to identified problems requires significant policy choices and detailed provisions beyond the scope of the legitimate role of the courts."*

88. MacMenamin J. said (at paragraphs 30-32):

> *"Even at a time after the possibility of in vitro fertilization was thought of, the same implied "understanding" of mother is to be found in statutory form. To take further examples s. 28(2) of the Social Welfare (Consolidation) Act 1982 provides:*

> *"(2) In deciding whether or not to make an order under section 21A of the Family Law (Maintenance of Spouses and Children) Act 1976 (inserted by the Status of Children Act, 1987) in so far as any order relates to the payment of expenses incidental to the birth of a child the Circuit Court or the District Court as the case may be shall not take into consideration the fact that the mother of the child is not entitled to maternity allowance."*
>
> *While it might be said that this provision does not actually preclude another interpretation, it is not easy to ignore the statutory juxtapositions of the terms "mother of the child" and "birth of the child". The link between motherhood and birth is also to be found in the Maternity Protection Acts 1994 to 2004 designed and intended to protect the rights of both pregnant employees and employees who have given birth. Section 16 of the 1994 Act (as amended by Section 10 of the Act of 2004) defines the "mother" as a person "who has been delivered of a living child". The protection extended by the legislation again links or connects pregnancy, birth and motherhood (see also s.6 of the 2004 Act). These close associations are difficult to ignore."*

89. The respondent concludes in written submissions that

> *" The decision in this case to grant maternity benefit to a woman who has given birth to a child but not to a woman who has a child by way of a surrogacy arrangements reflects and gives effect to the legislative choice and policy in this area. It follows a fundamental principle that the person who gives birth is in law the mother of the child and only she is entitled to benefits which accrue to a mother."*

90. The respondent submits that in light of these judgments it is not open to this court to interpret the relevant legislative provisions in a manner which gives rights to person who have a child on foot of a surrogacy arrangement, when the Oireachtas has not to date chosen to confer such rights. To do so would be to legislate by interpretation and would infringe the constitutionally protected power of the Oireachtas.

Submissions on M.R. on behalf of the appellant

91. The appellant submits that none of the passages relied upon by the respondent from the decision of the Supreme Court in *M.R.* have the effect contended for by the respondent. The consideration that it is a matter for the Oireachtas to legislate for the complex questions of family and other legal relations that arise from surrogacy arrangements, and that to date the Oireachtas, despite the importance of these matters to society and to the constitutional interests of those affected has not done so, does not have the consequence that the appellant is left outside the legislative scheme of the Equal Status Acts.

92. It is submitted that the judgments were given in a context where no provision has been made for surrogacy in this jurisdiction at all, including in respect of benefits equivalent to maternity protection benefits. The general provisions of the Equal Status Acts have not been qualified or contradicted or restricted in the manner contended for by the respondent.

93. The appellant submits that M.R. does not advance or in any way support the respondent's argument that this court would be legislating if it were to find in favour of the appellant in this case. That argument, it is contended, remains affected by the same error of law as the Circuit Court judge fell into in these proceedings, which is the removal from scrutiny of a matter that is *prima facie* prohibited by the general provisions of equality legislation. The appellant would thereby be deprived of a remedy – which is a limited remedy under and within the Equal Status Acts and has no wider legislative effect - on the sole ground that the matter is novel and unregulated or, as found by the Supreme Court, on the grounds that it is no longer novel and ought to be regulated by legislation, but to date has not been.

94. By making provision for the payment of benefit in particular circumstances, the social welfare Acts do not require that persons in comparable situations, but not meeting the precise statutory criteria, be excluded from the possibility of payment either of the benefit in question or of an equivalent payment. The appellant submits that s.14 does not create a charter to allow the State to discriminate by legislation. Specifically, it does not prohibit the taking of action, not itself prohibited by an enactment, but not falling within the express scope of the governing legislative scheme.

95. The appellant submits that if a failure to regulate the substantive subject matter underlying an equality claim is adjudged to afford a full defence to such a claim, this would serve only to reward legislative and administrative inaction in a manner which is contrary to the purpose and intent of the Equal Status Acts.

96. It is argued that all of the judgments in *M.R.* recognise that the intimate ties between a genetic mother who is bringing up her child born to a surrogate, and that child, are constitutionally underpinned and require legal protection. From this perspective, far from undermining the present claim, the appellant's case that the discrimination that has occurred here falls within the widely defined "family status" ground has become all the more compelling as a result of the Supreme Court judgments.

The United Kingdom authorities

97. In considering these authorities, which I propose to do chronologically, it is important to bear in mind the fact that the statutory provisions being construed are not identical to those under consideration here and have themselves been amended.

98. Section 5(1) of the Disability Discrimination Act 1995 defined discrimination by an employer against an employee as occurring where, for reasons which ***related*** to the employee's disability, the employer treated him less favourably than he treated or would treat others to whom "that reason" did not or would not apply, and could not show that the treatment in question was justified (emphasis added). The distinction drawn in earlier anti-discrimination legislation between direct and indirect discrimination did not feature.

99. The Act also provided that an employer was under a duty to take such steps as were reasonable to prevent a disabled employee being placed at a substantial disadvantage by reason of any work-related "arrangements" made by the employer, or any physical features of the employer's premises. Failure to comply with this duty, without justification, amounted to discrimination under s.5(2).

100. Sections 19 and 20 dealt with discrimination in the provision of services. Again, the definition provided that it was discrimination if, for a reason related to a disability, the disabled person was treated less favourably than the service provider treated or would treat others to whom that reason did not or would not apply, and it could not be shown that the treatment was justified.

101. "Justification" under the Act required showing that there was a reason which was both material to the circumstances of the particular case and substantial.

102. *Clark v Novacold Ltd*. was the first decision of the Court of Appeal dealing with this legislation. It concerned an employee whose job involved manual labour and who suffered a work-related injury. His employer came to the view that he would not be fit to return to work within a reasonable time and therefore terminated his employment on the basis that he was no longer capable of performing the main functions of his job.

103. An industrial tribunal held that the employee had a disability and was dismissed for a reason relating to it. However, he had not been subjected to discrimination, in that he was not treated less favourably than the employer would have treated others absent from work, without a foreseeable date of return, for reasons other than disability. This decision was reversed on appeal, and the matter ended up in the Court of Appeal.

104. The employer's case was that a person to whom "that reason" would not apply would be someone else incapable of performing the main functions of his job for a reason which did not relate to disability.

105. Giving the judgment of the court, Mummery L.J. said that the phrase "that reason" referred only to the facts constituting the reason for the treatment, and did not include within that reason the added requirement of a causal link with disability – that was more properly to be regarded as "*the cause of the reason for the treatment*" rather than as in itself a reason for the treatment.

106. On the issue of the correct comparator, Mummery L.J. referred to the example, given during a Parliamentary debate on the issue, of a café refusing to allow dogs, including guide dogs accompanying blind people. (It appears that it was intended by Parliament that this would be seen as a prima facie case of discrimination.)

> *"It could only be a case of less favourable treatment and therefore a prima facie case of discrimination, if the comparators are 'others' without dogs: 'that reason' for refusing access to refreshment in the café would not apply to 'others' without dogs.*

107. Mummery L.J. went on:

> *"If no dogs are admitted to a café, the reason for denying access to refreshment in it by a blind person with his guide dog would be the fact that no dogs are admitted. That reason 'relates' to his disability. His guide dog is with him because of his disability.'*

108. The court therefore considered that the appropriate comparators were employees who were able to perform the main functions of their jobs. The reason for the applicant's dismissal would not apply to them, so he had been treated less favourably than them. They would not be dismissed for "that reason".

> *"However, that does not necessarily mean that the employee has been discriminated against. It is open to the employers to show that the dismissal is justified, just as it would be open to the café proprietor to justify the exclusion of dogs, including guide dogs with their blind owners."*

109. The matter was remitted for consideration of the issue of justification.

110. *Murphy v Slough Borough Council* was a decision of the UK Employment Appeals Tribunal. It concerned a teacher who suffered from a medical condition which meant that a pregnancy would endanger her life. She had a child by a surrogate mother and applied to take paid post-natal leave. Her employer took the view that her situation was comparable to that of an adoptive mother, rather than that of a mother who had given birth – the difference being that paid leave for the former was only a matter of discretion, as opposed to entitlement. Her application was refused because of the school's difficult budgetary situation.

111. The EAT held that the applicant had been treated less favourably than women who gave birth to their own children; that the reason for that treatment was her inability to have children; and that this "related" to her disability within the meaning of the Act.

112. In its determination, *Clark v Novacold Ltd* was relied upon for a number of aspects. Referring to the example of the guide dog, it was said that

> *"The task therefore is to isolate the ultimate reason for the conduct complained of (i.e. the disability) and to ignore the immediate cause (i.e. the guide dog)."*

113. Applying this analysis, the EAT found that

> *"the applicant has been treated less favourably than others who have given birth in the conventional way to their own children; 'the reason' for the treatment accorded to the applicant related to her disability, namely her inability to have children. For those reasons, we consider…that the decision not to give the applicant paid leave was 'for a reason which relates to the disabled person's disability.'"*

114. However, it went on to find that the financial position of the school was such as to validate the finding of the employment tribunal that the treatment of the applicant, and the decision by the school not to adjust its arrangements, had been justified.

115. In 2008, the House of Lords considered the issue in *Lewisham London Borough Council v Malcolm*. There, a local authority tenant who suffered from schizophrenia sublet his flat in breach of the tenancy agreement. To do so was clearly not in his interest – he thereby lost his security of tenure. The landlord (which had been unaware of the tenant's illness) commenced a process to gain possession on the basis that he had moved out, which was resisted by the tenant on the basis of his disability. The Court of Appeal had held that the landlord's treatment of the tenant was for a reason which related to his disability, and that the fact that the landlord did not know of the disability did not preclude a finding of discrimination.

116. In allowing the appeal the House of Lords doubted the correctness of *Novacold* and took a different approach.

117. Lord Bingham held that the tenant would probably not have behaved so irresponsibly were it not for his illness, but the illness had nothing to do with the landlord's reason for seeking possession. On the question who the "others" were for the purpose of appropriate comparison, he identified three possible categories: (a) tenants without a mental disability who had sublet a flat and moved out, (b) tenants who had not sublet or moved out, and (c) "some other comparator group". The *Novacold* analysis would lead to the choice of group (b), but Lord Bingham considered that group (a) was the more natural choice and that *Novacold* was incorrect. It was clear that the landlord would have claimed possession against any non-disabled tenant who sublet and moved out, so the

tenant had not been discriminated against.

118. Lord Scott of Foscote said that the *Novacold* analysis "emasculated" the point of the statutory comparison.

> *"What is the point of asking whether a person has been treated 'less favourably than others' if the 'others' are those to whom the reason why the disabled person was subjected to the complained of treatment cannot apply? If a person has been dismissed because he is incapable of doing his job, what is the point of making the lawfulness of his dismissal depend on whether those who are capable of doing their job have been dismissed?"*

119. He referred to the hypothetical case of the blind man and the guide dog and analysed it as follows:

> *"Would the blind man without his dog have been refused entry? Almost certainly not. The problem was the dog. The dog was the reason for the refusal of entry. That reason was causally connected to the disability, but the disability would have played no part in the mind of the restaurant manager in refusing entry to the dog. The problem, I repeat, was the dog…*
>
> *If he is refused entry it is not because he is blind but because he is accompanied by a dog and is not prepared to leave his dog outside. Anyone, whether sighted or blind, who was accompanied by a dog would have been treated in the same way. The reason for the treatment would not have related to the blindness; it would have related to the dog."*

120. It was accepted by at least some of their lordships that the effect of this judgment was to reduce the protection afforded by the Act, and some misgivings were expressed on this score.

121. In *Stockton on Tees Borough Council v Aylott* [2010] I.C.R. 1278, the issue came before the Court of Appeal again. Mummery L.J. rejected a submission that his judgment in *Novacold* was still good law, holding that it was overruled by *Malcolm* and was "deceased as a case". However, it is worth noting two observations made in his judgment.

122. The first was that Parliament had legislated to, in effect, nullify Malcolm, by providing in the Equality Act 2010 that

> *A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability; and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

123. The second observation was that, after *Malcolm*, claimants and their advisers had shifted their focus to the duty to make reasonable adjustments. Mummery L.J. commented that this was, perhaps, what they should have been doing all along, since it was a concept central to the 1995 Act. It entailed a measure of "positive discrimination", requiring adjustments to be made for disabled persons that would not be required for others.

European Union Law

124. The parties are agreed that this is not an EU law case, turning as it does on domestic statutory law. However, the respondent places some reliance on the decision of the Court of Justice of the European Union in *Z. v A Government Department & Ors.* (Case C-363/12) delivered on the 18th March, 2014. In that case a school teacher who, like the appellant in the instant case, was fertile but could not support a pregnancy, had a child born through surrogacy. She sought paid leave equivalent to maternity or adoptive leave and was refused.

125. Ruling on a reference from the Equality Tribunal, the CJEU held that she had not been discriminated against under the relevant EU legislation. The refusal of leave would, it considered, have been discrimination

> *"if the fundamental reason for that refusal applies exclusively to members of one sex".*

126. However, a commissioning father in a surrogacy arrangement would have been treated in the same way.

127. Indirect discrimination was not established since it had not been shown that a refusal to grant leave put female workers at a particular disadvantage compared with male workers.

Interpretation of the Act

128. Having regard to the objectives of the Act, it must be acknowledged to be a remedial statute. 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."*

129. Dodd refers to *Bank of Ireland v Purcell* [1989] I.R. 327, where Walsh J. referred to the Family Home Protection Act, 1976 as a remedial social statute and said:

> *"This statute is not to be construed as if it were a conveyancing statute. As has been frequently pointed out remedial statutes are to be construed as widely and as liberally as can fairly be done. The first consideration in construing s. 3 is to ascertain the purpose of the section."*

130. In *Gooden v St Otteran's Hospital* [2005] 3 I.R. 617, Hardiman J. said of the Mental Health Act:

> *"I believe however that in construing the statutory provisions applicable in this case in the way that we have, the Court has gone as far as it possibly could without rewriting or supplementing the statutory provisions. The Court must always be reluctant to appear to be doing either of these things having regard to the requirements of the separation of powers. I do not know that I would have been prepared to go as far as we have in this direction were it not for the essentially paternal character of the legislation in question here…"*

Discussion and conclusions

131. It seems to me that the first question to be addressed is whether or not the provisions of the Act are capable of being applied to surrogacy-related issues. In this respect I agree with the appellant (and do not understand the respondent to expressly disagree) that the Act is intended to cover a broad range of human life and activity, and that its overall purpose is to reduce the social wrong of discrimination based on improper considerations. Having regard to the principles applicable to remedial statutes, it should be construed widely and liberally. I consider that the learned Circuit Court judge fell into error in holding that it could not be relied upon in relation to novel factual situations not familiar to the legislature at the time of enactment.

132. Since it is now accepted that the respondent does provide a service within the meaning of the Act, the question arises as to the proper definition of that service.

133. The respondent says that it is the operation of the statutory code of benefits and allowances. I consider this definition to be too restrictive, since it takes no account of the fact that the respondent also administers a large number of non-statutory payment schemes. There is insufficient material before the court to determine the legal basis for each of these schemes, but such case-law as there is makes it clear that they must be administered according to generally applicable principles of public law. In my view they would have to be regarded as services to the public within the meaning of the Act.

134. However, the proposition that the service in issue in this case is the making of payments to the mothers of newly-born or newly-adopted children is also too restrictive, since it leaves the statutory context for those payments out of account.

135. I consider that the service provided by the respondent is the administration or operation of the statutory code and of other non-statutory payment schemes.

136. The statutory provisions at issue in this case relate solely to mothers, whether natural or adoptive. It is clear, in the light of the judgments of the Supreme Court in M.R. that the appellant cannot claim the status of mother under Irish law. This situation is no doubt a source of great distress to her but, pending the introduction by the Oireachtas of legislation dealing with this field, it is equally clear from the Supreme Court judgments that it is not for the courts to attempt to resolve the complex questions that need to be addressed.

137. It follows that the appellant cannot, for the purposes of a claim of discrimination, choose to compare herself directly with the two categories of mother recognised under Irish law – that is, mothers who have given birth and mothers who have adopted. Both of these categories are entitled to social welfare payments that, in the applicable qualification conditions, relate directly to the legal status of motherhood. The appellant does not have that status. If she did, it seems likely that she would have a strong case based on Constitutional grounds but that is not what the court is dealing with here.

138. The appellant has maintained throughout, however, that her case does not depend on the status of motherhood. She says, primarily, that she is a person who is *in loco parentis* of a child and that she is discriminated against because she has not been pregnant. She also says that she is discriminated against on grounds of disability and gender.

139. Dealing with the last matter first, I do not think that the claim of gender discrimination would in any event be tenable. It is true that the appellant's medical condition is one that can only affect a woman. However, since no man can qualify for either maternity leave or adoptive leave payments in any circumstances, she has not been treated less favourably than any man is or would be, if he had a child through a surrogacy arrangement or otherwise.

140. The disability and family status arguments are more complex. Having regard to the purposes of the Act, and to the observations above, I would be prepared to agree with much of the appellant's submissions. If a complainant can show, by reference to one or more of the statutory grounds upon which discrimination is prohibited, that he or she was treated less favourably than a person to whom those grounds do not apply, it is not in my view necessary to prove actual intent to discriminate on that ground. Thus, in the context of disability, it is not necessary to show that the café proprietor has a hostility to blind people if he or she refuses, without justification, to admit blind people accompanied by guide dogs. The point of the legislation is to ensure that blind people can, as far as practicable, avail of services in the same way as sighted people. The problem as I see it, is not the dog – it is whether a blind person with a guide dog may be refused service without justification. However, I would prefer not to give a definitive view on the issue of the correct interpretation of the section in this case, since I do not consider that it can determine the case.

141. On the face of it, the appellant has, certainly, been discriminated against because she did not bear her child. As noted above, less favourable treatment on the basis that the complainant had not been pregnant would satisfy one of the statutory grounds. She says that this is a discriminatory exclusion from the social welfare legislation, within the terms of the equal status legislation, and that the refusal of the respondent to grant her an equivalent non-statutory payment is a matter entitling her to compensation.

142. The difficulty that I have with the appellant's case lies in the fact that the payment, from which she says she has been excluded for discriminatory reasons, is one created by statute. A claim to be legally entitled to compensation necessarily involves a claim that one has been subjected to a legal wrong, but in this particular instance such a wrong can only be established on the assumption that one statute can be held to be legally deficient by reference to another – that is, by reference to the Equal Status Act. Despite the submission that she is not to be taken either as attacking the validity of the social welfare legislation, or as attempting to measure those provisions against the Act as if it were the Constitution, I cannot see how the appellant can maintain a claim of unlawful discrimination without saying, in effect, that the Social Welfare Act discriminates unlawfully. In the proceedings as constituted before this court, the only legal standard by which she can make that claim is the standard set by the Equal Status Act. Since both are Acts of the Oireachtas, embodying policy choices made by the legislature, it is not open to a court to make a finding of unlawfulness in one on the basis of the policy of the other. There has been no assessment of the constitutionality of the choices made in the social welfare code, which would be the only legitimate basis for such a finding.

143. For the same reasons I find that the word "provision" in s.3(1)(c) cannot be interpreted as including a statutory provision. That too would have the effect of elevating the Equal Status Act to all-but Constitutional level, permitting the legitimacy of all other legislation to be assessed by reference to it.

144. I should perhaps say that I am not persuaded by the argument made by the respondent that a non-statutory scheme to make provision for women in the appellant's position would be *ultra vires*. The existence of a broad range of non-statutory schemes demonstrates that the respondent frequently uses such schemes as a flexible alternative, or supplement, to primary legislation, presumably on the basis of appropriate public policy objectives and assessments. I do not think that s.14 of the Act is relevant here. The social welfare Acts do not "prohibit" the making of payments other than in accordance with statutory criteria – if they did, all of the non-statutory schemes would be at risk of being found to be ultra vires. I consider that the main difference in relation to a non-statutory scheme would be that it would probably be open to challenge if the Equal Status Act prohibitions on discrimination were

contravened.

145. However, it is not open to a court to hold that the respondent is derelict, either in not legislating or in not creating a scheme in this instance, without holding that the policy choices embodied in the primary legislation are legally deficient. The appellant has argued that the Act envisages an order of compensation if discrimination is established, even if the respondent has no legal power to remove or ameliorate the discrimination complained of by way of making a non-statutory payment. Again, that raises the problem of whether the Equal Status Act can be relied upon in this fashion, to find that there is discrimination contrary to that Act embodied in another Act. In my view it cannot, whether by this court, or by the Equality Tribunal acting as the body primarily charged with dealing with complaints under the Act.

146. It is easy to understand why the appellant feels that she has been treated badly, why the Equality Officer referred to the case as raising "compelling" considerations and why the learned Circuit Court judge accepted that the respondent's decision might seem unfair or unjust. However, there is as yet no legislation governing the complex issues that arise in the context of surrogate births. My view is that the Equal Status Act cannot be used to fill the gap.

147. I therefore propose to dismiss this appeal.