

THE HIGH COURT

DENNIS DENNEHY

Plaintiff

v

THE MINISTER FOR SOCIAL WELFARE
AND ATTORNEY GENERAL

Defendants

Judgment of Mr. Justice Barron delivered the 26th day of July 1984.

The plaintiff is a married man who has been deserted by his wife.

The couple have two sons, the elder born on the 22nd November, 1962 and the younger on the 17th December, 1966. The plaintiff is a Bus Driver and had been so employed by C.I.E. for the last eight years. He has a take home pay for a full week's work varying between £80 and £90-50. His wife was employed most of their married life and contributed from her earnings to the family financial pool. She left the family home in July 1981 when the plaintiff was aged 42, and has not returned. Following his wife's departure, which in law amounted to desertion, the plaintiff applied for payments under the provisions of the Social Welfare (Consolidation) Act 1981 as a deserted spouse. He was refused upon the ground that it was payable only to a deserted wife.

The plaintiff brings the present proceedings for a declaration that the provisions of Chapter 13 of the Social Welfare (Consolidation) Act 1981 which

deal with deserted wife's benefit is repugnant to the provisions of the Constitution and that Section 195 of the same Act which provides for deserted wife's allowance is similarly repugnant to the provisions of the Constitution.

Section 100 of the Act is as follows:

"(1) Subject to this Act, deserted wife's benefit shall be payable to

a woman who -

- (a) has been deserted by her husband,
- (b) if she is less than 40 years of age, has at least one qualified child residing with her,
- (c) satisfies the contribution conditions in Section 101,
- and
- (d) satisfies such other conditions as may be prescribed."

Section 195 is as follows:-

"(1) A deserted wife's allowance shall, subject to regulations, be paid

to a woman -

- (a) who has been deserted by her husband,
- (b) who, if she is less than 40 years of age, has at least one qualified child residing with her, and
- (c) who satisfies the conditions as to means specified for the purposes of this sub-section by regulations."

These two separate provisions reflect the general scheme of the Act which provides for various benefits in varying circumstances, payment of which is dependent upon the level of insurance contributions paid under the Act; and which provides also for various allowances, payment of which is dependent upon need. Benefits and allowances are mutually exclusive in the sense that a claimant to both or to more than one benefit or allowance may only receive that which is the most beneficial to him or her. The defendants accept that if the plaintiff was a woman and his wife a man the conditions of Section 100 would have been satisfied and he would have been entitled to receive deserted wife's benefit. However, since he is in permanent employment he would not have qualified for deserted wife's allowance in any event.

The plaintiff's case is simply put. He contends that to provide a social welfare payment for a woman and not for a man in similar circumstances is invidious discrimination which makes the relevant statutory provision invalid as being repugnant to the provisions of the Constitution. He specifies four such provisions: Article 40 (1); Article 40 (3); Article 41 and Article 42.

Article 40 (1) is as follows:

"(1) All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and

moral, and of social function."

In relation to his argument based upon Article 40 (1), the plaintiff relies upon the decision in de Burca v Attorney General, 1976, I.R. 38. Several passages in the judgment of Walsh J. indicate the application of this constitutional provision to legislation providing for different treatment for men and women based upon their different sex. At page 71 he said:

"In my view, it is not open to the State to discriminate in its enactments between the persons who are subject to its laws solely upon the ground of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes such discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only."

Dealing with physical or moral capacity he had said earlier in the same passage:

"It would not be competent for the Oireachtas to legislate on the basis that women, by reason only of their sex, are physically or morally incapable of serving and acting as Jurors."

On page 72, dealing with differences in social function, he said:

"To be of either sex, without more, is not per se to have a social function within the meaning of Article 40 of the Constitution. To be

an architect or a doctor, for example, is to have a social function, but the function does not depend upon the sex of the person exercising the profession. Clearly some social functions must necessarily depend upon sex, such as motherhood or fatherhood. In the proper context, due recognition may also be given by the law to the fact that certain social functions are more usually performed by one sex rather than by the other. The essential test in each such case is the function and not the sex of the functionary."

In relation to Article 40 (3) he submits that his property rights have been adversely affected in that tax benefits which are available to a deserted wife in respect of deserted wife's benefit are not available to him. This however is the same as saying that his loss as a result of being excluded from deserted wife's benefit is not only the value of the benefit but the additional value of the rights which accrue to wives in receipt of such benefit. Such an argument does not advance his case.

Articles 41 and 42 relate to the family. They preclude legislation which is an attack on the family either as a natural primary and fundamental unit group of society or as the primary and natural educator of the child. The failure to provide benefit to a deserted husband is not per se an attack on the family, since the family has already been broken up by the desertion

of the wife. It cannot be suggested that to make provision for the husband in such circumstances would in any way cause the parties to come together again. Undoubtedly the failure to provide benefit for a deserted husband when in the same circumstances benefit is provided for a deserted wife means different treatment not only for a deserted husband as opposed to a deserted wife but also to the family comprising a deserted husband and his children as opposed to the family comprising a deserted wife and her children. Nevertheless, if this different treatment is not repugnant to the provisions of Article 40 (1), then as a matter of construction it cannot be repugnant to either Articles 41 or 42 since the reasoning which permits the discrimination for the purpose of Article 40 (1) must also permit its resultant effect on the family. The reality of the present case is whether or not a provision for the benefit of a wife in certain circumstances when a husband in the same circumstances is not so provided for is an invidious discrimination within the meaning of Article 40 (1) that all citizens shall, as human persons, be held equal before the law.

In answer to the plaintiff's case the defendants have made three submissions:-

1. that a legislative provision which gives effect to a conditional guarantee cannot be impugned;
2. that where discrimination is alleged the entire of the legislation

must be considered; and

3. that discrimination even on sex alone is permissible provided that there is a rational basis for it.

In support of his first submission Counsel for the defendants relied upon the recent decision of the Supreme Court in O'Brien v. Stoutt delivered on the 28th day of January, 1984. In that case the issue was whether or not certain provisions of the Succession Act dealing with intestacy were valid having regard to the provisions of the Constitution in that they excluded from succession persons who are illegitimate. The judgment of the Court was given by Walsh J. At page 16 he said:

"It cannot be contested that a person born outside marriage is, as a human person, equal to one born within marriage."

Again at page 19 he said:

"In the present case no question arises of any difference of physical or moral capacity. Neither is there any question of a social function of the defendant arising from her illegitimacy."

It is accordingly clear that the Court held that there was a discrimination against the plaintiff on the basis of her illegitimacy which was repugnant to the provisions of Article 40 (1). The defendant submitted nevertheless that the discrimination was justifiable having regard to the provisions of

Article 41 (1). Sub-paragraph 2 of this provision provides that:

"The State, therefore, guarantees to protect the family in its Constitution and authority, as a necessary basis of social order and as indispensable to the welfare of the nation and the State."

The family in this context is the family based upon marriage. At page 22

Walsh J. said:-

"The essential question is whether in recognising the undoubted social function of the family the validity of a law designed to protect the family depends upon compliance with the proviso to Article 40, Section 1, insofar as it distinguishes, in questions of intestate succession, between those born inside marriage and those born outside marriage. Does the law aimed at maintaining the primacy of the family as the fundamental unit group of society require to come within the words of the proviso to be valid? The Court is of opinion that it does not."

Having considered earlier decisions of the Court he concluded at page 25:

"Thus it may be seen from decisions of this Court referred to above that the object in the nature of the legislation concerned must be taken into account and the distinctions or discriminations which it creates must not be unjust or unreasonable or arbitrary and must, of course, be relevant to the legislation in question. Legislation which differentiates

citizens or which discriminates between them does not need to be justified under the proviso if justification for it can be found in other provisions of the Constitution.

Legislation which is unjust, unreasonable or arbitrary cannot be justified under any provision of the Constitution. Inversely, if legislation can be justified under one or more Articles of the Constitution, when read with all the others, it cannot be held to be unjust within the meaning of any

Article: see the decision of this Court in Dreher v. Irish Land Commission and the Attorney General 1st July, 1983 unreported and also Quinns Supermarket v Attorney General at page 24."

The essence of the defendants' second submission is that there are other provisions of the Social Welfare Code of which the plaintiff could have availed and which were similar in amount. I do not accept this submission. It is no answer to a charge of discrimination that the person claiming to be discriminated against is treated equally as well or even better under a

different section of the same code. The question is whether persons in the same position are treated alike in the same circumstances.

In support of his final submission Counsel for the defendants relied upon passages in the judgment in Dillane v. Ireland and the Attorney General, an unreported decision of the Supreme Court delivered on the 31st July, 1980. In that case the provision which was being attacked was Rule 67 of the District Court Rules 1948. This rule provided, inter alia, that the Court could not award costs against a member of the Garda Síochána acting in discharge of his duties as a police officer. The judgment of the Court was delivered by Henchy J. Dealing with the part of the rule which related to the officer acting in discharge of his duties as a police officer Henchy J. said at page 4:

"It is the latter requirement for immunity from costs or witnesses expenses that, in my opinion, provides a valid constitutional justification, on the ground of social function, for the discrimination complained of between one kind of common informer and another."

Later in the same passage he said:

"The Courts will not condemn such discrimination as being in breach of Article 40, Section 1, if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification

complained of."

And again later in the same passage:

"Whether the Courts support or approve of that distinction is irrelevant: what matters is whether it could reasonably have been arrived at as a matter of policy by those to whom the elected representatives of the people delegated the power of laying down the principles from which costs are to be awarded."

Further in the same judgment there is support for the defendants' first submission dealing with the submission that the rule was an unjust attack upon the property rights of a successful defendant. Henchy J. said at page 9:

"What happened when the plaintiff was denied his costs under the rule was categorically permitted by Article 40, Section 1, so it cannot be part of the injustice which Article 40, Section 3, sub-section 2, was designed to prevent."

A number of American cases have been cited by both parties in support of their arguments. The expression "rational basis" is one taken by Counsel for the defendants from such cases. In Dandridge v Williams 397 U.S. 471, the attack was against a Maryland Social Welfare Regulation which provided for social welfare payments to families in accordance with an ascertained standard of need but nevertheless subject to an upper limit on the total amount which

any one family could receive. The effect of the regulation was that while small families received payments sufficient to meet their needs larger families did not always do so. It was submitted that this was an improper discrimination against larger families and offended the Equal Protection Clause of the Constitution. In support of the regulation it was argued that it was justified in terms of legitimate State interests in that, inter alia, it maintained an equitable balance in economic status as between welfare families and those supported by a wage earner, and allocated public funds in such a way as fully to meet the needs of the largest number of families. The regulation was upheld. Stewart J. delivering the opinion of the Court said at page 486:

"But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. ... It is enough that the State's action be rationally based and free from invidious discrimination."

In Mathews v de Castro, 429 U.S. 181, the regulation impugned was one which made provision for a married woman with a minor or other dependant child in her care in the event of her husband retiring or becoming disabled, but did not make such provision for a divorced woman in similar circumstances unless she was over the age of 62. The Court accepted that the primary

objective of the regulation was to provide workers and their families with basic protection against hardships created by the loss of earnings due to illness or old age, and that it was consistent with this aim to give married women the particular benefit and rational to assume that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married. The basis upon which the Court acted was set out in the judgment of Stewart J. at page 185 as follows:

"The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are not confided to the courts. The discretion belongs to congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.... In enacting legislation of this kind a government does not deny equal protection merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis", it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality."

In a number of cases relied upon by the plaintiff however the Court held that the

discrimination was entirely sex orientated and in those circumstances held the legislation to be invidious discrimination and declared it to be invalid. In Frontiero v Richardson 411 U.S. 677, the regulation which was being impugned was one under which the spouse of a male officer in the armed forces was treated as a dependant whereas the spouse of a female officer was not so treated unless the required level of dependency was established. It was submitted that the rule was introduced for administrative convenience since in general spouses of male officers were so dependent while spouses of female officers were not. This was not regarded as a sufficient excuse for "dissimilar treatment for men and women who are ... similarly situated." In Weinberger v Wiesenfeld 420 U.S. 636, the provisions of the social security code made provision for benefit on death in the case of a man for the deceased's widow and minor children, but in the case of a woman only for her minor children. The Court took the view that the reason for the discrimination was a generalisation that wives are normally dependent upon their husbands whereas husbands are not normally dependent upon their wives, which it found to be unacceptable. Brennan J. who delivered the opinion of the Court said at page 645:

"The section clearly operates, as did the statutes invalidated by our judgment in Frontiero, to deprive women of protection for their families which men receive as a result of their employment. Indeed, the

classification here is in some ways more pernicious. First, it was open to the service woman under the statutes invalidated in *Frontiero* to prove that her husband was in fact dependent upon her. Here, Stephen Wiesenfeld was not given the opportunity to show, as may well have been the case, that he was dependent upon his wife for his support, or that, had his wife lived, she would have remained at work while he took over care of the child. Second, in this case social security taxes were deducted from Paula's salary during the years in which she worked. Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. Since the Constitution forbids the gender-based differentiation premised upon assumptions as to dependency made in the statutes before us in *Frontiero*, the Constitution also forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men."

In two later cases, Califano v. Goldfarb 430 U.S. 199 and Califano v. Westcott

443 U.S. 76, the Court again rejected the assumption that the husband would

be the breadwinner as being a discrimination based upon sex. In the former case, the provision which was declared invalid was one whereby social welfare benefits based on the earnings of a deceased husband were payable to his widow regardless of dependency whereas such benefits based on the earnings of a deceased wife were payable to her widower only if he was receiving at least half his support from her. In the later case the regulation which was impugned was one whereby the social welfare payments were provided for dependant children on the unemployment of their father but not upon the unemployment of their mother.

It is inviting to seek to decide the present case upon the basis of the principles established in these American cases. Nevertheless, they were decided upon a different Constitution and on the basis of a different constitutional jurisprudence. The present case must be decided upon the basis of the fundamental principles enunciated in the cases to which I have referred from our own jurisprudence.

Each of the judgments to which I have referred represents a distinct and different legal result. The judgment of Henchy J. in Dillane v. Ireland and the Attorney General represents a case where discrimination within the meaning of Article 40 (1) is justified by the proviso to that sub-section. The judgment of Walsh J. in O'Brien v. Stoutt represents a case where such

discrimination is not so justified but is justified by a different constitutional provision. Finally, the judgment of Walsh J. in de Burca v Attorney General represents a case where there is no justification for such discrimination either in the sub-section itself or in any other provisions of the Constitution. The question for determination is, within which of these categories does the present case fall?

The evidence adduced on behalf of the defendants indicates that the sections which are impugned were originally enacted to meet what was then an increasing problem of wives being deserted by their husbands and being left without proper provision. Similar provision was not made for husbands because the desertion of husbands by their wives was not causing any problem which required to be resolved.

The defendants rely upon the provisions of Article 41 (2) of the Constitution as justification for the provisions in favour of deserted wives and the absence of the same provisions in favour of deserted husbands.

Article 41 (2) provides as follows:-

"(1) In particular, the State recognises by her life within the home, a woman gives to the State a support without which the common good cannot be achieved.

(2) The State, shall, therefore, endeavour to ensure that mothers shall

not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

The defendants contend that these provisions establish either that such provisions themselves justify the discrimination or alternatively that the existence of such provision entitles the Oireachtas as a matter of policy to regard deserted wives as having a different social function from deserted husbands. The plaintiff on the other hand contends that to distinguish between deserted spouses on the ground of their sex is arbitrary and unjustified by any provision of the Constitution and is irrelevant to the nature of the legislation being considered.

Deserted wives entitled to receive either benefit under Section 100 or allowance under Section 195 are effectively divided into three categories. Those under the age of 40 years who do not have a qualified child residing with them; those under that age who do; and those over that age whether or not they have such a child residing with them. The first category are not eligible to receive either deserted wife's benefit or deserted wife's allowance whereas the latter two categories are. Is it unjust, unreasonable or arbitrary to exclude men from the categories which are entitled to such payments or is it a discrimination which could reasonably have been arrived at as a matter of policy by the Oireachtas? Having regard to the provisions of

Article 41 (2), it does not seem to me that as a matter of policy it would be unreasonable, unjust or arbitrary for the Oireachtas to protect financially deserted wives who are mothers who have dependant children residing with them or to recognise that mothers who have had to care for children will have lost out in the labour market and so are likley to need similar protection^{in similarly deserted}.

Since in effect I take the view that the legislation impugned insofar as it affects the plaintiff is within the proviso to Article 40 (1) of the Constitution, it follows that the plaintiff is not entitled to the relief which he seeks.

Henry Barron.
26th July 1984.