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Equal Status Act 2000

EQUALITY OFFICER'S PRELIMINARY DECISION NUMBER: DEC - S2001-011

Mr Paddy Donovan
(Represented by Mr Charles Foley, Solicitor)

-v-

Garda Olive Donnellan
(Represented by the Chief State Solicitor's Office)

File Ref: ES/2001/074
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Summary of Preliminary Decision DEC-S2001-011

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Headnotes

Equal Status Act 2000 - direct discrimination - section 3(1)(a) - membership of the Traveller community - section 5(1) - investigation and prosecution of crime by the Gardai - using plain meaning and legislative history as aids to interpretation of definition of service defined in section 2(1) - incident which happened before Act came into operation giving rise to alleged discrimination before and after that date - complaint outside scope of Act.

Background

On 8th August, 2000, four horses were wandering on a public road in Gort, Co Galway. The respondent investigated this incident and prosecuted the complainant, who is a member of the Traveller community, because he owned at least one of the horses. The complainant made a complaint to the Director of Equality Investigations claiming that the respondent discriminated against him. While he accepted he was guilty of the offence, he claimed that he did not own all of the horses and that the respondent did not summons the other horse owners, who were not Travellers.

The respondent objected to the investigation of the complaint on the basis that it was outside the scope of the Act. She argued that i) the investigation and prosecution of crime by the Gardai are not services which are available to the public within the meaning defined in the Act, and ii) the Act is not retrospective and incidents which occurred before it came into operation cannot be investigated.

Conclusions of Equality Officer

The Equality Officer found that the investigation and prosecution of crime by the Gardai are not services which are available to the public within the meaning defined in section 2(1). It was also found that a complaint arising from an incident which occurred before the Act came into operation can be investigated in circumstances where discrimination may have taken place after the Act came into operation. However, this was not appropriate in this case because the complaint is outside the scope of the Act.

Decision

The Equality Officer decided that the complaint is outside the scope of the Act.

Preliminary Decision DEC-S2001-011
Complaint under the Equal Status Act 2000

Mr Paddy Donovan
(Represented by Mr Charles Foley, Solicitor)

-v-

Garda Olive Donnellan
(Represented by the Chief State Solicitor's Office)

DISPUTE

1. This dispute in this preliminary decision concerns two issues:
 1. whether the investigation and prosecution of crime by the Gardai is a service which is available to the public within the meaning of service defined in section 2(1) of the Act.
 2. whether a complaint under section 21 of the Act, arising from an incident which occurred before the Act came into operation on 25th October, 2000, can be investigated by the Director of Equality Investigations, in circumstances where the discrimination may have been ongoing both before and after that date.

BACKGROUND TO DISPUTE

2. It was agreed by both parties that:
 - On 8th August, 2000, four horses were wandering on a public road in Gort, Co Galway.
 - The complainant owned at least one of the horses.
 - At least one other person, who is not a member of the Traveller community, also owned one of the horses which were wandering.
 - The respondent investigated this incident and applied for a summons, in the name of the Director of Public Prosecutions, to prosecute the complainant on 14th November, 2000.
 - The summons was issued, in the name of the Director of Public Prosecutions at the suit of the respondent, on 20th November, 2000, and the complainant was subsequently convicted in Gort District Court on 27th November, 2000, for allowing a horse which he owned to wander on the public road, contrary to section 10(11) of the Summary Jurisdiction (Ireland) Act, 1851, as amended by section 7 of the Animals Act, 1985.

On 12th March, 2001, the Director of Equality Investigations received a complaint from Mr Donovan under section 21 of the Act alleging that he had been discriminated against by the respondent under section 5(1) of the Act on the basis of his membership of the Traveller community. While he accepted he was guilty of the offence the grounds for his complaint were that the owners of the other horses, who were not Travellers, were not also prosecuted by the respondent.

The respondent was informed about the complaint and objected to the investigation continuing. She argued that the complaint was not within the scope of the Act and that the Director of Equality Investigations did not have jurisdiction to investigate it. The reasons for her objections were i) the investigation and prosecution of crime by the Gardai are not services which are available to the public within the meaning defined in the Act, and ii) the Act is not retrospective and incidents which occurred before it came into operation cannot be investigated.

It was considered necessary to determine whether the complaint was within the scope of the Act before progressing with the investigation of the substantive allegation of discrimination. All correspondence received was copied to both parties and an oral hearing which focussed solely on the preliminary issues which needed to be determined was held on 4th September, 2001.

SUMMARY OF COMPLAINANT'S CASE

3. The complainant's arguments that the investigation and prosecution of crime by the Gardai is within the scope of the definition of service contained in the Act were as follows:
 - No parts of the public service are specifically excluded from the scope of the Act - therefore, they are included.
 - If the Oireachtas had wanted to exclude any aspects of the public service from the Act, including the police service, it would have done so specifically.
 - The complainant referred to the Dail Debates when the Equal Status Bill, 1999, was being debated in Dail Eireann. He noted that the Minister for Justice, Equality and Law Reform stated during the debates that controlling duties in the areas of policing would not be a service within the scope of the Act. The complainant stated that he never heard of the the police service not being referred to as such and being referred to as controlling duties instead. In his view all aspects of the police service are covered by the Act, including the investigation and prosecution of crime, and not just the aspects of policing which the respondent accepts are services within the scope of the Act e.g. giving directions, accepting complaints.
 - The prosecution of an individual is a service to the public, including the complainant himself as a member of the public.
- 3.1 The complainant's argument that the complaint can be investigated although the incident which gave rise to his prosecution occurred before the Act came into operation, were as follows:
 - The Act came into operation on 25th October, 2000. Although the horses were wandering on 8th August, 2000, the respondent had 6 months from that date to prosecute the other alleged offenders. The period from 25th October, 2000, to 8th February, 2001, is within this six month period and is covered by the Act.
 - The respondent applied for the summons on 14th November, 2000, and it was issued on 20th November, 2000. Both of these events occurred after the Act was in operation.

SUMMARY OF RESPONDENT'S CASE

4. The respondent's arguments that her actions complained of are not within the scope of the definition of service contained in the Act were as follows:
- The argument that the investigation and prosecution of crime are police services which are available to the public, or a section of it, is essentially trying to draw an equivalence between services which are available to the public and State functions which are discharged for the benefit of all citizens.
 - If the argument in this regard were to be followed through it would mean, for example, that the determination of national defence policy or national foreign policy would be services within the meaning defined in the Act. If this argument was accepted then actions or decisions taken by the judiciary would also be included as services within the meaning defined in the Act and the Director of Equality Investigations would in effect be a supervisor of the Courts. The respondent does not think that this is the meaning of the Act or the intention of the Oireachtas when it adopted the legislation
 - The legislation should be interpreted plainly. It is plain that some State services are covered by the Act e.g. health services and social welfare services. It is also plain that some aspects of policing are services covered by the Act, such as a Garda giving directions to the public or a Garda accepting a complaint. However, in this case the issue is the investigation and prosecution of crime and neither of these are services within the meaning of the Act. The investigation and prosecution of crime are not services which are available to the public or a section of it.
 - It is clear from the Dail Debates when the Equal Status Bill, 1999, was being debated that the intention of the Oireachtas was to include some aspects of police services within the scope of the Act but that it did not intend the investigation and prosecution of crime on behalf of the State to be services to the public within the scope of the Act.
 - The prosecution of one person is not a service to another. When the Gardai investigate and prosecute crime they are carrying out State functions which are not covered by the Act.
- 4.1 It was also argued on the respondent's behalf that the complaint is not within the jurisdiction of the Director of Equality Investigations because the Act is not retrospective and it cannot be used to investigate incidents which occurred before it came into operation. There is no evidence that the investigation was ongoing after the Act came into operation.

CONCLUSIONS OF EQUALITY OFFICER

5. In reaching my conclusions in this case I have taken account all of the submissions, both written and oral, made to me by both sides except the letter from the complainant's solicitor dated 27th September, 2001, which was received after I made this decision but before it issued. I do not consider that the contents of this letter would have any bearing on my decision in any event.
- 5.1 The first issue which I will determine is whether the investigation and prosecution of crime by the Gardai are services within the meaning defined in section 2(1) of the Act, which is as follows:
- “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 the 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 (whether or not it is a club holding a certificate of registration under the Registration of Clubs Acts, 1904 to 1999) which is available to the public generally or a section of the public, whether on payment or without payment, and
 (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”.

Having examined the wording of section 2(1) it is clear to me that the services which are covered by it are services which are available to the public or a section of it. A number of examples of such services are mentioned in the Act but it does not purport to be an exhaustive list. While State services are not specifically mentioned as being covered they are not specifically excluded either and I believe it is clear that certain services provided by the State are available to the public and are covered by the Act, e.g. social welfare services, health services, etc.

The issue in this case is whether the investigation and prosecution of crime are services which are available to the public. I consider that clearly certain aspects of the service provided by the Gardai may be services within the meaning defined in the Act e.g. a Garda witnessing a passport application, giving directions or taking a complaint. If a Garda did not provide these services to an applicant who was covered by one of the grounds covered by the Act then clearly it could be within the jurisdiction of the Director of Equality Investigations to investigate a complaint under section 21 of the Act arising from any such refusal.

5.2 I consider it is clear and plain from the wording of section 2(1) that the investigation and prosecution of crime are not services which are available to the public, or a section of it, within the meaning of service defined therein. It is my belief that these are State functions which are carried out by Gardai (and the Director of Public Prosecutions) on behalf of and for the benefit of the public and society as a whole. They are clearly not services which the public have access to in the way that other services clearly are, such as access to facilities for banking, leisure or travel.

5.3 I am satisfied that the intention of the Oireachtas was not to include the investigation and prosecution of crime as services within the scope of the Act when it enacted the legislation. It has previously been held in the High Court and the Supreme Court that as an aid to interpreting legislation it is permissible to consider the parliamentary debates which took place when an Act was going through the legislative process (see *Wavin Pipes v Hepworth Iron Co Ltd*, Costello J., HC, 1982 8 F.S.R. 32 and *DPP v McDonagh*, SC, 1996 1 I.R.

565, respectively). I think that the following statement made by the Minister for Justice, Equality and Law Reform during the Dail debates on 15th December, 1999, clearly illustrates the point that the Oireachtas intended the service aspects of policing to be covered by the Act but the investigation and prosecution of crime to be excluded from its scope:

“Not all actions of the State vis-avis members of the public can be regarded as services. There is a difference between controlling duties exercised by the State and services provided by the State. I am advised that immigration and citizenship matters, for example, are not services within the meaning of the Equal Status Bill but rather an expression of the State’s duty as a sovereign power to control who it admits to the State. Controlling duties in the areas of policing, defence, and prisons would likewise not be regarded as services. The service aspect of policing, immigration, defence and prisons will, however, come within the scope of of the Bill. For example, while a decision to grant a visa would not be covered by the Equal Status Bill, the interaction between officials and the visa applicant and collateral services and facilities, such as access to buildings and information, would come within the scope of the legislation.

In the policing area, for example, while riot control or apprehending a criminal gang could not be regarded as services, information and assistance provided by gardai, including responding to reported crimes, would be regarded as services within the scope of the equal status legislation. Furthermore, the fact that a controlling duty of the State does not come within the scope of the legislation does not give carte blanche to officials to discriminate in the exercise of such duties. Discrimination or irrationality in the exercise of such controlling duties can be challenged in a High Court constitutional action or in judicial review proceedings”.

It is my view that the drafting of the legislation succeeded in excluding from the scope of the Act the controlling duties of the Garda Siochana, including those of the investigation and prosecution of crime, while at the same time legislating that the service aspects of policing come within its scope.

- 5.4 I also consider that the UK Court of Appeal case of *Farah -v- Commissioner of Police of the Metropolis (1997) 2 W.L.R. 824* is of interest in relation to this complaint. It involved a claim under the UK Race Relations Act, 1976, by a Somali refugee. There are similarities between the complainant’s case and the Farah case:
- They both involve claims by people who are covered by protected grounds in anti-discrimination legislation who claim they were discriminated against by the police because they were prosecuted and other people, who were not covered by the protected grounds, were not prosecuted.
 - The police power to investigate crime and issue summonses is essentially a common law one in both jurisdictions,
 - They both involve an interpretation of the meaning of services, although there are different definitions of services in the two pieces of legislation.

The following points in the decision in the Farah case are of interest in this case:

- Those parts of a police officer's duties involving assistance to, or protection of, the public were found to be the provision of services to the public.
- The Court seemed to agree that pursuing, or arresting, or charging criminals are not services which are available to the public.

5.5 I realise my earlier findings mean the complaint is not within the jurisdiction of the Director of Equality Investigations. However, I also want to put on record my findings on whether it would be within the Director's jurisdiction to investigate a complaint which arose from an incident which occurred before the Act came into operation where there may have been ongoing discrimination after it came into operation.

There is no dispute between the parties in relation to the dates when i) the horses were wandering, ii) the summons was applied for, or iii) the summons was issued. There is no dispute that the respondent had six months from the date of the incident on 8th August, 2001, to decide whether to prosecute anyone arising from the incident i.e. until February, 2001. There is no dispute either between the parties that the complainant was not the only person who owned a wandering horse.

What is in dispute between the parties is when the investigation and the prosecution finished. The respondent claims that the Act is not retrospective and incidents which occurred before it came into operation on 25th October, 2000, cannot be investigated by the Director of Equality Investigations. This view is correct. The respondent also claims that there is no evidence that the investigation or deliberations as to who should be prosecuted in relation to the incident on 8th August, 2001, took place after the Act came into operation. In my opinion this is not entirely correct.

5.6 In relation to the decision to prosecute I have noted that the summons was applied for and issued in November, 2000. I am satisfied that there would be sufficient grounds to proceed with the investigation with a view to establishing definitively whether any of the respondent's actions in relation to the prosecution constituted discrimination. If the investigation were to proceed the respondent would have the opportunity to rebut the inference of discrimination. However, in view of my earlier finding that the complaint is not within the scope of the Act I consider that the Director of Equality Investigations would be acting outside her jurisdiction were she to investigate the incident further.

5.7 The position as to whether the respondent's investigation was ongoing after the Act came into operation is not as clearcut. I have noted that the six month period under which the respondent could have initiated a prosecution against someone else included a substantial period when the Act was in operation i.e. 25th October, 2000, until February, 2001. In addition, as mentioned previously the complainant's summons was applied for and issued in November, 2000. However, the complainant has not presented any prima facie evidence to show that the respondent's investigation was actually ongoing after the Act came into operation and I am satisfied that there would be insufficient grounds to continue with the investigation into this aspect of the complaint on this basis.

DECISION

6. I decide that the complaint is outside the scope of the Act because the investigation and prosecution of crime are not services within the meaning of section 2(1) of the Act.

Anthony Cummins
Equality Officer
17 October 2001