

## THE HIGH COURT

2010 201 MCA

BETWEEN

PADDY FITZGERALD

APPELLANT

AND

MINISTER FOR COMMUNITY, EQUALITY AND GAELTACHT AFFAIRS

DEFENDANT

**JUDGMENT of Mr. Justice Hogan delivered on 5th May, 2011**

1. This statutory appeal has its origins in a complaint made by the appellant, Paddy FitzGerald, to the Equality Tribunal on 5th June, 2007. In that complaint Mr. FitzGerald maintained that he had been harassed and victimized by agents of South Tipperary County Council, contrary to the provisions of the Equal Status Acts, 2000-2004. The gist of the complaint was that Mr. FitzGerald was prevented from making his lands arable due to their insistence that planning permission was first required.

2. When pressed by the Tribunal to give particulars as to how his claim fell within the Equal Status Acts, Mr. FitzGerald maintained that he had been discriminated on grounds of race. The Tribunal then drew Mr. FitzGerald's attention to the definition of "race" which was contained in the provisions of s. 3(1) of the Equal Status Act 2000 ("the 2000 Act") and asked him for his comments. Mr. FitzGerald then responded to this query by saying that he was "a member of the farming community: (an ethnic group)."

3. In its decision of 8th January, 2009, the Director of the Tribunal exercised her statutory power pursuant to s. 22 of the 2000 Act to dismiss a claim *in limine* where she was of opinion that the claim had been made "in bad faith or is frivolous, vexatious or misconceived or relates to a trivial matter." The Director concluded that the claim was misconceived and had no prospect of success:

"Membership of the farming community *per se* has not been defined as an ethnic group by legislation or case law. In my view, the claim does not fall within protected grounds and, accordingly, the Tribunal has no jurisdiction to investigate this claim. As Mr. FitzGerald's complaints of discrimination and victimization are not based on grounds covered by the Acts, they have no basis in law and therefore have no prospect of success."

4. Mr. FitzGerald appealed this decision to the Circuit Court pursuant to s. 22(2) of the 2000 Act (as inserted by s. 56 of the Equality Act 2004). The appeal came on before His Honour Judge Teehan on 14th April, 2010, who affirmed the decision of the Director and refused to make a reference to the Court of Justice pursuant to Article 267 TFEU on the ground that the matter is obvious. Mr. FitzGerald now appeals this decision on a point of law to this Court pursuant to s. 22(4) of the 2000 Act (as inserted by s. 56 of the 2004 Act). This sub-section provides that:-

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

5. Section 22(4) plainly excepts the jurisdiction of the Supreme Court for the purposes of Article 34.4.3 of the Constitution, so that no appeal to that Court lies against my decision. In these special circumstances, this Court is therefore constituted for this purpose as a court of last resort within the meaning of Article 267(3) TFEU, as there is "no judicial remedy [available] under national law". It follows that where a point of Union law arises for resolution, this Court is under a mandatory obligation to refer any such question to the Court of Justice, save in interlocutory matters or - more pertinently - where the issue is *acte clair*: see, e.g., Case 238/81 *CILFIT* [1982] E.C.R. 3415. The concept of *acte clair* is not simply confined to those cases where the point has already been determined, but also embraces those cases where the answer is obvious.

6. It is against this general background that the appeal requires to be considered. I propose to commence with an analysis of s. 3 of the 2000 Act and then to consider the EU law arguments.

**Section 3(1) of the Equal Status Act 2000**

7. The main objective of the Equal Status Acts is to preclude certain types of discrimination by both public and private actors in respect of the provision of goods and services. This is plain from the structure of the 2000 Act, but this objective also clearly emerges the Long Title which provides:

"An Act to provide equality and *prohibit types of discrimination*, harassment and related behaviour in connection with the provision of services, property and other opportunities to which the public generally or a section of the public has access, to provide for an investigating and remedying certain discriminations and other unlawful activities to provide for the administration by the Equality Authority of various matters pertaining to this Act, to amend the Employment Equality Act, 1998 in relation thereto and in certain other respects and to provide to related matters". (emphasis supplied).

8. To this end, s. 3(1) of the Equal Status Act 2000 provides for a prohibition of a general nature:

"(1) For the purposes of this Act, discrimination shall be taken to occur -

(a) where a person is treated from 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)...

9. There then follows ten discrete prohibited grounds: gender, marital status, family status, sexual orientation, religious belief, age, disability, membership of the Traveller community and victimization. To this must be added the ground specified by s. 3(2)(h) and

which is the one at issue here:

"that they are of different race, colour, nationality or ethnic or national origins ("the ground of race").

10. There is no statutory definition of the term "ethnic origins". In these circumstances, the reference to ethnic group must, of course, be understood in the context in which the term appears: see, e.g., the comments of Henchy J. in *Dillon v. Minister for Posts and Telegraphs*, Supreme Court, 3rd June, 1981. The fact that the words "ethnic origins" appears in the same context as race, colour, nationality or national origins confirms - as if confirmation was needed - that the reference here is principally to immutable characteristics in respect of which the individual has no control. It must, of course, be recognized that there are undoubtedly instances where an individual belonging to one nationality or ethnic group might elect to adhere to another, but, for present purposes, at least, it is sufficient to point out that these are exceptional cases which do not take from the general point.

11. So far as a description of ethnicity is concerned, it is probably difficult to improve on the definition offered by Lord Fraser in *Mandla v. Dowell Lee* [1983] A.C. 548, 562:-

"The conditions which appear to me to be essential are these: —

(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion, different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups."

12. In *Mandla* the principal issue was whether Sikhs were a group defined by "ethnic origins" for the purposes of the (United Kingdom's) Race Relations Act 1976. Giving that term a wide definition, the House of Lords held that they were. While "biologically indistinguishable" from others living in the Punjab, the evidence showed that Sikhs were a "distinctive and self conscious" community with a particular history, language and (originally) religious tradition.

13. Viewed from that perspective and applying this test, it is self evident that members of the farming community are not an ethnic group in that sense. While it is naturally true that farmers as a group have their own proud traditions and history, this is no more than could be said in respect of any other occupational group such as teaching, medicine, accountancy and the law. The fact that an occupational group may have its own perspective in respect of its traditions and history does not make it an ethnic group for this purpose. Nor can it be said that farmers share some immutable or quasi-immutable characteristic that it is one of the triggering factors of s. 3(2)(h).

14. It follows, therefore, that, at the risk of stating that which is all too obvious and self evident, farmers do not constitute an ethnic group. It equally follows, therefore, the Director of the Tribunal was amply justified in invoking the powers conferred by s. 22 of the 2000 Act to strike out this claim *in limine*. It follows in turn that Judge Teehan was perfectly correct in affirming that decision.

### **The European Union Law Argument**

15. It remains to consider Mr. Fitzgerald's final argument, namely, that Council Directive 2000/43/EC ("the Equal Treatment Directive") was not properly transposed into domestic law via the Equality Act 2004. One of the declared objects of the 2004 Act - as reflected in its Long Title - is to give effect to the Equal Treatment Directive.

16. Article 2(1) deals with the *concept* of discrimination by providing that:-

"1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin."

17. Article 3, on the other hand, deals with the *scope of application* of the Directive by providing:-

"1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

- (c) employment and working conditions, including dismissals and pay;
- (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
- (e) social protection, including social security and healthcare;
- (f) social advantages;
- (g) education;
- (h) access to and supply of goods and services which are available to the public, including housing."

18. At the hearing before me, Mr. FitzGerald placed great emphasis on the fact that Article 3 applies to all persons. So it does. But this does not mean that either Article 3 in particular or the Directive in general prohibits all differentiation or even all discrimination between all categories of persons for all purposes. Rather, Article 2 prohibits discrimination on racial or ethnic grounds and Article 3 identifies the scope of the prohibition by providing, for example, that there can be no discrimination on racial or ethnic grounds in matters such as housing and education. The Directive simply does not apply to any other form of discrimination other than race or ethnic grounds.

19. In this respect, therefore, there is absolutely no ambiguity regarding either the concept of discrimination or its scope of application, at least so far as the present case is concerned. Nor is there anything to suggest that the 2004 Act does not adequately transpose the Directive.

20. In these circumstances, the present case is so plainly *acte clair* that it obviously falls within the *CILFIT* exception. Any reference to the Court of Justice would be a pointless and redundant exercise. For these reasons I do not consider it appropriate to make the reference sought.

### **Conclusions**

21. It follows, therefore, that for the reasons stated I must affirm the decision of Judge Teehan.