AN CHÚIRT UACHTARACH
THE SUPREME COURT

Record No:2022/139

O'Donnell C.J.
Dunne J.
O'Malley J.
Woulfe J.
Hogan J.
Murray J.
Collins J.

Between/

JOHN O'MEARA, JACK O'MEARA (A MINOR SUING BY HIS FATHER AND NEXT FRIEND JOHN O'MEARA), THOMAS O'MEARA (A MINOR SUING BY HIS FATHER AND NEXT FRIEND JOHN O'MEARA), AND AOIFE O'MEARA (A MINOR SUING BY HER FATHER AND NEXT FRIEND JOHN O'MEARA)

Applicants/Appellants

AND

THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr. Justice Woulfe delivered on the 22nd day of January, 2024

Introduction

1. The appellants appeal an order of the High Court dated the 14th November, 2022, following a judgment of Heslin J. dated the 7th October, 2022 (see [2022] IEHC 552), in which he dismissed a challenge to a decision of the first respondent to refuse the first appellant's application for the payment of Widower's (Contributory) Pension ("WCP"), in respect of himself and the minor appellants, as qualified children, following the death of his long-term partner.

2. WCP is paid in accordance with Chapter 18 of Part 2 ("Chapter 18") of the Social Welfare Consolidation Act, 2005 ("the 2005 Act"). Section 124(1) of the 2005 Act provides that, subject to this Act, a widow, widower or surviving civil partner shall be entitled to a pension, *inter alia*, where the contribution conditions set out in s. 125 are satisfied on either the insurance record of the widow, widower or surviving civil partner or that of his or her deceased spouse or deceased civil partner. "Widower" is defined in s. 123 as including a man who would otherwise be a widower but for the fact that his marriage has been dissolved, and "surviving civil partner" is defined in s. 2(1) as including a civil partner who would otherwise be a surviving civil partner but for the fact that his or her civil partnership has been dissolved. Section 127(1) provides that the weekly rate of pension shall be increased by a set amount in respect of each qualified child who has not attained the age of twelve years who normally resides with the beneficiary, and by another set amount in respect of each qualified child who has attained the age of twelve years who normally resides with the beneficiary.

3. The first appellant was the long-term partner of M.B., who died in 2021. The second, third and fourth appellants are the minor children of the first appellant and

M.B., born in 2008, 2010 and 2007 respectively. The first appellant and M.B. had been living together in a committed relationship for almost twenty years but, at the time of M.B.'s death, they had not married, nor could they have entered into a civil partnership within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 ("the 2010 Act").

4. The application for WCP was originally made on the 15th March, 2021, and it included a claim for an increased rate of pension in respect of the three qualified children under the age of eighteen. The first appellant was requested to provide a copy of his original civil marriage/civil partnership certificate. The first appellant responded to indicate that he had been in a long-term cohabiting relationship with the deceased for nearly twenty years, and that they were parents to their three children, for whom he was now left as the sole provider.

5. Having regard to the information which had been provided to the first respondent, the application for WCP was refused on the grounds that the first appellant was not the legal widower of his deceased partner as there had been no civil marriage and, therefore, he was not eligible for the payment. That decision was notified to the first appellant by letter dated the 21st April, 2021. On foot of correspondence dated the 7th May, 2021, from solicitors acting for the first appellant, a review of the original decision of the deciding officer was carried out by a second deciding officer. On review, there was no change to the original decision, and this was notified to the solicitors for the first appellant by letter dated the 27th May, 2021.

The High Court

6. By order of the High Court dated the 26th August, 2021, the appellants were granted leave to apply for judicial review of the decision of the first respondent dated the

27th May, 2021. In these proceedings the appellants challenged the constitutionality of the relevant provisions of Chapter 18 of the 2005 Act, and also contended that same are incompatible with the European Convention on Human Rights ("the ECHR"), to which effect is given in the State by the European Convention on Human Rights Act 2003 ("the 2003 Act"). While it appeared that the first appellant was contending that he has been discriminated against by reason of the fact that he was not married to or in a civil partnership with M.B., the principal constitutional argument made by the appellants was that Chapter 18 discriminates against the dependent children of non-marital relationships, on the basis of the marital status of their parents, in a manner said to be contrary to the equality guarantee in Article 40.1 of the Constitution.

7. The appellants also contended that the exclusion of any entitlement to WCP in the circumstances presented here – where that exclusion is based on or derives from marital status, directly or indirectly – is contrary to Article 14 of the ECHR, read with Article 8 and/or Article 1 of the First Protocol. In support of that argument they relied on a recent decision of the UK Supreme Court in *Re McLaughlin* [2018] 1 WLR 4250 ("*McLaughlin*"), which concerned widowed parent's allowance, ("WPA"), and the subsequent decision of the High Court of England and Wales, *R (Jackson) v. Secretary of State for Work and Pensions* [2020] 1 WLR 1441 ("*Jackson*"), which concerned bereavement support payment.

8. Heslin J. noted that WCP is payable to a qualifying recipient, irrespective of their parental status. That being so, it seemed to him uncontroversial to say that the core objective of the payment is not the support of children, in circumstances where the entitlement to the payment of WCP is not linked to the relevant couple having children. The trial judge felt that the only relevance of children is that, if a recipient

has a dependent child (or children) they will be eligible for a "qualified child" increase (at the time €40 for a child under 12, €48 for a child over 12). He stated (at para. 17) that thus the increase "although material, represents just a fraction of the WCP itself", in circumstances where the amount of the weekly pension was stated to range from €213 to €253. He later added (at para. 29) that it seemed to him that, as a matter of common sense and basic mathematics, if the focus of the legislation was on making provision for a child, as opposed to providing support to a bereaved spouse, the legislation would have been drafted in a materially different way (*e.g.* by doubling the payment where there is a child), and the question of children would have been dealt with by way of what is simply a modest increase on the basic payment.

9. The trial judge referred (at para. 31) to an affidavit sworn by a Ms. Murphy, Assistant Principal Officer of the Department of Social Protection, and in particular averments made by her in relation to the purpose of and rationale for WCP. Ms. Murphy stated that upon the death of a spouse, a surviving spouse loses a person who owed them certain rights and obligations in law, and she continued as follows:

> "In recognition of that loss, the Oireachtas has determined that it is appropriate for certain supports to be provided to the surviving spouse or civil partner of that relationship, including assistance in dealing with the economic aspects of that loss. The establishment of benefits of this nature is one of the mechanisms by which the State supports and encourages the institution of marriage and the fostering of the legal and social bonds which derive from that institution."

10. Heslin J. contrasted child benefit, which he said has the needs of children as its focus, with WCP, which he said does not. In doing so he noted the recent decision of this Court in *Michael (a minor) v Minister for Social Protection* [2020] ILRM 1

("*Michael*"), and he referred to passages from the judgment of Dunne J. regarding the nature of child benefit. Dunne J. had noted that the Court of Appeal had acknowledged in its judgment that child benefit is not in any sense "hypothecated by law for the benefit of the child", and she stated that the child is not entitled to receive the payment of child benefit.

11. The trial judge held that he was entitled to take the view, as per the principles in *Michael*, that WCP is not a payment which, as a matter of law, is made for the benefit of children, nor is it a benefit to which any child, regardless of the marital status of their parents, has an entitlement to. He went on to find that the distinction which underpins eligibility for WCP – the marital status of the recipient – is a perfectly permissible distinction based upon rational grounds and a legitimate State objective, namely the support and encouragement of marriage and the family based on marriage, per Article 41 of the Constitution. Heslin J. then stated as follows (at para. 65):

> "In short it is permissible for the State to differentiate between, on the one hand, a couple who chose to get married and, on the other, a couple who made a different choice. As a consequence of the permissible distinction, but very much a "side-effect" of the furtherance by the State of the legitimate aim of supporting and encouraging marriage, the second to fourth applicants find themselves in a different position to children of a married couple where one of the parties to the marriage has died. That does not render Chapter 18 unconstitutional, nor amount to unlawful indirect secondary discrimination."

12. Heslin J. noted that the second to fourth appellants each contended that their rights to equality had been infringed, contrary to Article 40.1 of the Constitution. He stated that, in approaching the case made by the appellant, the High Court must, however,

also recognise the reality that legislation will often confer benefits on some, but not on others. He referred to the decision of this Court in *Donnelly v Minister for Social Protection* [2022] 2 ILRM 185 ("*Donnelly*") as authority for the proposition that the drawing of distinctions was an intrinsic part of legislating. Overall, Heslin J. was not persuaded that the appellants, and in particular the second, third and fourth appellants, had brought home any claim of secondary indirect discrimination.

13. As regards the ECHR challenge, Heslin J. distinguished the two judgments which the appellants relied on as part of their argument that, where exclusion for WCP is based on marital status, it is contrary to Article 14 of the ECHR, read with Article 8 and/or Article 1 of the First Protocol. As regards *McLaughlin*, the trial judge noted that the benefit in question, WPA, was a contributory social security benefit payable to men and women who are widowed with dependent children. In other words, to be entitled to the payment the widow or widower had to have dependent children, and that was "utterly different" to the situation which pertains as regards WCP. Whereas in *McLaughlin* the Court could say of the payment that its "purpose must be to benefit the children", that simply could not be said of WCP.

14. The trial judge noted that, in *McGovern v. Chief Appeals Officer* [2021] IEHC 202, which also concerned a similar challenge to WCP, the High Court (O'Regan J.) had distinguished *McLaughlin* on the basis that the allowance there was held to be a payment in respect of children, whereas WCP payments are clearly for the benefit of a surviving spouse or civil partner, with additional sums payable if there is a dependent child. Although Heslin J. considered that he was constrained to follow *McGovern*, he reached the same conclusions in any event.

15. Heslin J. was entirely satisfied that *Jackson* must also be distinguished. In *Jackson* higher rate bereavement support payment was a bereavement support payment

payable, at a higher rate, to a qualifying surviving spouse or civil partner if there was one or more dependent child. The trial judge quoted how Holman J. had observed that where the State may pay over twice as much to a person who has a dependent child than to one who does not, it was, to his mind, fanciful to suggest that part, if not all, of that extra sum was not intended to benefit, and does not usually benefit, the child or children. The foregoing highlighted for Heslin J. the very different factual situation at play in *Jackson*. Firstly, WCP is payable regardless of whether any child is involved; and, secondly, even where there is a child, the increase in WCP provided for represents, in relative terms, a small fraction of the pension payment itself.

16. The trial judge also referred in detail to a decision of the European Court of Human Rights, *Shackell v. United Kingdom*, 45851/99, (27th April, 2000) ("*Shackell*") which he considered supported his view that a distinction based on marital status in this context was not impermissible from the perspective of the ECHR.

17. In concluding his judgment Heslin J. stated as follows:

> "128. The foregoing brings me to the practical issues which would inevitably arise, were the applicants correct. The logic of the case advanced by the applicants, even in its refined form (which acknowledges that the first applicant has not been discriminated against) is that the WCP is properly payable to all, regardless of marital status. That being so, the inescapable logic of the applicants' argument is that even if the deceased had not cohabitated with their partner for years, or decades, the pension was payable (subject only to social insurance requirements being met). As we know, to have a child is not a qualification requirement for receipt of WCP and, thus, the logic of the applicants' argument is that WCP is also properly payable to an unmarried

person who never had children with their partner, irrespective of how many years, or decades earlier the couple ceased to cohabit.

129. Two comments seem appropriate in relation to the foregoing. First, the logical consequences, were the applicants correct (and, with respect, I am entirely satisfied that they are not) would represent "policy" decisions which are the exclusive preserve of other branches of government. Moreover, it would represent, in substance, the allocation of finite resources to persons in groups and circumstances where the need for or appropriateness of providing such support has not been determined by the Oireachtas. It seems to me that to do what the applicants contend for would involve this Court violating the separation of powers principle and interfering, impermissibly, in the carefully constructed architecture of the State's social welfare system, of which the WCP represents a part. It would, in substance, be for this Court impermissibly to involve itself in the difficult task, entrusted to the Oireachtas, of making decisions as to who is to obtain the benefit of scarce public resources. Second, these (albeit theoretical) consequences are in stark contrast to the legitimate aim of Chapter 18 itself, namely the support of marriage. The consequences sketched out above undermine that legitimate aim of the Oireachtas, highlighting for me that, no matter how well argued and despite the enormous sympathy this Court has for the applicants as individuals, this is a claim which must be dismissed. Why this is so can be summarised succinctly, as follows, *i.e.* for the reasons explained in this judgment, this Court cannot accept the submission made on behalf of the applicants that the reason for WCP "is to protect the family which includes the children". That is not the reason for or aim and focus of WCP. Nor was this case ever about families or the applicants'

family. This case hinges on a legitimate decision made by the State to support, not families, but those who made the choice to enter, for present purposes, the marriage contract (thereby assuming legal rights and obligations *inter se* as married persons) where their spouse has died."

Determination

18. This Court granted the appellants leave to appeal by a determination dated the 20th February 2023: see [2023] IESCDET 25. The Court was satisfied that the intended appeal raised matters of general public importance. The application of Article 40.1 in the area of social welfare law raised difficult and important issues, as illustrated by *Michael* and *Donnelly*. Neither *Michael* nor *Donnelly* involved issues relating to WCP or distinctions based on marital status, and those decisions did not foreclose the argument sought to be advanced by the appellants. Distinctions based on marital status which impact on children, directly or indirectly, arguably presented particular complexity and difficulty. The application of the ECHR in this context also raised matters of general public importance in the Court's view. The Court was also of the view that there were "exceptional circumstances" such as to warrant a direct appeal from the High Court to this Court.

19. Accordingly, the Court granted leave to appeal in respect of the following issues:

(1) Whether the non-payment of WCP in the circumstances here is consistent with the Constitution, and in particular Articles 40.1 and 41;

(2) Whether the non-payment of WCP in the circumstances here is compatible with the ECHR, and in particular Article 14, read with Article 8 and/or Article 1 of the First Protocol.

The Court added that the issue of the nature and purpose of WCP, and in particular whether it is to be regarded, in whole or in part, as a benefit for children, might be addressed within the framework of those two issues.

Submissions of the Appellants

The Nature and Purpose of WCP

20. The appellants submit that the most important part of the WCP scheme for their purposes is s. 127 of the 2005 Act, under which the rate of the pension is increased in respect of each qualified child who normally resides with the beneficiary. A qualified child is defined in s. 2(3) of the Act as a person who is ordinarily resident in the State, is not detained in a children detention school and is either under the age of 18, or satisfies another condition. The appellants contend that the second, third, and fourth appellants would be qualified children under this definition.

21. The appellants argue that Heslin J. was incorrect in finding that the nature and purpose of WCP is to provide only for the needs of the surviving spouse, and that it is not regarded as a benefit for children or families. They note that the trial judge acknowledged that increases in WCP are provided for in respect of children living with the beneficiary, but held that the fact that the Oireachtas addressed that eventuality did not mean that the focus of the legislation was other than on providing support for the benefit of the surviving member of a married couple.

22. The High Court's finding as to the "focus" of WCP is disputed by the applicants. They submit that the inclusion of increases for qualified children shows that WCP is capable of having more than one focus and purpose, in terms of the people whose well-being it seeks to secure. They stress the fact that Irish social welfare law does not contain any provisions which entitle children to payments directly. All core

social welfare payments are based on a personal rate of payment for adults, which is increased for qualifying children. Under our system, social welfare provision for children is always channelled through adults. This is grounded on the assumption that parents and people in *loco parentis* can be relied upon to provide for the children in their care, an assumption which is reflected in observations made by this Court (per Murphy J.) in *Ó Síocháin (Inspector of Taxes) v. Neenan* [1999] 1 IR 533 ("*Ó Síocháin*"), at 544.

23. The appellants submit that, given the Irish model of making social welfare provision for children through adults, it follows that the rules relating to the entitlement of parents and people in *loco parentis* to social welfare payments – especially social welfare payments intended to supplement family income – will have consequential affects on children, even if those children do not actually have a right to the social welfare payments themselves. It must further follow that differential treatment of adults in terms of such entitlement entails, necessarily, differential treatment of the children for whom they are assumed to provide.

The Constitutional Challenge

24. The appellants rely upon Article 40.1 of the Constitution, and submit that discrimination in connection with exclusion of a claimant from a social welfare benefit may give rise to a complaint under Article 40.1. They refer to *Donnelly* where this Court held (at para. 197) that Article 40.1 provides protection against discrimination that is based on arbitrary, capricious or irrational considerations, and also that the objectives of a legislative measure, and its rationality (or irrationality) and justification (or lack of justification) may in some cases be apparent on its face. Conversely, in other cases it may be necessary to adduce evidence in support of a

party's case. The appellants submit that the distinction made by the WCP scheme on the grounds of marital and birth status is irrational on its face and therefore contrary to Article 40.1.

25. As regards the alleged victims of the differential treatment, the appellant states that WCP is paid to the widow, widower or surviving civil partner, so in the first instance the question of differential treatment must be addressed by reference to the first appellant, but they say the analysis does not end there. The appellants rely upon the reasoning put forward by O'Donnell J. (as he then was) in *Michael*, who acknowledged the secondary/indirect effects on children of differential treatment of parents on the grounds of immigration status. They argue on this basis that the children are indirectly discriminated against by the non-payment of increased WCP to their father on the grounds of his marital status, and therefore on the basis of their birth status.

26. The appellants put forward a series of arguments outlining why the O'Meara's should be considered a family unit for the purposes of the Article 40.1 argument, so that the impact of non-payment of increased WCP on them can be compared with the situation of a martial family in comparable circumstances. It is submitted that it may not be necessary that a family unit should be able to claim rights under Article 41, for it to be able to advance a claim for equal treatment as a unit under Article 40.1. But if it is, it is acknowledged that the appellants must confront the fact that in *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567("*Nicolaou*"), it was established (at 643) "that the family referred to in [Article 41] is the family which is founded on the institution of marriage", and this interpretation has been repeated in various subsequent authorities. The appellants cite the judgment of McKechnie J. in *Re JJ* [2022] 3 I.R. 1("*JJ*"), where he observed that there is now a diversity of

family structures, and he noted certain expressions of judicial disquiet with the traditional interpretation of Article 41, in particular, the comments of O'Donnell J. in *Gorry v Minster for Justice* [2020] IESC 55("*Gorry*"), as demonstrating that an alternative construction of Article 41 is open to that adopted in *Nicolaou*.

27. The appellants submit that the comments of McKechnie J. in *JJ* and the remarks of O'Donnell J. in *Gorry* provide a road map towards a harmonisation of the rights of children under Article 42A and the rights of families under Article 41, which this Court should follow here. They suggest that the Irish text of Article 41.3.1 appears also to be open now to an interpretation broader than the English text was given in *Nicolaou.* They argue that the authorities suggest that the O'Meara family has a constitutional value and that it can assert a right to recognition as such, including in this context a right to equal treatment with marital families in the same circumstances.

28. The appellants then analyse their complaint by reference to the appropriate comparators. They cite the judgment of O'Donnell J. in *MR and DR v An tArd Chláraitheoir* [2014] 3 IR 533, where he observed (at para. 241) that any equality argument involves the proposition that like should be treated alike. The appellants contend that the comparator for the O'Meara family is a marital family entitled to increased WCP following the death of one of the spouses.

29. The appellants then address the issue of the justification for the legislative differentiation. They cite *Donnelly* where O'Malley J. highlighted the issue of the rationality of the legislative differentiation, and stated that the answer to the question of rationality will of course entail considerations of proportionality. They question whether the Oireachtas can exclude a claimant from increased WCP on grounds of marital status, even though he performs the same social function as an

eligible marital father, and the children in respect of whom the increases are claimed have equal rights with marital children and will suffer if the benefit is refused. They submit that the current exclusion of all unmarried surviving parents from increased WCP can only be motivated by prejudice and stereotyping. If it is acknowledged that the duties of married and unmarried parents are the same, and if groundless notions (that unmarried parents are somehow less likely to provide for the care, safety, welfare and education of children than married ones) are excluded from consideration, there is a glaring irrationality in the blanket exclusion of unmarried parents from eligibility for support under the WCP scheme.

30. As regards the exclusion of the O'Meara children and the family unit, the appellants contend that a measure which treats unmarried parents and their children less favourably than married parents and their children cannot rationally be connected to the protection of the institution of marriage, and they say it is perverse to rely on same as a justification for perpetuating stigma against unmarried parents and their children. Although discrimination against surviving adults in their own right may be constitutionally permissible, discrimination against children and families must be a different matter. Given that the O'Meara children were 15, 14 and 12, the impact of the differential treatment on their family's resources was significant.

The ECHR Challenge

31. The appellants submit that the WCP scheme is incompatible with Article 14 of the ECHR, taken in conjunction with Article 8 and Article 1 of the First Protocol. They note that in *McLaughlin*, Baroness Hale said that a claim of discrimination contrary to Article 14 raises four questions, and they apply those questions to the facts of the present case.

32. On the question of justification for the difference in treatment, the appellants note that in *McLaughlin,* Baroness Hale found that the difference in treatment required justification, and this in turn depended upon whether it pursues a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. They suggest that Baroness Hale accepted that promoting marriage was a legitimate aim, but could not accept that denying Ms McLaughlin and her children the benefit of her partner's contributions because they were not married was a proportionate means of achieving that aim.

33. In this case the appellants submit that whatever justification the legitimate aim of the promotion and support of marriage may provide for treating married and unmarried adults differently regarding survivor benefits for widows and widowers, that aim does not provide an objective justification required for such differential treatment insofar as measures intended to meet the needs of parents, children and families are concerned. They again cite *McLaughlin*, which concluded that such differential treatment was manifestly without reasonable foundation. They submit that obvious similarities between *McLaughlin* and the appellant's case suggest that this Court should reach the same conclusion with regard to increased WCP, and that a declaration of incompatibility under s. 5 of the 2003 Act is warranted.

Submissions of the Respondents

The Nature and Purpose of WCP

34. The respondents highlight the qualification conditions for WCP and submit that the legislation frames entitlement to WCP by reference to the institution of marriage/civil partnership, and that this is evident from both the qualification criteria and the circumstances in which a person will be precluded from receiving

the payment. Eligibility rests on a person having entered into a legally recognisable relationship which confers mutual rights and obligations on the parties in that relationship. The respondents state that WCP is a mechanism whereby the State supports and encourages the institution of marriage. Widows, widowers and surviving civil partners, on becoming bereaved, lose someone who had legal duties towards them and the social welfare code recognises this by providing a pension to them, subject to certain conditions.

35. The respondents maintain that WCP is not dependent on a couple having children and it is not paid for the benefit of children nor targeted at children. They state that the eligibility criteria are framed entirely by reference to the marital status of the applicant and the contributions. As regards the payment of increased rate WCP, where a qualified child is normally resident with the beneficiary of a payment, they say this is a common feature of payments made under the 2005 Act. However, they submit that that does not alter the nature of the particular payment, nor does it mean that each of those payments are for the benefit of the child.

36. The respondents suggest that it is relevant that the increased rate for a qualified child is only one of a number of increases which can be awarded to beneficiaries pursuant to s. 127 of the 2005 Act, and they submit that none of these increases change the nature or purpose of WCP. The respondents submit that the position articulated in *Michael* is inconsistent with a contention that it is necessary to examine the consequential effects on persons who do not have an entitlement to the WCP payment. The differential analysis is to be undertaken by reference to the appropriate comparator, which they maintain is the marital spouse and non-marital partner, rather than by reference to children.

37. The respondents say that *Michael* highlights that a parent is free to dispose of any social welfare payment in a manner which they see fit. They recognise that, depending on the choices made, there may be consequences which arise from the manner in which any income is spent. They argue that the appellants' contention that WCP is a "family payment" is simply incorrect, and is not one that is supported by the statutory scheme or the evidence in the case. They reiterate that the existence of a small increase for a dependent child does not alter the nature of the payment, nor does it alter the basis upon which the analysis of the validity of the statutory scheme is to be undertaken.

The Constitutional Challenge

38. The respondents submit that the guarantee contained in Article 40.1 does not require identical treatment for all persons without any recognition of different circumstances. Where legislation is enacted which draws a rational distinction between the differing needs of different groups of persons, no breach of Article 40.1 will arise: see *Murphy v. Ireland* [2014] I.R. 198 ("*Murphy*"). They argue that to demonstrate a breach of Article 40.1, it must be demonstrated that the distinction drawn is arbitrary, capricious, or not reasonably capable of supporting the selection or classification complained of.

39. The respondents cite *Donnelly* where O'Malley J. emphasised the need for the courts to respect the "role of the legislature in enacting laws concerned with social and revenue matters, because the raising and spending of public money involves policy decisions that are more appropriate to the elected members of the legislature than to the courts" (at para. 163). They state that it is difficult to see how the appellants could be granted the relief sought, without this Court substituting its own

policy choices for those made by the Oireachtas, in breach of the separation of powers. If the Court were to make an order to extend the payment of WCP to the first appellant, the consequence of such a grant of relief would be to extend the entitlement to WCP to a new category of person by judicial order rather than by legislation.

40. The respondents consider the appellants' argument that it is not rational to exclude the first appellant from receipt of "increased WCP", and submit that such an argument is based on a legal fiction that there exists a payment that is "increased WCP", and they say that no such payment exists in the 2005 Act. The only payment which exists is WCP, eligibility for which is determined by reference to marital status rather than parenthood, though the rate of that payment can vary depending on certain factors.

41. The respondents submit that the distinction drawn in the 2005 Act between married and co-habiting couples is one which has been determined to be rational, and is consistent with both the particular status afforded to the institution of marriage by the Constitution and a long line of authority from this Court. It is legitimate and rational for the Oireachtas to recognise the existence of obligations which are owed to each other by marital couples, and to enact social welfare legislation which grants benefits to those persons who are in recognised relationships.

42. As regards the argument that the exclusion of the minor appellants (or the family as a whole) from the receipt of WCP is not rational, the respondents submit that such an argument could only be maintained on the basis that the 2005 Act gives rise to an indirect and secondary impact, and that this argument is one which should be rejected for various reasons.

43. The respondents state that, insofar as a claim of indirect discrimination could be maintained, the appellants have not discharged the burden which they say was identified by O'Donnell J. in *Michael* (at para 19). They submit that there is no evidence that the indirect effect claimed was the object of the legislation. They argue that there is also no evidence to suggest that the legislation was motivated by prejudice or stereotyping, and no evidence to suggest a substantial impact on either the appellants themselves or on the wider class of person affected.

44. The respondents finally address the arguments made in respect of the definition of a family in the context of Article 41 of the Constitution. They cite the analysis of O'Donnell J. in *Jordan v. Minister for Children and Youth Affairs* [2015] 4 I.R. 232, where he addresses circumstances where this Court may be entitled to depart from an earlier decision. They state that the analysis in *Gorry* is more properly directed at noting that while marriage is given a particular status in the Constitution, that does not mean that other relationships are to be "ignored". The respondents contend that it does not follow from that analysis that it is necessary to depart from existing authority as to the basis upon which the Family for the purposes of Article 41 is formed.

The ECHR Challenge

45. The respondents state that the ECHR argument made by the appellants has been rejected by the European Court of Human Rights ("ECtHR") on a number of occasions, and that the approach of the ECtHR is similar to that which is found in domestic case law. They submit that any reliance on *McLaughlin* must be considered in conjunction with an analysis of any differences which arise in the manner in which the ECHR has been incorporated into domestic law in this

jurisdiction and in the United Kingdom, and argue that no such analysis is present in the appellants' submissions.

46. The respondents rely upon the decision of the ECtHR in *Shackell,* where the Court considered whether the refusal to grant widow's benefits to the surviving partner in a cohabiting relationship breached the Convention. In holding the complaint to be inadmissible, the Court held that the position of unmarried cohabitees was not analogous to that of a married couple. The Court reiterated that States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. It considered that the promotion of marriage, by way of limited benefits for surviving spouses, cannot be said to exceed the margin of appreciation afforded to the respondent government.

47. The respondents contend that the entirety of the case made by the appellants under this heading rests on the analysis of Baroness Hale in *McLaughlin.* They submit that the core distinction between WCP and WPA (as was at issue in *McLaughlin),* is that the eligibility criteria for the latter was not just linked to marital status but also to the care of dependent children. Central to the analysis and findings of the UK Supreme Court was the finding that the purpose of WPA was to benefit children. Consequent on that finding, it was concluded that there was no rational connection between the aim of the promotion of marriage and the framing of the eligibility criteria for WPA.

48. The respondents conclude by stating that it would be more appropriate to apply the principles derived from *Shackell,* and to prefer the dissenting judgment of Lord Hodge in *McLaughlin,* which they say contains an analysis closer to that found in the Supreme Court judgments in *Michael*. They contend that this analysis is consistent with the case law of the ECtHR itself, and must be preferred in any

analysis of the legislation impugned in these proceedings. For this reason, the analysis in *Jackson*, which they say simply follows the analysis in *McLaughlin*, must also be rejected.

Supplemental Submissions

49. This appeal was originally listed for hearing on the 13th July, 2023, but was adjourned in the light of the Court's concern that all constitutional issues arising might not have been fully dealt with in the submissions filed up to that point. Following further case management the parties filed supplemental submissions and furnished responses to a number of questions posed by the Court.

50. In their supplemental submissions the appellants submit that the doctrine of harmonious interpretation, and the "living document" approach to constitutional interpretation, favour an interpretation of the word "Family" in Articles 41 and 42 broader than that adopted in *Nicolaou*. They argue that the *Nicolaou* approach results in conflict with other parts of the text, such as the reference to "all children" in Article 42.A.1. They submit that the Court should adopt a harmonious approach to the interpretation of Article 41, in light of the changes which have taken place in Irish society since 1960. This means, in effect, deciding that *Nicolaou* should no longer be followed, and that non-martial families may, as units and as individuals, enjoy the protections of Article 41 and Article 42.

51. In their responses to the Court's questions, the appellants state that the increased rate WCP payable to the first appellant on a weekly basis as of September, 2023 would be €400.50 per week, *i.e.* the applicable person rate of €250.50 in respect of the first applicant, plus the three increases of €50 in respect of the second, third and fourth appellants.

52. In their supplemental submissions the respondents conclude that the textual analysis suggested by the appellants is not, in fact, an analysis which readily flows from the language used in Article 41 and Article 42. In particular, they say that this analysis requires the clear terms of Article 41.3.1 to be ignored, and that the correct approach to the constitutional interpretation does not permit certain phrases to be set aside in this manner.

53. The respondents submit that neither the doctrine of harmonious interpretation or the concept of the Constitution as a living document suggest that Articles 41 and 42 have been wrongly interpreted. In fact, an examination of their text in the context of the prevailing views at the time of the adoption of the Constitution, and having regard to the amendments which have subsequently been adopted by the People, suggest that their application is limited to marital families (with the rights of persons in non-marital families being recognised elsewhere in the Constitution). The fact that there have been significant changes in societal views around the family is not something which can justify a departure from a volume of precedent.

54. In their responses to the Court's questions, the respondents suggest that the correct weekly figure for increased rate WCP would in fact be €375.50, based on an appliable personal rate of €225.50 rather than €250.50, plus the three increases of €50 in respect of each qualified child.

Discussion

55. It seems to me that, broadly speaking, three issues may arise for decision in this appeal:

(i) Who are the victims of the differential treatment as regards payment of WCP, and who are the appropriate comparators?

(ii) Is the differential treatment in breach of Article 40.1 of the Constitution?

(iii) Is the differential treatment incompatible with the State's obligations under the ECHR?

(i) Victims and Comparators

56. In the present case it is clear that the first appellant is directly impacted by the non-payment of increased rate WCP to him, in comparison with the payment to a widower or surviving partner. The appellants argue, however, that the analysis of alleged discrimination cannot end there. They submit that the second, third and fourth appellants are indirectly discriminated against by the non-payment of increased rate WCP to their father on the grounds of his marital status, and therefore on the basis of their birth status. In addition, they contend that the four appellants can be considered together as a family unit, so that the impact of non-payment of increased rate WCP on them can be compared with payment to a marital family in similar circumstances.

57. It seems to me that the analysis by the trial judge did ultimately end with a focus on the impact of the non-payment on the first appellant, and his judgment showed a marked reluctance to engage with the impact on the other appellants and on the family unit. Some examples of this restrictive approach are as follows:

(a) Heslin J. held that WCP is not a payment which, as a matter of law, is made for the benefit of children and that the appellants are not entitled to receive the payment of WCP (para. 40).

(b) He stated that the second to fourth appellants "find themselves in a different position" to the children of a married couple where one of the parties to the marriage has died, but this was very much a "side-effect" of the furtherance

by the State of the legitimate aim of supporting and encouraging marriage (para. 65).

(c) He did not agree with what he saw as the premise of the appellants' case that the purpose of WCP is to support bereaved families; it seemed to him that the purpose of WCP is to provide support to a bereaved spouse (para. 68).

(d) He held that the existence of a child is certainly not a prerequisite of a person's entitlement to WCP. The existence of a child simply gives rise to a marginal increase on the payment, the object of which is to support the bereaved spouse (para. 75).

(e) Heslin J. ultimately rejected the appellants' submission which posited as comparators a marital family versus a family not based on marriage, finding that these are not the appropriate comparators. He held that the appropriate comparators are, on the one hand, someone entitled to receive the benefit because they meet the qualification requirements in Chapter 18 and, on the other hand, an unmarried person who has lost their life partner (para. 124).

58. While some parts of the above may be literally correct when taken alone, such as the statement that children are not entitled to receive the payment of WCP, overall I am of the opinion that the narrow approach adopted by the trial judge was fundamentally misconceived, for the following reasons.

59. Firstly, Heslin J. stated that his finding that WCP is not a payment made for the benefit of children, and that the children are not entitled to receive the payment of WCP, was as per the principles in *Michael*. That case concerned the question of when a payment of child benefit arises to parents whose immigration status has not yet been determined finally by the State, but a child of the relevant family had either status as an Irish citizen or as a refugee. In her judgment Dunne J. considered (at

para. 37) the nature of child benefit, and noted that it was acknowledged by the Court of Appeal in its judgment that "child benefit is not in any sense hypothecated by law for the benefit of the child or otherwise held in trust by the parent for her interest, so that the parent is in principle free to do with these monies as he or she may think fit". She later concluded as follows (at para. 52):

> "To summarise, child benefit is payable in respect of a qualified child to a qualified person, namely, a person with whom the qualified child normally resides provided that that person is habitually resident in the State. The qualified person in receipt of child benefit is entitled to use child benefit for whatever purpose they consider appropriate and are not obliged to spend it exclusively on the qualified child or for the benefit of the qualified child directly or indirectly as the case may be. No doubt, the majority of people use child benefit for the benefit of their children but this may be done by pooling the sum of money available by way of child benefit with other family resources for the benefit of the family as a whole. Nevertheless, child benefit, when payable, is not something that is required to be used solely and exclusively for the benefit of the child concerned. The child concerned or a person acting on behalf of the child is not entitled to dictate to the recipient of child benefit how that sum of money is used. The child is not entitled to receive the payment of child benefit."

60. I agree with the trial judge that he was entitled to take the view, as per the principles in *Michael* as set out above, that the second to fourth appellants are not entitled to receive the payment of WCP, or perhaps more correctly, would not be entitled were it otherwise payable. This, however, does not really advance matters, as under our social welfare system provision for children is always channelled through adults, and obviously could not be paid directly to young children.

61. However, I am doubtful that the trial judge was entitled to derive from *Michael* the additional view that WCP is not a payment which, as a matter of law, is made for the benefit of children, bearing in mind that we are dealing here with increased rate WCP arising in respect of qualified children. It seems to me that the view expressed by the trial judge required further elaboration. If he meant that increased rate WCP is not required by law to be used for the benefit of the children, that is consistent with *Michael*, and I would agree with same.

62. However, if Heslin J. meant that the Oireachtas did not intend, in enacting s. 127 of the 2005 Act, that payment of increased rate WCP would be made (at least in part) for the benefit of children, then that to me is an unwarranted expansion of the *Michael* principles. On my reading of her judgment Dunne J. did not say that child benefit is not intended to benefit the child, nor that it does not benefit the child. On the contrary she stated that there is no doubt that "the majority of people use child benefit for the benefit of their children but this may be done by pooling the sum of money available by way of child benefit with other family resources for the benefit of the family as a whole".

63. My second reason for disagreeing with the approach of the trial judge is that, with respect, I do not consider his approach accords with the reality of how a social welfare benefit such as increased rate WCP impacts on a family. As acknowledged by Dunne J. in *Michael*, in practice social welfare benefits such as child benefit and increased rate WCP benefit children because the money received by the beneficiary is pooled with other family resources for the benefit of the family as a whole. While Heslin J. may be correct to state that the sole purpose of WCP is to provide support to a bereaved spouse where there are no qualified children, this cannot to my mind be the sole purpose where one is dealing with increased rate WCP which is payable

because there are qualified children. It accords with common sense and with reality that the purpose of increased rate WCP is also to provide support for the children and for the family as a whole.

64. As set out above at para. 57, another finding made by the trial judge was that the existence of a child is certainly not a prerequisite to the payment of WCP. While this is correct as regards personal rate WCP, the existence of a child certainly is a prerequisite to entitlement to increased rate WCP, which is what we are dealing with in this appeal.

65. Heslin J. went on to say that the existence of a child simply gives rise to a "marginal increase" in the payment. Elsewhere he referred to the increase as representing "just a fraction of the WCP itself" (para. 17), and as a "relatively small fraction" of the personal rate payment. In my opinion this assessment is plainly wrong, and not in accordance with how the vast majority of people would view the increased rate payment. As set out at para. 54 above, the increased rate WCP in the present case would be €375.50, as opposed to the personal rate of €225.50, an increase of €150.00 in the weekly payment. This is not a marginal increase or a relatively small increase, but an increase equivalent to over 66% or two thirds of the personal rate of payment.

66. In circumstances where the reality is that most people will use increased rate WCP for the benefit of the family as a whole, whether by pooling that payment with other family resources or otherwise, it seems to me appropriate that any analysis of whether differential treatment offends Article 40.1 should engage with that reality. Therefore, in my opinion, the appropriate comparator is, as submitted by the appellants, on the one hand a marital family who are entitled to increased rate WCP and, on the other hand, an equivalent family, not based on marriage, who are not

entitled to the same payment, notwithstanding the latter having similar needs of support to the former.

67. I might add the following comments. Firstly, I think the above approach is consistent with a somewhat similar approach to standing adopted by O'Donnell J. in *Michael* where he stated as follows (at para. 19):

> "Given the fact that the legislation specifically contemplates child benefit being paid in respect of a "qualified child" and that the intended object of the benefit is clearly to assist parents with the cost of child rearing, I agree that Emma and Michael in this case are fully entitled to challenge the operation of s. 246 in so much as it affects them even indirectly."

68. Secondly, in my opinion the appellants' family unit is clearly entitled to advance a claim for equal treatment under Article 40.1 as a unit of human persons, irrespective of whether the family referred to in Article 41.3 of the Constitution is limited to the marital family. As stated by O'Donnell J. in *Gorry* (at para. 67), it would be wrong and inconsistent with the social order envisaged by the Constitution to disregard that family unit or to treat that unit as being of no value because it was not founded on marriage. I will consider the issue regarding Article 41.3 further below.

(ii) Breach of Article 40.1? Differential treatment and justification

69. The principle of equality before the law is the very first principle set out in the part of the Constitution dealing with "Fundamental Rights", and would appear to be a fundamental principle inherent in any modern democratic republic. Indeed, it is suggested in Kelly, *The Irish Constitution* (5th Ed., 2018) that the guarantee of equality in Article 40.1 would appear to be reinforced by a commitment to equality

inherent in the constitutional characterisation of the State in Article 5 as, *inter alia*, a democratic state.

70. Article 40.1 of the Constitution provides as follows:

> "All citizens shall, as human persons, be held equal before the law.
>
> This will 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."

71. It is not necessary for me to review the authorities on the interpretation of Article 40.1, as this Court has done so very recently in *Donnelly*, another case dealing with a challenge to legislation that excluded a person from eligibility for a social welfare payment. In her judgment for the Court O'Malley J. stated as follows (at para. 188):

> "The authorities do demonstrate support for the following propositions:
>
> (i) Article 40.1 provides protection against discrimination that is based on arbitrary, capricious or irrational considerations.
>
> (ii) The burden of proof rests upon the party challenging the constitutionality of a law by reference to Article 40.1.
>
> (iii) In assessing whether or not a plaintiff has discharged that burden, the court will have regard to the presumption of constitutionality.
>
> (iv) The court will also have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy.

(v) Where the discrimination is based upon matters that can be said to be intrinsic to the human sense of self, or where it particularly affects members of a group that is vulnerable to prejudice and stereotyping, the court will assess the legislation with particularly close scrutiny. Conversely, where there is no such impact, a lesser level of examination is required.

(vi) The objectives of a legislative measure, and its rationality (or irrationality) and justification (or lack of justification) may in some cases be apparent on its face. Conversely, in other cases it may be necessary to adduce evidence in support of a party's case."

72. O'Malley J. later continued as follows:

"191. The approach must be one that includes appropriate deference to the principle that the Constitution allocates the primary function of making decisions in such matters to the People's elected representatives in the Oireachtas, and that it is not for the courts to usurp that function. Where the constitutional guarantee of equality is the only ground for a challenge the court will have to bear in mind that all legislation involves differentiating between individuals or groups, and that inevitably the differentiation settled upon by the legislature will mean that some people are excluded despite being in a very similar position to some people who are included.

192. What might be termed a "pure" equality claim may arise where the legislature has decided to confer a benefit on a class of persons, and the plaintiff is aggrieved at being excluded because he or she has at least some relevant similarity with those who are included. But the legislature is entitled to make policy choices, and therefore must be entitled to distinguish between classes of

persons. To refer again to the text of Article 40.1, the equality guarantee is not to be interpreted as meaning that the State shall not, in its enactments, have "due regard" to differences of physical and moral capacity and of social function. I consider, therefore, that the challenge can only succeed if the legislative exclusion is grounded upon some constitutionally legitimate consideration, and thus draws an irrational distinction resulting in some people being treated as inferior for no justifiable reason. The Constitution does not permit the court to determine that the plaintiff should be included simply because a more inclusive policy, assimilating more people sharing some relevant characteristic into the class, would be "fairer".

193. In considering whether the legislation offends against the Constitution, the court will engage in a greater degree of scrutiny where the differentiation involves what may be termed one or more "suspect" grounds…

194. The guarantee in Article 40.1 is grounded upon the respect due to all human persons. The question here must in the first instance be whether the legislation draws a distinction on the basis of intrinsic aspects of the human personality such as those referred to in *Murphy v. Ireland*. The reason that grounds concerning those intrinsic aspects of human personality are considered "suspect" is that a differentiation based on such grounds may in fact be the result of either irrational prejudices or groundless assumptions. In my view, the obligation of the court under Article 40.1 includes ensuring that groundless assumptions or prejudices have no role in determining the legal rights of the individual."

73. Pausing here for a moment, as regards the reference in the last paragraph quoted above to the *Murphy* case, in his judgment for this Court in that case O'Donnell J.

noted (at para. 34) that the guarantee of equality before the law in Article 40.1 is expressed in terms of such equality "as human persons". He stated that the phrase was problematic in the early period of constitutional interpretation, but it is, however, increasingly understood that it is intended to refer to those immutable characteristics of human beings, or choices made in relation to their status, which are central to their identity and sense of self and which, on occasions, have given rise, whether in Ireland or elsewhere, to prejudice, discrimination or stereotyping. He added that matters such as gender, race, religion, marital status and political affiliation, while not all immutable characteristics, can nevertheless be said to be intrinsic to human beings' sense of themselves.

74. The analysis of O'Malley J. then continued as followed:

> "195. This analysis should in my view be applied even in the areas of tax and welfare…I do not see a higher level of scrutiny in such cases, where warranted by the nature of the grounds for differentiation, as diluting the principle of deference to the Oireachtas in matters of taxation and welfare.
>
> …
>
> 197. I consider that the Court of Appeal was correct in holding that the principal issue in the case is, as discussed by Henchy J. in *Dillane*, the rationality of the legislative differentiation. The first question is whether the legislation makes a discrimination in favour of, or against, a person or category of persons, on the express or implied ground of a difference in social function. If so, does the discrimination have a legitimate purpose, relevant to the objective of the legislation? Is it 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? The answer to this

latter question will of course entail considerations of proportionality, insofar as proportionality may be seen as an intrinsic aspect of rationality – the distinction drawn may, on its face, be rational, but it may be that in a particular case there is no rational relationship between that distinction and the measure enacted. There is no real conflict, in my view, between asking the question whether the discriminatory provision is "rational" and pursues a legitimate objective (the Irish test) and asking whether it has "no objective and reasonable relationship of proportionality between the means employed and the aims sought to be realised" (the ECtHR in *Stec v. United Kingdom*)."

Application of the principles

75. In applying the above principles to the present case, the first point to be noted is that the 2005 Act does draw a distinction on the basis of one of the intrinsic aspects of human personality referred to in *Murphy, i.e.* marital status. The differentiation is thus based on one of the "suspect" grounds referred to in *Donnelly*, and therefore requires more intense scrutiny than might be warranted if differentiation were based on other grounds, notwithstanding the context being that of social welfare legislation.

The First Question

76. As per *Donnelly*, the first question is whether the 2005 Act makes a discrimination in favour of, or against, a person or category of persons, on the express or implied ground of a difference of social function. If so, does the discrimination have a legitimate purpose, relevant to the objective of the legislation?

77. In the present case the 2005 Act discriminates against a category of persons on the grounds of a purported difference in social function, *i.e.* on the grounds that they are not a widower (note however how this is defined in the Act as including a person who would otherwise be a widower but for the fact he is divorced) or a surviving civil partner (again defined more extensively to include a former civil partner post-dissolution of the civil partnership), but instead an unmarried person who has lost their life partner.

78. It seems to me that, in principle, the discrimination can be seen as having a legitimate purpose, relevant to the objective of the legislation, that objective being to provide financial support to the surviving spouse or civil partner. Insofar as the purpose of the discrimination is the promotion and encouragement of marriage, in my opinion this can be seen in principle as a legitimate purpose relevant to that objective, having regard to the terms of Article 41.3 of the Constitution. Insofar as the purpose of the discrimination could also be seen as the promotion and encouragement of civil partnership, again in my opinion this can be seen in principle as another legitimate purpose on the part of the State relevant to that objective, having regard to the enactment of the 2010 Act.

79. It is necessary to develop the last point further in this respect. Firstly, part of the foundation for the legitimate purpose of promoting and encouraging marriage is Article 41.3.1 of the Constitution, whereby the State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack. In *Nicolaou* the Supreme Court held that the Family referred to in Article 41 is the marital family only, and does not include the non-marital family. While this interpretation has been repeated in a number of subsequent authorities since *Nicolaou,* the appellants have noted some modern

expressions of judicial questioning of the traditional interpretation of Article 41, and whether the provision should be construed as extending also to non-marital families.

80. When first drafting this judgment, I felt that it might not be necessary to resolve this issue for the purpose of deciding the present appeal. Even in the absence of Article 41.3, it seemed to me that the promotion and encouragement of marriage would still constitute a legitimate objective on the part of the State, as a matter of general principle. This was also the view taken by the UK Supreme Court in *McLaughlin* (at para. 36), and the same view has been expressed by the ECtHR in various cases.

81. However, since first drafting this judgment, I have had the benefit of reading a draft of the judgments which O'Donnell C.J. and Hogan J. propose to deliver herein, and have noted that both my colleagues have engaged with the questions of whether the interpretation of Article 41 in *Nicolaou* was correctly decided, and if not whether it should now be overruled. In the light of same, I think it is appropriate that I should offer some views on these important questions.

The Nicolaou Article 41 Interpretation

82. I referred above to some modern expressions of judicial questioning of the *Nicolaou* interpretation of Article 41, and the best example is the powerful concurring judgment of McKechnie J. in *JJ*, where he stated as follows (at para. 343):

> "The traditional interpretation of Article 41 has long had consequences for unmarried parents; many of these consequences have been ameliorated by statute, but the fact remains that unmarried families are excluded from the fundamental constitutional protections afforded to the Family by Article 41. It is perhaps for this reason that there have been some apparent expressions of

judicial disquiet with this situation in more recent years, a move long overdue but one which I strongly welcome."

83. McKechnie J. went on to review some authorities which he felt evinced such judicial disquiet, and he later continued as follows (at para. 347):

"However, …I do not consider that any of these judgments has yet sufficiently altered the historical and traditional position, even if rooted in norms which no longer hold exclusive sway over society, whereby the marital family hitherto recognised in Article 41 is the only type of family which can obtain protection thereunder. I do not believe that such a basic departure, in the face of the decided case law, could be inferred from these judgments, none of which concerned any true frontal attack on the established position. It could be said that the signposts are pointing in that direction for sure, with the judgment of O'Donnell J. in *Gorry* suggesting an alternative construction of Article 41 to that which has been favoured since *The State (Nicolaou).* However, those remarks were clearly *obiter* in the context of that case, where the couples in question were married. It may well be that an alternative interpretation of Article 41 is open to the Court and if it had been fully argued with focused submissions at a detailed textual level, the same would have warranted a serious reconsideration of the existing position, having regard to the decided cases and the circumstances in which this Court can depart from them ...".

84. In this appeal we have had the benefit of that hypothetical scenario envisaged by McKechnie J., in that an alternative interpretation of Article 41 was fully argued with focused submissions "at a detailed textual level", and I am grateful to Counsel for same. As anticipated by McKechnie J. the same has warranted a serious reconsideration on my part of the existing position, and ultimately has brought me

to the same conclusions arrived at by Hogan J. in his judgment herein, *i.e.* that the *Nicolaou* interpretation of Article 41 is simply not sustained by any close reading of the actual text of the Constitution itself, and that it should now be overruled notwithstanding its repetition in subsequent case law.

85. I have arrived at these same conclusions for largely the same reasons as those set out very clearly by Hogan J. in his judgment, and it would be otiose to repeat all of those reasons again. However, I do wish to highlight certain matters which seem to me particularly important, at the risk of some repetition, and to add some additional observations.

86. At the outset I think it is important to highlight some of the relevant context underlying the interpretative task which faced this Court in *Nicolaou*. The appellant, Mr. Nicolaou, and Ms. D. were the father and mother of their child, and the resulting family had all lived together as a family for the first few months of their baby's life, during which time Ms. D. and their baby were cared for and maintained by the appellant. The People in 1937 had adopted the Constitution, as per the Preamble, "seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured".

87. Against this backdrop, this Court in *Nicolaou* was asked to endorse an interpretation of Article 41 of the Constitution which would, in effect, institutionalise discrimination against certain families, such as the appellants' family, by excluding them from the fundamental constitutional protections afforded to the Family by Article 41. If the constitutional provisions clearly showed that the People had made that deliberate choice, then of course such an interpretation by this Court had to follow. However, in my opinion the dictates of justice demanded strict scrutiny by this Court as to whether those provisions did in fact clearly and unambiguously

mandate such discrimination, notwithstanding the obvious friction with the values proclaimed in the Preamble and also with the guarantee of equality before the law in Article 40.1.

88. In my opinion the limited scrutiny of the text of Article 41 carried out by this Court in *Nicolaou* was totally unsatisfactory, with an almost exclusive focus on only the provisions of Article 41.3.1. A proper consideration required a close reading of more of the text, in terms of both structure and language.

89. As regards structure and language, the starting point for me is Article 41.1 which is the most general clause in Article 41 dealing with the institution of the Family. It recognises the Family as the natural primary and fundamental unit group of Society, and guarantees to protect the Family in its constitution and authority. It is striking, however, that there is no express definition of "the Family" in Article 41 (or elsewhere) which directly limits the scope of that unit group to married couples and their children. As pointed out by Hogan J. in his judgment, the drafters of the Constitution were well capable of expressly defining the scope of a particular term when it was intended to have only that specific scope, and no greater scope as might be determined by the courts. He instances the definition of "Money Bill" in Article 22.1 and the definition of "the Courts" in Article 34.2, to which one might add the definition of "Treason" in Article 39.

90. One comes on then to Article 41.2, which is more "particular" and contains the general references to "woman" in Article 41.2.1 and to "mothers" in Article 41.2.2. On the face of these provisions, they apply generally to all women and all mothers, and their scope is not limited to married women and married mothers respectively. As noted by O'Donnell J. in *Gorry* (at para. 66):

"Whatever else may be said about Article 41.2, it has not been suggested that the "woman" and "mother" contemplated in those provisions is limited to a married woman even if that was overwhelmingly the model in existence when the Constitution was drafted."

91. The above provisions, expressed in the most general terms without limitation as to marital status, lead up to Article 41.3, and in particular Article 41.3.1, upon which so much reliance was placed by this Court in *Nicolaou*. A number of points can be made about the structure and language of Article 41.3.1, all of which combine against the approach adopted in *Nicolaou*.

92. As regards structure, firstly the provisions appear to be primarily directed not at the institution of the Family, but at what is stated to be another institution, the institution of Marriage. The primary clause in Article 41.3.1 provides that the State pledges itself to guard with special care the institution of Marriage…and to protect it against attack. In the middle of the primary clause we find a subordinate clause, with the reference to the institution of Marriage, "on which the Family is founded" ("the subordinate clause"). The effect of the *Nicolaou* interpretation is to elevate this subordinate clause into a type of indirect but exclusive definition of "the Family", and in turn an even more indirect but again exclusive definition of the words "woman" and "mothers" in Article 41 and the words "child", "children" and "parents" in Article 42. In terms of structure this would represent a very strange if not unique method of constitutional drafting, and it would require exceptionally clear language in the subordinate clause or elsewhere to persuade me that this was the true intention of the drafters.

93. The second point about the textual structure is a development of a point well made by Hogan J. at para. 15 of his judgment. If the references to "the Family" in Article

41.1 must be read as meaning "the marital Family", and the references to "woman" and "mothers" in Article 41.2 must be read as meaning "wives" and "married mothers" respectively, because of the subordinate clause in Article 41.3.1, then as a matter of ordinary constitutional drafting it is somewhat curious that this subordinate clause should come only *after* Article 41.1 and Article 41.2, and that there is no express linkage between these references and the married state. One might contrast the reference to "treason as defined in this Constitution" in Article 15.13, in advance of the subsequent definition of treason in Article 39.

94. As regards the language of Article 41.3.1, I agree with Hogan J. that the statement in the subordinate clause that the Family is "founded" on the institution of Marriage does not, as a matter of ordinary English, mean that the Family is synonymous with Marriage. It means that Marriage is acknowledged to be the principal foundation or principal basis for the Family, but it does not follow that any other form of family life is thereby automatically excluded from the protection of Article 41. By way of analogy, one might say that the judgment of Walsh J. for this Court in *Nicolaou* on the constitutional ground was "founded" on Article 41.3.1 of the Constitution. Doubtless the judgment was primarily based on that provision, yet clearly the judgment and that provision are not synonymous as the judgment encompasses a somewhat wider sphere of matters than merely Article 41.3.1.

95. It is also relevant, in my opinion, to consider whether the purpose of the primary clause in Article 41.3.1 can be fulfilled without the need to interpret the subordinate clause as providing that marriage forms the exclusive basis for all forms of family life. As already set out, in the primary clause the State pledges itself to guard with special care the institution of Marriage, and to protect it against attack. The State, therefore, must not discriminate against or disadvantage married couples by treating

them less favourably than other unit groups of society. The corollary is not, however, an obligation or a right to discriminate against non-marital families. As stated by O'Donnell J. in *Gorry* (at para. 68):

> "It is not necessary for the exultation of Marriage that other pair-bonding nurturing relationships be humbled, still less ignored."

96. In his judgment herein Hogan J. goes on to consider other relevant provisions of the Constitution, including various provisions in Article 42, Article 44.2.4 and Article 45.2.v. It is unnecessary for me to deal further with these other provisions, as I agree with his analysis in this regard.

97. In my opinion, therefore, a careful scrutiny of all of the constitutional provisions involved, including but not limited to Article 41.3.1, demonstrates that those provisions did not clearly and unambiguously mandate discrimination against non-marital families. The opposite is in fact the case. The irresistible conclusion must be that *Nicolaou* was wrongly decided on the constitutional ground; on a true interpretation of the Constitution the decision was plainly wrong at the time it was decided, and has remained wrong.

98. The above conclusion chimes with and advances certain comments made by McKechnie J. in *JJ*. Having referred to the traditional interpretation of "the Family" flowing from *Nicolaou*, he then continued as follows (at para. 334):

> "It may be said that the text of the Constitution permits of no other interpretation, although I am far from convinced that that is the case. In fact, I am quite satisfied that Article 41.3.1 of the Constitution, read in conjunction with the other relevant provisions, is well capable of a broader meaning and wider understanding if there was a judicial willingness to do so. To date, regrettably, that has not been the case ...".

99. I might address three further matters as briefly as possible. Firstly, I might mention the doctrine of harmonious interpretation of constitutional provisions, noting the correct approach to same as recently summarised by Murray J. in his judgment for this Court in *Heneghan v. Minister for House, Planning and Local Government* [2023] IESC 7 (at para. 85):

> "The Constitution, as the basic law of the State, is animated by a number of fundamental principles and is intended to achieve its various purposes through a sequence of provisions intended to be read as one, and designed to function collectively. That understanding dictates the proper approach to the interpretation of any individual part of the instrument. As with any legal document, the intent of those adopting it is informed in the first instance by the language they have used (and having regard to Article 25.4, that appearing in the Irish text) but the exercise of interpreting that language involves not merely deducing the meaning of the words appearing in the provision in question, but also reconciling the text of the Article with the document in its entirety while at the same time ensuring that both are analysed in the light of their underlying purpose. The predominant importance of that purpose, and the fundamental principles that inform it, means that in undertaking the exercise of constitutional interpretation the courts must incline more to flexibility in subordinating the strictly literal interpretation of the text in order to attain a construction that is both internally harmonious, and that achieves a clearly ascertainable purpose, than might be the case when conducting the exercise of interpreting ordinary legislation."

100. It may be recalled that in *JJ* McKechnie J. felt that "Article 41.3.1 is not the sole constitutional provision involved: even though there are several other provisions in

play, it is of striking concern that in none of the multiple judgments in this area has there been a serious attempt to harmonise these relevant provisions" (at para. 347). It seems to me that the approach to the interpretation of Article 41 set out in this judgment is consistent with attaining a construction that is internally harmonious, in contra distinction to the *Nicolaou* approach which could never do so.

101. Secondly, it may be suggested that the discriminatory effects of the *Nicolaou* interpretation have been considerably softened by judicial decisions finding that children of unmarried parents, and their unmarried parents, do in fact still have certain natural rights recognised by the Constitution, but in these cases through the route of unenumerated rights pursuant to Article 40.3. While I appreciate that there may have been a well-motivated desire to reduce these discriminatory effects, nonetheless I have great difficulty with the logic and legitimacy of this judicial "back door" approach, for the following reasons.

102. As referred to above, part of the argument for approving the *Nicolaou* interpretation must be that the constitutional provisions clearly showed that the People had made the deliberate choice to confine Articles 41 and 42 rights to the marital family, and to exclude the family outside marriage. If that argument is correct, however, how could it be logical or legitimate for the courts to find that members of the non-marital family do in fact have such rights, recognised elsewhere in the Constitution, notwithstanding the People's deliberate choice to the contrary?

103. Thirdly, having held above that *Nicolaou* was plainly wrong, I am satisfied that it – and the other decisions which followed it – should be overruled, for the reasons set out by Hogan J. in his judgment herein. I do not see how the interests of justice could possibly justify a decision not to overrule it, having regard to the constitutional context and what I have found to be a fundamental error of

constitutional interpretation which had the effect of institutionalising a form of discrimination against a section of the population.

The Second Question

104. All of the above, however, only deals with the first question as ultimately framed in *Donnelly* (at para. 197), *i.e.* whether the discriminatory provision pursues a legitimate objective. Even if it does so in principle, a second and potentially more difficult question arises on foot of the qualification that any such legitimate objective cannot necessarily justify each and every means of discrimination employed in pursuit of that objective. This principle follows from the text of Article 40.1 itself, whereby the second sentence allows the State in its enactments to have regard to differences of capacity and social function, but crucially, however, the allowance is qualified so that the enactments shall have only " *due regard* " to any such differences, with the corollary being the legislation cannot have *undue regard* to such differences.

105. As set out above, in *Donnelly* this Court framed the second question in terms of the rationality of the legislative differentiation and asked whether the discrimination is 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. It added that the answer to this question would of course entail considerations of proportionality, insofar as proportionality may be seen as an intrinsic aspect of rationality.

106. In *O'B. v. S.* [1984] I.R. 316, this Court upheld the constitutionality of provisions of the Succession Act, 1965 which provided that, in the event of intestate succession, children of the deceased born outside marriage would not stand in the

line of succession. The Court, per Walsh J., appeared to hold that a discriminatory measure "aimed at" some other provision of the Constitution, such as the guarantee to protect the Family in Article 41, was not required "to come within the words of the *proviso* to be valid" (at 334). Walsh J. later stated as follows (at 335):

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

107. In my opinion the above statement of principle was overly broad and likely to lead to inadequate scrutiny of discriminatory measures, but this approach does not appear to have been expressly addressed and disavowed in any of the subsequent cases, and there was some reliance upon same in the supplemental written submissions filed on behalf of the respondents in this appeal (see para. 43). In *O'B. v. S.* the Court then appeared to focus solely on the first question arising as to whether the discriminatory provision pursued a legitimate objective, and in effect failed to have any or any adequate regard to the necessary second question, as to the rationality and proportionality of the means adopted in pursuit of that objective. If it had done so it would presumably have asked how discriminating against innocent children born outside marriage could possibly be a rational and proportional means of promoting marriage. In my opinion, *O'B. v. S.* was wrongly decided and is a major blot on Irish constitutional jurisprudence, and it should now be overruled.

108. Returning to the present case, I am satisfied that the discriminatory provisions in the 2005 Act cannot meet the test of rationality and proportionality, notwithstanding the presumption of constitutionality and the principle of deference to the Oireachtas in matters of social welfare. My reasons are as follows.

109. Firstly, I do not think the differential treatment as regards payment of increased rate WCP as between the marital family/civil partnership family and a non-marital family, such as the appellants' family, can be objectively justified. Or to use the language in *Donnelly*, I consider the discrimination is not reasonably capable, when objectively viewed in the light of the social functions involved, of supporting the selection or classification complained of, *i.e.* that selection in the 2005 Act whereby widowers (including divorced widowers) and surviving civil partners (including post-dissolution) are selected as eligible for increased rate WCP, but surviving life partners are not.

110. The absence of objective justification arises from the fact that the factors which give rise to the increased rate WCP payment, i.e. payment of the social insurance contributions, the responsibilities of the deceased and the survivor towards their children, bereavement and consequential financial loss, are experienced in exactly the same way by the appellants' family as by the families who are given entitlement to increased rate WCP. The impact of the death upon the appellants, and the financial and other needs of the family members, are precisely the same.

111. Secondly, I do not consider that there is a rational connection between the legitimate aim of promoting and encouraging marriage and civil partnership and the means employed in the 2005 Act, which involves denying the appellants the benefit of the PRSI contributions paid by both the first appellant and by M.B., thereby adversely impacting upon the children. While couples may have a choice whether or not to marry, children cannot make the choice between marriage and cohabitation.

112. Thirdly, there is an arbitrary and capricious aspect to the means employed whereby "spouse" is defined in s. 2 of the 2005 Act as including a party to a

marriage that has been dissolved, so that a widower may include a divorced former husband, irrespective of how long the marriage lasted, and the surviving civil partner may include a civil partner post-dissolution, irrespective of how long the civil partnership lasted. I cannot to see how these elements of the legislative selection or classification are consistent with the stated aims of promoting and encouraging marriage and civil partnership, and consistent with excluding a surviving long-term partner like the first appellant from payment of the benefit.

113. For all of the above reasons, I am satisfied that the relevant provisions of the 2005 Act give rise to an unconstitutional discrimination, contrary to Article 40.1 of the Constitution. In *Re Haughey* [1971] IR 217 O'Dálaigh C.J. said (at 264) that it was the duty of this Court to ensure that the fundamental rights guaranteed in Article 40 were not reduced to the status of mere 'political shibboleths'. To uphold the discriminatory provisions at issue in this appeal could render the guarantee of equality before the law an empty shibboleth, in my opinion.

(iii) ECHR challenge

114. In the light of my answer on the constitutional issue, it is not necessary to for me to express any concluded view on the ECHR challenge.

Conclusion

115. In conclusion, I am satisfied that the relevant provisions of Chapter 18, Part 2 of the 2005 Act are invalid, having regard to Article 40.1 of the Constitution, insofar as they exclude payment of increased rate WCP to the first appellant as a parent of the second, third and fourth appellants. I would therefore allow the appeal, and make a declaration to that effect. I would also grant an order of *certiorari* quashing

the decision of the first respondent to refuse the first appellant's application for the payment of the benefit in question.