Church of the Flying Spaghetti Monster in Ireland

Parties:	Mr John Hamill Church of the Flying Spaghetti Monster in Ireland v Dr Michael Mulvey Dundalk Institute of Technology
Issue:	Equal Status Act ADJ-00027156 CA-00034750
Date:	14th February 2022
Purpose:	Supplemental Submission, Burke v Minister for Education

1. Introduction

1.1
Mr Elijah Burke from Co Mayo was home-schooled by his mother, Ms Martina Burke. He claimed that as a home-schooled student, he was unlawfully and unfairly excluded from the Leaving Certificate calculated grades process.

1.2
The decision of the Supreme Court in *Burke v Minister for Education* has recently been published, and some aspects of the case are relevant to the arguments made during the present case referenced above. This submission summarises the pertinent comments within the Supreme Court decision.

2. Administration of Policies

2.1
One important distinction that the Supreme Court took some time to separate out, was the difference between policies themselves as compared to the scheme of administering those policies. An example extract from the decision includes the following remarks:

> *"Administration assumes that there is already in existence a principle and that all the administrator has to do is to establish the facts and circumstances and then to apply the principle and the result should be the same whether it is administrator A or administrator B who has taken the decision. By contrast, policy-making is largely discretionary; the policy-maker must decide, as between two alternatives, the one which he or she considers best in the interest of the community.*
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> *For example, we can say that matters such as the building of a concert hall, the making of procedural regulations, and the making of a development plan, are policy matters; whereas the grant of planning permission, assessment of capital gains, award of a welfare benefit, and allocation of a corporation house are acts of administration."*

The same distinction can be observed within the present case referenced above. For example, the Respondent contends that a custom and practice policy has existed as follows:

> *"The institute will not facilitate religious and non-religious bodies attempting to use its facilities in the recruitment of students and staff."*

Moreover, the Respondent also contends that a further custom and practice policy exists as follows:

> *"Any external group must be invited by either students or staff to access its facilities free of charge. Otherwise, the group or individual must reserve a room through the Institute's normal channels which does incur a fee."*

In relation to policy formation, the recent Supreme Court decision in *Burke v Minister for Education* states as follows:

> *"Defining and keeping separate executive power is key to the issue as to whether the decision to cancel the Leaving Certificate and to substitute predicted grades in such a way as to disenable home-schooling as guaranteed by the Constitution is the exercise of executive power. It is no part of the judicial function to decide policy or 'as to what may be the best method by which the State can carry out its constitutional duties'."*

Similarly, it is for the management team within Dundalk Institute of Technology to create formal written policies as to the principles by which the campus is to operate. However as articulated by the Supreme Court, the scheme of administration for any given policy is quite a different matter from the policy formation process.

2.2
The Supreme Court decision in the case of *Burke v Minister of Education* has indicated that whereas any given policy principle may have been entirely legitimate, the scheme of administration for that policy may still exceed lawful limitations:

> *"The implementation of that scheme by the Department of Education pursued that legitimate government policy through a detailed scheme in such a way, however, as interfered with home-schooling by not providing an avenue of assessment for those home-schooled which approximated with what was open to those at second level schools.*
>
> *With the considerable stress of keeping interested parties, including parents, administrators and teachers, within the ark of consideration, and pursuing the possible while faced by a close-to impossible situation, the Department of Education devised a scheme which inadvertently exceeded constitutional limits.*
>
> *By implementing a scheme which left those who were home-schooled with no possibility of advancing to third level education in 2020, the Department acted outside what the Constitution required. Thus, applying an analysis derived from administrative law, this was not a decision as to an existing scheme but the administration seeking to do what seemed possible to implement a governmental decision.*
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> *Hence, the Department of Education derived an entirely new scheme based on a valid governmental policy and which required a new tier of administrative arrangement to implement. That scheme, however, left the home-schooled outside of the range of assessment for achieving a grade to progress to third level education in 2020. That was not constitutionally permissible. Hence the departmental scheme exceeded jurisdiction."*

Similarly, notwithstanding whether or not there were ever any legitimate policies within Dundalk Institute of Technology in relation to the recruitment of students; or whether policies in relation to invitations issued by students and staff existed; the actual scheme of administration in practice has exceeded the limitations described by the Equal Status Act. By implementing an administrative process that treated a non-religious applicant less favourably than religious applicants in equivalent circumstances, the Respondent *"derived an entirely new scheme"* unrelated to the principle of the supposed policy.

3. Entirely New Scheme Derived In Contrast To Recruitment Policy

3.1
Whereas it is possible to imagine a Dundalk Institute of Technology policy goal that may be legitimate in relation to prohibiting the recruitment of students on campus, in practice the Institute has *"derived an entirely new scheme"* of administration that is contrary to the Equal Status Act. For example, in practice the Respondent was not interested in whether any recruitment into religious groups was actually happening on campus. As described in evidence by the Respondent, even when the title and context of a religious event suggested proselytising and evangelising, the Respondent made no effort to inform the organisers of those events about any policy in relation to recruitment, and made no effort to ensure that such a policy was adhered to at these events.

Similarly, there is currently a Fianna Fáil Society and a Fine Gael Society within the Dundalk Institute of Technology[1]. If an adult student attends one of those society meetings and expresses an interest in joining one of those political parties, there is no suggestion that the Institute is actively prohibiting those societies from helping the student become a member. In practice then, the scheme of administration implemented by the Respondent is used only to apply prohibitive barriers to those that are opposed to religious ideas, such as the Complainant.

3.2
No religious organisations have been subject to policing according to the supposed prohibition against recruiting new members. Only non-religious organisations like that of the Complainant have been subject to such policing.

The practical scheme of administration for this policy is not objective or coherent. In fact, even after the Complainant made it clear that he would be happy to recruit new members at his proposed event, the Respondent offered the hire of their meeting rooms to facilitate exactly this event. In what sense could there possibly be a legitimate scheme of administration for a 'no recruitment' policy, which involves offering the hire of rooms explicitly when recruitment is expressly anticipated? In a similar manner to that described by the Supreme Court in *Burke v Minister for Education*, the Respondent *"derived an entirely new scheme"* unrelated to the principle of the stated policy principle.

Whether or not there was ever any actual well-intentioned custom and practice policy with respect to prohibiting recruitment, it is clear that the present scheme of administration is permitting arbitrary decisions to be made by administrators, which have no relation to the principle behind any such policy. Moreover, it is very obvious that those decisions have uniformly and universally favoured the religious, while consistently disadvantaging the non-religious such as the Complainant at every turn.

3.3
At the Dundalk Institute of Technology, it is not the case *"that there is already in existence a principle and that all the administrator has to do is to establish the facts and circumstances and then to apply the principle and the result should be the same whether it is administrator A or administrator B who has taken the decision"*. Instead, it is the case that whether it is administrator A or administrator B who is making any decision based on a supposed 'no recruitment' principle, the outcome will in fact treat the non-religious less favourably than the religious, irrespective of whether or not this is consistent with any purported custom and practice policy.

3.4
The 'custom and practice' test in *O'Reilly v Irish Press* is that such a unwritten policy can only be established if it is:

> *"… so notorious, well-known and acquiesced in … that anyone concerned should have known of it or easily become aware of it."*

The supposed custom and practice policy described by the Respondent in relation to prohibiting the recruitment of students is neither notorious, nor acquiesced in, nor easy to become aware of.

It is not acquiesced in, because the same people who excluded the Respondent from campus on the basis of this policy, also proposed to the Respondent that he should hire a room on campus to pursue exactly identical activities. It is not easy to become aware of, because it is not communicated to event organisers even when the title and context of their event implies proselytising and evangelising. It is not notorious or well-known, because according to the evidence of the Respondent there is no effort made to enforce this policy within religious events.

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[1] https://www.dkit.ie/student-life/sports-and-societies/societies.html

4. Entirely New Scheme Derived In Contrast To Invitation Policy

4.1
Whereas it is possible to imagine a Dundalk Institute of Technology policy goal that may be legitimate in relation to ensuring that external presentations are made only at the invitation of staff and students, in practice the Respondent has *"derived an entirely new scheme"* of administration that is contrary to the Equal Status Act. For example, during the Hearing on 4th February 2022 the Respondent stated as follows:

> *"Fr Rushe and the Dundalk Institute of Technology are not the same legal entity. Fr Rushe was not even an employee of the Institute. The chaplaincy service was provided to the Institute on a contract for services basis and the Institute would request that the Adjudicator reject this complaint as the required steps to make a valid complaint under the Act have not been met."*

On this basis, according to their own purported custom and practice policy, the direct comparator stipulated by the Complainant should not have been facilitated with a free room and free catering. Instead, since there had been no invite by any student or any member of staff, when Eamon Martin announced that he was *"doing a tour of the area and was in Dundalk that day"* he should have been instructed that he *"must reserve a room through the Institute's normal channels which does incur a fee"*. This did not happen because even if a custom and practice policy existed in relation to invitations from students and staff, the Respondent *"derived an entirely new scheme"* of administration, which bears no relation to the principle of the purported policy.

4.2
No religious organisations have been told that they can only arrange events within the campus on the condition they have been invited by students or staff. Only non-religious organisations like that of the Complainant have been restricted in this manner. Moreover, the actual scheme of administration for the supposed custom and practice policy, allows administrators to make arbitrary decisions that fly in the face of the purported policy.

For example, we could ask what the word *"student"* means in the context of the stated policy. This is not at all clear given that the policy has never been formally adopted by any authority within the Institute; or captured in writing by the Respondent; or advertised towards paying students by the Respondent. For prospective students considering Lifelong Learning courses, the Respondent advertises that the chaplaincy *"is available to all students"*. However in practice, the chaplaincy is not available to students on uncertified courses, unless the student on the uncertified course is a Roman Catholic who is interested in attending Roman Catholic Mass, in which case the chaplaincy is then available to them.

Whether or not there was ever an actual well-intentioned custom and practice policy with respect to who qualifies as *"students or staff"* for the purpose of arranging invitations, it is clear that the present scheme of administration is permitting arbitrary decisions to be made, which are in no way related to the principle supporting any such policy. Moreover, it is very obvious that those decisions have uniformly and universally all favoured the religious, while consistently disadvantaging the non-religious like the Complainant at every turn.

4.3
At the Dundalk Institute of Technology, it is not the case *"that there is already in existence a principle and that all the administrator has to do is to establish the facts and circumstances and then to apply the principle and the result should be the same whether it is administrator A or administrator B who has taken the decision"*. Instead, it is the case that whether it is administrator A or administrator B who is making any decision based on a 'must be invited by student or staff'

principle, the outcome will treat the non-religious less favourably than the religious, irrespective of whether or not this is consistent with the principle of any purported customer and practice policy.

4.4
The supposed custom and practice policy described by the Respondent in relation to external events requiring an invitation from staff or students, is neither notorious, nor acquiesced in, nor easy to become aware of (*O'Reilly v Irish Press*). It is not acquiesced in because it can be waived so that the chaplain can arrange events for his co-religionists without any invitation by either staff or students. It is not easy to become aware of, because the chaplain can initially invite students attending uncertified Lifelong Learning courses to use the chaplaincy, only to later prevent those same students from using the chaplaincy upon realising that their preferred events may have a non-religious character. It is not notorious or well-known, because the rules that have been used to prohibit students from seeking non-religious chaplaincy events on campus, are not consistent with how the chaplaincy service has been described in the prospectus advertised to potential students.

5. Conclusion

5.1
It is submitted that the positions described by the Respondent are entirely consistent with an ever-shifting set of invented pseudo-policies, redesigned at each turn to facilitate the religious while creating prohibitive barriers for the non-religious. Moreover, it is submitted that none of the proposed custom and practice policies that the Respondent relies upon have met the *"notorious, well-known and acquiesced in"* test (*O'Reilly v Irish Press*). The Respondent provided no evidence that the purported custom and practice policies are either notorious, well-known or acquiesced in. Notwithstanding this, even in the case where well-intentioned custom and practice policies did in fact exist, it is submitted that the Respondent *"derived an entirely new scheme"* of administration, which bears no relation to the stated principles of such policies (*Burke v Minister for Education*).

5.2
Consistent with the Supreme Court decision in *Burke v Minister for Education*, it is entirely possible that legitimate policies may be defined, while the scheme of administration for those polices may exceed lawful limitations by departing from the initial principles. It is submitted that notwithstanding any custom and practice policy statements described by the Respondent, the Adjudicator can consider instead the practical schemes of administration that have been implemented by the Respondent, which are contrary to the Equal Status Act.

Signed 14th February 2021:

Mr John Hamill.