THE COURT OF APPEAL
CIVIL

NO REDACTION NEEDED

Neutral Citation Number [2021] IECA 155
Court of Appeal Record No. 2018/296
High Court Record No. 2017/464 JR

Noonan J.
Haughton J.
Murray J.

BETWEEN:

ROBERT DONNELLY AND HENRY DONNELLY (A MINOR SUING BY HIS FATHER AND NEXT FRIEND ROBERT DONNELLY

APPLICANTS/APPELLANTS

- AND -

THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Murray delivered on the 21st of May 2021

The issue

1. This case concerns Domiciliary Care Allowance ('DCA'), a benefit provided for in the Social Welfare Consolidation Act 2005, as amended ('SWCA). DCA may be paid on a monthly basis in respect of a child who has a severe disability requiring continual care in excess of that normally needed by a child of the same age. The second named applicant ('HD') is a child

falling within this description. The benefit is payable to the person providing for the care of the child (a 'qualified person'). HD's father, the first named applicant ('RD'), fulfils this condition *vis a vis* HD.

2. The applicants' complaint arises from the exclusion from DCA of children resident for more than specified periods of time in a hospital. HD was so resident in a hospital at the times relevant to this action. That exclusion, the applicants say, creates an unjustifiable discrimination against them when their position is compared with that of the parents of children (and/or of the children themselves) where the child is being cared for at home. In consequence, they say, the provisions providing for that exclusion are contrary to Article 40.1 of the Constitution and/or to the guarantee of non-discrimination contained in Article 14 of the European Convention on Human Rights, having regard to Article 8 of the Convention and/or Article 1 of the First Protocol thereto.

3. The reason the applicants say that the provision is thus discriminatory is simple. Even though HD was, at the times relevant to these proceedings, resident in a hospital they say that RD together with his wife provided constant care to him for between 8 and 12 hours a day, 7 days a week. Accordingly, they contend, the provision treats them differently from the parents and carers of a similarly positioned child who is cared for at home, without there being any rational, proportionate or objective justification for this distinction.

4. Binchy J., ([2018] IEHC 421) while rightly expressing great admiration for the first named applicant and his wife having regard to the remarkable efforts they make in the care of their child, felt compelled to reject this challenge. This is the applicants' appeal against that decision.

The facts

5. HD suffers from a number of serious medical conditions. He was born with Down Syndrome and had persistent tracheomalacia which caused cardio respiratory arrest, ultimately requiring a tracheostomy, the insertion of a PEG feeding tube and a Hickman line. As a result, HD required almost permanent hospitalisation from his birth in June 2015 until his discharge from hospital in November 2017.

6. HD's family reside in County Offaly. Nonetheless, while HD was in hospital in Dublin RD provided daily care to him. To that end RD bathed, fed and delivered medication to HD. He administered to him trachi care, physiotherapy and engaged in physical and sensory activities with him. He undertook social development skills programmes, motor skills development programmes, together with daily speech and language therapy. He attended medical meetings and case conferences pertaining to HD and received training relevant to his ongoing medical care.

7. In order to do this, RD gave up his position of employment and for five days a week stayed in a residence adjacent to the hospital provided by a charitable organisation. HD's mother assisted with his care, usually on a Thursday, Saturday and Sunday. She was, during the remainder of the week, caring for other children in the family without RD's assistance.

8. The undisputed evidence is that while HD's medical care was provided by his medical team, his parents were expected to provide care for him. Kim Murray, a social worker attached to the Oncology Haematology and Cardiology Department of the hospital wrote on 27 June 2017 in the following terms:

'During prolonged hospitalisation parents are required to provide consistent emotional warmth and to respond to the cognitive and emotional need of the child. Mr. & Mrs. Donnelly were advised by the Multi-Disciplinary team that one parent was required to provide daily care for the duration of his admission, not to provide such care is considered neglect. Mr. Donnelly provided daily care for his son, Henry, for the duration of his treatment.'"

9. HD was discharged from hospital in November 2017 and, as of the date of the hearing of this appeal, resided at home with his family.

Domiciliary Care Allowance

10. DCA was originally introduced in 1973 by ministerial circular and is now governed by Chapter 8A of the SWCA. That Chapter was introduced by way of amendment to SWCA by s. 15 of the Social Welfare and Pensions Act 2008. The relevant provisions for the purposes of these proceedings are ss. 186B, 186C(1), 186D and 186E.

11. The effect of these provisions is that the entitlement to DCA (which is not means tested) is conditioned in a number of respects. Insofar as relevant to this case, these are as follows. First, the child must have a severe disability requiring continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age (s. 186C(1)(a)). Second, the level of disability of the child must be such that the child is likely to require full time care and attention for at least 12 consecutive months. These two conditions are met in this case.

12. Third, the child must normally reside with the qualified person, and the qualified person must '*provide[ ] for the care of the child'*. The legislation does not, it might be noted, condition the entitlement by reference to the provision of care at any particular level: the trigger for the entitlement is the *need* of the child and the *fact* that it is the qualified person who provides for the child's care.

13. Fourth, and most importantly for the purposes of these proceedings, s. 186E(1) provides that DCA is not payable for any period during which a child is resident in an institution. Institution is defined in s. 186B as follows:

> '*a hospital, convalescent home or home for children suffering from physical or mental disability or ancillary accommodation and any other similar establishment providing residence, maintenance or care where the cost of the child's maintenance in that institution is being met in whole or in part by or on behalf of the [Health Services] Executive or the Department of Education and Science'*

14. Section 186E(1) is then in the following terms:

> *'(1) Subject to sub-sections (2) and (3), domiciliary care allowance is not payable for any period during which a child is resident in an institution.*
>
> *(2) Subject to this Chapter, regulations may provide, subject to such conditions and in such circumstances as are prescribed, for payment of domiciliary care allowance at a rate less than the scheduled rate referenced to in s.186F in respect of a qualified child in respect of whom the allowance would be payable but for the fact that the qualified chid is resident in an institution, where the child is temporarily resident with the qualified person for a period of not less than two days in any one week.*

(3) Where a qualified child in respect of whom a domiciliary care allowance is payable is admitted to an institution otherwise than in the circumstances referred to in subsection (2), that allowance shall continue to be payable for such period, and in such circumstances as are prescribed.'

15. The Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (SI 142 of 2007) as amended by the Social Welfare (Consolidated Claims, Payments and Control) (Domiciliary Care Allowance) (Amendment) No.3) Regulations 2009 (SI 162 of 2009) ('the Regulations') provide (Article 140E) for an exception to this exclusion. The exception arises where the child has been admitted to an institution for the purposes of receiving medical care or treatment of a temporary nature for not more than 13 weeks in a 12 month period. It provides as follows:

'For the purpose of section 186E (3), domiciliary care allowance shall continue to be payable in respect of a qualified child who has been admitted to an institution on a full-time basis for the purpose of receiving medical or other treatment of a temporary nature for not more than 13 weeks in a 12 month period.'

The impugned decisions and these proceedings

16. In July 2016 RD applied to the first respondent ('the Minister') for payment of DCA in respect of HD. The Minister refused this application by decision of 6 April 2017. The stated reason for the refusal was that the relevant legislation required that the child for whom the allowance was payable must normally be resident with the carer and that, in respect of the period to which the application related, this was not so. Section 186E(1) was referred to. RD unsuccessfully sought a review of that decision, that review being determined on May 23 2017.

On May 29 2017 the applicants sought and obtained leave to seek judicial review of these decisions.

17. The applicants claimed an order of *certiorari* quashing the decisions of 6 April and 23May 2017, together with three declaratory orders. The declaratory orders sought were to the effect:

(i) that ss.186(d)(1)(a) and 186E together with such provisions of the Regulations as amended that precluded the payment to RD of DCA are invalid having regard to the provisions of the Constitution;

(ii) that these sections of SWCA are incompatible with the provisions of the European Convention on Human Rights ('ECHR');

(iii) that HD is resident with RD for the purposes of SWCA and the Regulations.

18. The respondents in their statement of opposition and replying affidavits stress that the payment of DCA is premised on a requirement that the qualified child is resident at home with his or her parents. They contend that the payment is made to recognise the additional obligations and expense that are placed on parents who are caring for children in their own home and having regard to the consideration that care provided for children resident in an institution is provided out of public funds. For that reason, they say, DCA has never been payable in respect of qualified children who were resident in either an institutional setting, a hospital or otherwise outside of the home. Thus, on their case, the difference between the manner in which SWCA treats children with a severe disability who are in a hospital, and the manner in which it treats such children who are not, reflects the different circumstances of

those children. Children in a hospital have their care funded by the Exchequer. Parents of children who are cared for at home have additional expense and obligations. The differentiation between them arising from the operation of DCA is, they say, a reasonable and rational policy choice made in the expenditure of public funds and in the implementation of social policy.

19. This rationale was explained in the affidavit sworn on behalf of the Minister by Roy Baldrick, an Assistant Principal of the Department of Social Protection. He averred that DCA is paid '*in recognition of the additional obligations and expense that are placed on parents for caring for children in their own home.'* HD, he said, '*is currently admitted to hospital where his care needs are being met by public funds'*.

The judgment of the trial Judge

20. Noting that the respondents had submitted that the applicants had not advanced any evidence to support the proposition that RD incurred the same or even more expense in attending to HD's needs while in hospital than a person who was caring for an eligible child at home, Binchy J. reached the following conclusions based on the evidence (at para. 57 of the judgment):

(1) RD was required to attend and care for HD for long hours on a daily basis.

(2) That care was very much 'hands on' and some of it required a degree of training - '*[i]t was not simply a case of sitting at HD's bedside*'.

(3) In order to provide this care, one of HD's parents had to be absent from work, and, in the event, RD was required to cease his employment in order to do so. However, for a two year period, RD was eligible to receive and did receive illness benefit from the first

named respondent. Coincidentally, he said, payment of DCA commenced almost contemporaneous with the cessation of payment of illness benefit to RD.

(4) In order to be with HD to the extent necessary, RD was required to absent himself from the family home for five days of the week, and at weekends HD's mother took over. This meant that the family was effectively 'split' during this period.

(5) RD was able to avail of accommodation provided by a charity adjacent to the hospital and thus that expense was saved as indeed was the expense of the alternative possibility i.e. travel to and from home to the hospital, at least to the extent that it was not required on a daily basis

(6) RD did not contend that his other living expenses were increased by reason of his attendance in the hospital, for example by reason of having to eat out instead of preparing meals at home. It was not, the judge felt, unreasonable to infer that if he had any significant increased living expenses, he would have identified them.

21. The Court noted that no evidence was put before the Court to demonstrate the actual expenditure or losses incurred by RD in caring for HD while in hospital. That being so, Binchy J. felt he could not infer that he was at such a loss. Nonetheless, the Court concluded that it could *'hardly be gainsaid that the time spent by Mr. Donnelly and his wife in caring for Henry while he was in hospital was in any way materially different to that required to be spent in caring for a child in the home.'* (at para. 59). Further, parents who were obliged to travel to and from a hospital will incur at least that expense which would not be incurred by a parent caring for a child at home, and would also face items of expenditure that were difficult to recall.

22. At the same time, the judge accepted that expenses would be incurred in caring for a child at home that would not arise where he was in hospital. This was explained as follows (at para 61):

> *'As against all of that, it cannot be gainsaid either that Mr and Mrs Donnelly were spared the expense of maintaining Henry during his time in hospital, and of course the State bore the expense of his actual medical care while Henry was in hospital. Disregarding the medical care, no evidence was advanced by the respondents as to the value of the savings in what I might describe as the "ordinary" maintenance of Henry, but such savings cannot be simply disregarded as being insignificant. Any parent of a new born child must surely notice an increase in domestic expenditure following upon the birth and new arrival to the household.*'

23. Having observed both the increased expenditure and possible loss of earnings by reason of HD's hospitalisation, and the savings in the form of the cost that, were HD not in hospital, would have been incurred in maintaining him at home, the judge noted (at para. 62) that without the benefit of exact figures in individual cases or a general study of the financial impacts upon carers in those situations, that the State had *'chosen a blunt instrument to assist those persons who undoubtedly experience loss and increased levels of expenditure in caring for their child at home, but not those with a child resident in a hospital or other institution for more than thirteen weeks in a year.*'

24. Binchy J. also agreed with the contention advanced by the applicants that given that they were asserting a constitutional right to equality guaranteed by Art. 40.1 of the Constitution,

that any interference with that right had to be proportionate. Binchy J. explained as follows (at para. 65):

> *'The Oireachtas has identified a category of children who are eligible for DCA and this includes Henry. However, it is then provided that DCA will not be payable in particular circumstances. Unless Article 40.1 is engaged, the Oireachtas will be free to discriminate between persons in the same category – a category of persons which it itself has identified – without reason or justification of any kind – in other words, indiscriminately. When treating differently with people within the same class or grouping, it behoves the Oireachtas to discriminate between such persons on an objective and rational basis, that is proportionate to an identified purpose.'*

25. Binchy J. proceeded to observe that the purpose of DCA was *'to alleviate the financial burden in caring for an eligible child at home'* (at para 66). Having thus identified the purpose of the provision he observed that it was not difficult to see why the Oireachtas would exclude from those entitled to the benefit, eligible children who are in the full-time care of an institution. He continued (at para. 66):

> *'The position is a little more complicated for children who are resident in a hospital for an extended period. The Oireachtas clearly envisaged such a possibility by including a hospital in the definition of 'institution'. More than that however, presumably in an effort to avoid the administrative complications that would be involved in short-term or relatively short-term hospital stays, the Oireachtas has provided by way of the Regulations that DCA will remain payable in respect of hospital stays of up to thirteen weeks in any twelve month period. This assumes that the child concerned has met all of*

the eligibility criteria in the first place, and that the benefit has been paid up to the time of admission to the hospital concerned.'

26. Noting that the impact upon parents affected by the impugned provisions will vary from case to case, the trial judge observed (at para. 67) that it could not be doubted that the aim of avoiding what might amount to a duplication of expense was rational and objective. In the case of a child in hospital, he felt there was such justification which he explained as follows:

'...the State is entitled to take measures to avoid the potential duplication of maintenance of an eligible child, not least in circumstances where it is also fully funding the cost of the medical care of the child. Moreover, in providing for payment of the benefit for up to thirteen weeks of hospitalisation in any one year, the Oireachtas has exercised its discretion proportionately.'

27. Binchy J. interpreted the judgment of the Supreme Court in *MhicMathúna v. Attorney General* [1995] 1 IR 484 as deciding that once a justification for disparity in the provision of allowances or benefits of the kind issue here arises, the court cannot interfere by seeking to assess what the extent of the disparity should be. Having arrived at that conclusion, Binchy J. said, the Court had no further role in adjudicating upon the merits of the impugned provisions.

28. The judge also accepted the contention advanced by the Minister that arguments advanced by the applicants in submissions before the High Court and based upon *'the concept of constitutional omission'* (an argument repeated before this Court and to which I will return later) had not been pleaded but that even if they had, there was no mere accidental oversight in

the course of statutory drafting involved. The Oireachtas had clearly reached a deliberate decision whether or not children who would otherwise be eligible, should obtain the benefit.

29. Insofar as the case based upon the European Convention of Human Rights was concerned and referring to the decision of the United Kingdom Supreme Court in *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47, Binchy J. expressed his agreement with the finding of the United Kingdom Supreme Court in that case that a person in the position of HD had a status falling within the grounds of discrimination prohibited by Article 14 of the Convention on the basis that he was a child in need of lengthy in-hospital care and treatment. Noting that in *Mathieson* the United Kingdom Supreme Court determined that there was no objective and reasonable justification for the withdrawal of DCA because the claimant's needs during his hospitalisation were in terms of parental attention just the same as his needs before and after hospitalisation, Binchy J. decided that in this case, the reasons for differentiating in treatment were objective, reasonable and proportionate. The State, he said (at para. 76) is discharging the vast bulk of Henry's maintenance costs during his stay in hospital and is additionally paying his medical care costs. He continued as follows:

> *'But the exemplary behaviour of Mr Donnelly (and for that matter Mrs Donnelly) in their care for Henry does not mean that the reasons advanced by the respondent for the differentiation in treatment are not objective, reasonable or proportionate. Even taking the claimants' case at its height, there is no escaping the fact that the State is discharging the vast bulk of Henry's maintenance costs during his stay in hospital. The State is additionally paying for his medical care costs, but even leaving that to one side the value in financial terms of the expenditure being incurred by the State in maintaining Henry while he is in hospital may well be more than the DCA received by a parent looking after a child at home. This is obviously*

speculative, but even if it is not so, if DCA were to be paid while a child is resident in hospital then it must surely be the case that the parent of that child, in financial terms, is receiving more from the State than the parent who is looking after a child at home. There is no perfect answer to the problem and the achievement of absolute equality of treatment as between the parents and children in each set of circumstances is an almost impossible ideal. The best that the Oireachtas can do is to try and strike a balance and if it endeavours to do so in a reasonable, objective and proportionate manner then the measures that it takes will not amount to a contravention of the rights conferred by Convention. In my opinion the impugned provisions pass this test and the application for a declaration of incompatibility must also be dismissed.'

The issues

30. The concept of equality before the law has been described as one of the most difficult and elusive in the Constitution (*Brennan and ors. v. Attorney General* [1983] ILRM 449, at p. 479 per Barrington J.). This is, in part, a product of the broad and diffuse range of circumstances in which the provision may be engaged and the varying legal responses required by different types of legislative classification. The degree of scrutiny demanded by distinct categories of differential treatment imposed by law, the allocation of the burden of proof in specific types of cases and the extent of the deference afforded to legislative judgment in a variety of contexts fall to be rationalised and accommodated within a tightly packed constitutional mandate framed by two qualifications-: '*all citizens shall,* ***as human persons****, be equal* ***before the law'***. That direction is followed by what has been described as '*the proviso'* : '*[t]his 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'*.

31. In this case, the appellant's complaint presents in a legislative and factual context defined by three features. The first arises from the treatment of which complaint is made in the action. This is the withholding from the applicants of a social welfare allowance which, they say, is given to others who are like positioned. While the precise (and, it might be said, somewhat variable) role of the reference in Article 40.1 - '*as human persons'* - has yet to be conclusively resolved, the authorities make it clear that in principle, discrimination in connection with the exclusion of a claimant from a social welfare benefit may in at least some circumstances give rise to a complaint under the provision (see *Lowth v. Minister for Social Welfare* [1998] 4 IR 321 and more recently *M. and ors v. Minister for Social Protection* [2019] IESC 82). The respondents did not contend otherwise although, as I explain shortly, they do question whether RD can make such a case having regard to the fact that it is he (and not HD) who is entitled to claim the allowance.

32. Second, because the alleged discrimination lies in a decision by the Oireachtas as to the distribution of public resources as between citizens, the case law is emphatic in demanding that the presumption of constitutionality be applied with particular force, and in requiring that the courts should approach with great caution a review of legislative judgment on issues of social or economic policy (per Kenny J. in *Ryan v. Attorney General* [1965] IR 294 at p. 313). As it has been put, the legislature must be allowed '*very considerable latitude'* in the complex task of organising and directing the financial affairs of the State (*Madigan v. Attorney General* [1986] ILRM 136, at p. 151 per O'Hanlon J.).

33. Third, the applicants do not base their claim on any constitutional right *other* than their right to the protection of Article 40.1. They do not assert a constitutional right to payment of the benefit, and do not seek to contend that they have any constitutionally protected property

right in connection with the allowance (*see PC v. Minister for Social Protection* [2017] IESC 63, [2017] 2 ILRM 369 at para. 28). The case insofar as it is based on domestic law is a '*pure'* discrimination claim divorced from any asserted inequality in the protection or vindication of any other specific constitutional entitlement.

34. These three aspects of the legal and factual context being either undisputed or indisputable, the applicants and respondents part company on two issues. The first of these arises from the identification of which of the applicants is properly viewed as being the subject of the allegedly discriminatory treatment and the related question as to the capacity in which it can be said that the differential treatment is experienced. The second is the question of whether there is a constitutionally adequate justification for the withholding of DCA from persons in the position of the applicants having regard to the fact that the allowance is paid in respect of a qualified child who is being cared for at home.

The comparator

35. The principle of equality requires, in general terms, that like persons should be treated alike and different persons treated differently by reference to the manner in which they are distinct (*Murphy v. Ireland* [2014] IESC 19, [2014] 1 IR 198 at para. 35). It logically follows that any claim of unconstitutional discrimination revolves around the relationship between three variables – a treatment of the claimant by legislation which is alleged to be discriminatory, a similarly positioned comparator with whom the claimant asserts he or she can be juxtaposed for the purposes of asserting a claim to that effect, and a suggested justification for that difference.

36. The comparator lies at the centre of this inquiry-: the treatment of which the claimant complains must be different from that afforded to the comparator, the comparator must be positioned similarly to the claimant in a relevant respect and the justification for any differential treatment must generally be related to any differences between them. The importance of this reference point was underlined by O'Donnell J. in *MR and DR v. An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 IR 533 at para. 241:

> '*Any assertion of inequality involves identifying a comparator or class of comparators which it is asserted are the same (or alike), but which have been treated differently (or unalike). In each case it is necessary to focus very clearly on the context in which the comparison is made. It is important not simply that a person can be said to be similar or even the same in some respect, but they must be same for the purposes in respect of which the comparison is made.'*

37. At first glance, identification of the comparator in this case might appear a simple matter. The benefit is paid because the child has a severe disability requiring continual care in excess of that normally needed by a child of the same age and because the parents provide that care. It is *inter alia* the location of the child that determines entitlement to it. However, the respondents raise an issue in this regard. DCA is not paid to the child, and the child has no legal entitlement of any kind to it. It is paid to the carer, who is subject to no legal restraint in its disposal or application. Accordingly, it is said, it is wrong for the applicants to frame the inquiry by reference to a comparison between HD and a child being cared for at home. The conclusion urged is not necessarily that a claim of unconstitutional discrimination cannot be advanced (although this was suggested at one point in the course of oral submissions). What is said is that such a claim cannot be judged by reference to the position and characteristics of

the second named applicant. The end point is that the making of such a case by the first named applicant will be more difficult for the applicants than a claim based on the status of the second named applicant.

38. This argument was advanced having regard to the decision in *M. v. Minister for Justice and Equality*. There, the Court was concerned with a challenge to the validity of provisions governing the grant of child benefit. As with DCA, child benefit is paid to '*qualified persons'* in respect of '*qualified children'*, the '*qualified person'* being a person with whom the child normally resides. However, in order to be eligible for child benefit the qualified person must be habitually resident in the State. *M. v. Minister for Justice and Equality* involved claims by two applicants (Michael and Emma) who resided with their mothers in direct provision accommodation, but in respect of whom child benefit was refused for certain periods. In relation to Michael (who had been declared a refugee) the benefit was refused because during the relevant period his mother was awaiting a decision from the respondent on her application for residency. In relation to Emma (who, unlike Michael, was an Irish citizen) her mother was awaiting a hearing before the Refugee Appeals Tribunal on foot of her application for asylum at the relevant time. The facts of their respective pending residency application and asylum application meant that neither Michael's mother nor Emma's mother were habitually resident in the State under the applicable legislation at the times in question. Child benefit having been refused in relation to both children, it was claimed that their exclusion from the statutory entitlement was in breach of Article 40.1 of the Constitution.

39. This Court agreed that this was so in relation to Emma. All other citizens in the State could avail of the benefit, it was held, and the fact that her guardian did not have an entitlement to reside in the State and/or that her immigration status was uncertain did not justify her

exclusion from the benefit: it was not proper to bar the making of payment for the benefit of the citizen child in order to deter an opportunistic claim that its parents might make. The position in relation to Michael, who was not a citizen, was different. Because he was not a citizen his entitlement to reside in the State was purely contingent on a statutory entitlement to which the Oireachtas might attach conditions, including a condition that any parent who claims the benefit must also have an entitlement to reside in the State. However, it was also held that under Article 28 of the Qualification Directive (Directive 2004/83/EC) he was entitled to benefit payment as and from the date he was recognised as a refugee.

40. In allowing the appeal against this decision, Dunne J. (with whose judgment Clarke C.J., Charlton and O'Malley JJ. agreed, O'Donnell J. delivering a separate judgment) based her conclusion on the fact that the benefit in question was payable not to the qualified child, but to the guardian. This Court, it was held, had erred in proceeding as if it was the right to the benefit was vested in the child. The conclusion that it was inherently unfair and disproportionate not to pay child benefit in respect of a child by reason of the immigration status of his or her parents could only have been reached on the basis that the child has an entitlement to child benefit. Once this was understood, Dunne J. reasoned, there was no difference of treatment because *all* qualified persons who were habitually resident in the State were entitled to receive the benefit. The status of the child was neither here nor there when it came to the entitlement to the benefit.

41. There can be no doubt but that *M. v. Minister for Justice and Equality* is relevant to the form of this case and the proper structure of the analysis to be brought to bear on the facts here insofar as it makes clear that the justification for any differential treatment in the payment of such benefit must be addressed in the first instance by reference to the position of the person in receipt of it.

42. However, it is important to observe the differences between the cases. In *M.* the justification proffered by the State for the differential treatment revolved around the status of the person in receipt of the payment. This Court held that the status of the parents did not provide a proportionate basis for refusing a benefit to a citizen child where other citizen children would obtain it. At the core of the Supreme Court decision was the conclusion, in essence, that because the benefit was paid to the parent, it could not be wrong to take account of the status of the parent in deciding whether it was dispersed in a discriminatory way. Obviously, viewed from the perspective fixed by the Supreme Court – that of the person entitled to payment of the benefit – their residence or lack of it would be at the very least a material consideration in assessing whether a difference of treatment between that person and the proper comparator (a parent who *was* habitually resident in the State) was justifiable and that, indeed, was how the majority ultimately approached that issue (see para. 76 of the judgment). Conversely, the citizenship of the child was not a factor determining who was and who was not entitled to the payment, and it logically followed that the child's citizenship could not be determinative of its constitutional validity. This was the point stressed by Dunne J. at para. 65 of her judgment.

43. In this case the situation is quite different. The position and needs of the child *are* the determining factors in distinguishing between those parents who are and those who are not entitled to the payment. So, while here the payment is made to the parent as it was in *M.*, the justification in this case for withholding it is rooted in the position of the child, not exclusively that of the parent. It follows that the child's status is one of the critical considerations in determining the validity of the distinction drawn within the legislation.

44. Insofar as this issue arises in this case I am therefore of the view that the position adopted by the respondents is unduly formalistic and places a weight on the decision in *M.* which it

does not bear. *M.* decides at most that a child benefit payment to a parent which is made independently of the citizenship of his or her child cannot be contrary to Article 40.1 because it discriminates against the child *qua* citizen. It does not require the court to blind itself to the fact that RD asserts his claims in this case as the parent, guardian and carer of a child with disability nor to the effect of the fact that (on his case) it is because of the extent of his child's disability that he has been both deprived of DCA and required to expend a great deal of his time in caring for him. Simply put, if RD's entitlement to DCA is derivative from his child's disability, and if (as he contends) it is the extremity of the disability that results in withholding of the allowance, the fact of that disability must be centrally relevant in assessing the validity of its non-payment. The statement by the respondents in their submissions that '*[t]he status of the qualified child is not relevant to the analysis of whether any breach of Article 40.1 arises'* is, accordingly, incorrect. Insofar as '*the guarantee of equality before the law as human persons involves particular protection against legislation for differentiations based on immutable human characteristics or features intrinsic to the human personality and sense of self*' (*M. v. Minister for Social Protection and ors.* per O'Donnell J. at para. 20), Article 40.1 is applicable in this case because the criterion by reference to which DCA is withheld, insofar as material here, arises from HD's hospitalisation and, to that extent, engages the nature and extent of his disability (and see in this regard the judgment of the Divisional Court in *Fleming v. Ireland* [2013] IEHC 2, [2013] 2 ILRM 9 at para. 122).

The legal test to be applied to the justification

45. The resolution of that first issue is relevant to the second – the question of justification. A diversity of arrangements does not in itself constitute discrimination between citizens in their legal rights, and Article 40.1 of the Constitution does not require identical treatment of all

persons without recognition of differences in relevant circumstances. The provision, it has been observed, requires equality, not identity, of treatment (*Minister for Justice and Equality v. O'Connor* [2017] IESC 21 at para. 20 per O'Donnell J.). It is often said that the Article forbids only '*invidious discrimination'* (per O'Dalaigh C.J. in *O'Brien v. Keogh* [1972] IR 144, at p. 156), and while this description has been dismissed as more likely to mislead than to help (per Kenny J. in *Murphy v. Attorney General* [1982] IR 241, at p. 286) it has occasionally resurfaced in judicial analysis of the provision (*see Lowth v. Minister for Social Welfare* [1998] 4 IR 321, at p. 340 per Hamilton C.J.). The formulation suggested by the judgment of Henchy J. in *Dillane v. Attorney General* [1980] ILRM 167, at p. 169 is, perhaps, more informative:

> '*When the State … 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, the courts will not condemn such discrimination as being in breach of Article 40.1 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.'*

46. As noted by Doyle in the course of his treatment of this issue and consideration of these authorities ('*Constitutional Equality Law'* (2004) at p. 108), Henchy J. was, in effect, proposing that the social function involved must be reasonably capable of supporting the classification and, to that extent his formulation should be viewed as reflecting that of Kenny J. in *Murphy*: '*an inequality will not be set aside as being repugnant to the Constitution* ***if any state of facts exists which may reasonably justify it'*** (*Murphy v. Attorney General* [1982] IR 241, 283) (emphasis added). It also has echoes in the approach suggested by Walsh J. in *O'B. v. S* [1984] IR 316, at p. 335:

'... the object and the nature of the legislation concerned must be taken into account, and ... the distinctions or discriminations which the legislation creates must not be unjust, unreasonable or arbitrary and must, of course, be relevant to the legislation in question.'

47. This analysis involves a test of rationality in (a) the classification of persons for legislative purposes, and (b) the relationship between those categories and the underlying difference of treatment. As the law has developed, the courts have been increasingly inclined to describe this approach as involving a proportionality test, and indeed in this case the applicants contend that the application of such a test would invalidate their exclusion from the benefit. It might be said that the foundation for this was laid by Barrington J. in a formulation suggested in the course of his judgment in *Brennan v. Attorney General*, at p. 480 when, having noted that there is a sense in which to legislate is to discriminate, he continued:

'*the classification must be for a legitimate legislative purpose ... it must be relevant to that purpose, and ... each class must be treated fairly'*.

48. Those cases that have referenced proportionality in discrimination cases (they are most helpfully gathered together in Kelly, '*The Irish Constitution'* (5th ed. 2018) at para. 7.2.145 fn. 414) have tended to insert it at the point where a claimant has identified a comparator with whom he or she has been treated differentially in a respect relevant to the similarities between them. Essentially, they hold that the differential treatment imposed on the class to which the claimant belongs should not, when matched against the comparator class, have any greater adverse effect than the differences between them, or objective of the classification, reasonably require. Thus, in the course of his judgment in *An Blascoid Mor Teo v. Commissioner for*

*Public Works (*Unreported, High Court 27 February 1998,) Budd J. explained that implicit in the term '*invidious'*:

> *'is the requirement of proportionality. Where there is a difference of treatment this must be in a proportionate relationship to the quality of difference between the two categories of the landowners in the situation which is sought to be regulated'.*

49. Hogan '*The Supreme Court and the Equality Clause*' (1999) 4 BR 116, in urging that '*legislation ... must be proportionate in the manner in which it takes account of relevant differences'* proceeds to explain how the test posited by Henchy J. in *Dillane v. Ireland* to which I have earlier referred imposes precisely this requirement. To that extent the submission of the respondents recorded in the High Court judgment that proportionality does not apply in a context in which the applicants do not assert a constitutional right to the payment of DCA is not, so stated, correct. While the proposition that an Article 40.1 case involves a '*right to equality'* to be matched against the constituents identified by Costello P. in *Heaney v. Ireland* in the same way as claims based on other constitutional guarantees, is an oversimplification of the analysis (and one which is, perhaps, liable to confuse), the concept that there must be a rational relationship between any adverse consequence caused by the different treatment of like positioned persons and the objective of that differentiation has been a feature of Article 40.1 cases from an early stage.

Differential treatment, justification, social protection and the allocation of public resources

50. The respondents point to two authorities in which the Supreme Court has addressed the application of Article 40.1 of the Constitution to provisions of the social welfare code. In *MhicMhathúna and anor. v. Ireland* the plaintiffs (a married couple with nine children)

challenged the validity having regard to *inter alia* Article 40.1 of provisions of the Social Welfare (Social Assistance Allowance) Regulations 1973. These provided for an allowance to an unmarried mother, the Regulations precluding receipt of that allowance where such a mother and any person were '*cohabiting as man and wife'*. Between 1978 and 1987, tax free allowances payable to married couples in respect of dependent children were reduced to nil, during which time average weekly support received by the plaintiffs through the income tax and social welfare systems increased at a rate significantly below that of inflation while that paid to unmarried mothers with a similar number of children increased at a rate that was slightly greater than that of inflation. One of the pillars of the challenge brought by the plaintiffs to various provisions of the Income Tax and Social Welfare Codes was the claim that unmarried mothers, separated married women with children or single parents of various kinds were provided with greater financial support than were married parents living together.

51. The essential basis on which the Court rejected the constitutional challenge insofar as it was grounded on Article 40.1, was shortly explained. There were, the Court held ([1995] 1 IR at p. 499): '*abundant grounds for distinguishing between the needs and requirements of single parents and those of married parents living together and rearing a family together. Once such justification for disparity arises, the Court is satisfied it cannot interfere by seeking to assess what the extent of the disparity should be.'* The High Court judgement (approved without qualification by the Supreme Court) had expressed the test by reference to whether '*a state of facts exists which reasonably justifies the differences in allowances ...'* ([1989] IR 504, at p. 512 per Carroll J.). The position of a single parent, Carroll J. had reasoned, was different to the position of two parents living together, if only because the parent on his or her own has a more difficult task in bringing the children up single-handedly because two parents living together could give each other mutual support and assistance (at p. 511).

52. The approach adopted by the Court was thus driven by two features of the case, (a) the fact that the challenge involved questions as to the application by the Oireachtas in its statutes of the resources available '*as between various objects and persons or categories of persons'* (at p. 497), and (b) the conclusion that there were grounds for distinguishing between the '*needs and requirements'* of the plaintiffs and the comparator identified by them.

53. *Lowth v. Minister for Social Welfare* is to similar effect. There, the first named plaintiff and his two young children were deserted by his wife and he was forced to cease work to look after them. He was dependant on unemployment assistance augmented by social assistance payments. A deserted wife would, in similar circumstances, have been eligible to qualify for '*deserted wife's benefit'* under the provisions of the Social Welfare (Consolidation) Act 1981. The plaintiffs' unsuccessful challenge to their exclusion from that benefit was based upon Article 40.1, and indeed followed the rejection of a similar claim some years previously (*Dennehy v. Minister for Social Welfare* (Unreported, High Court, 26 July 1984, Barron J.). Before the High Court the defendants led evidence demonstrating that at the material times women in employment were at a financial disadvantage to men and establishing the relatively small proportion of married women then in the workforce.

54. The High Court Judge (Costello J.) explained that the distinction made within the impugned legislation was not based on an assumption that husbands deserted by their wives were to be treated in some way as inferior to wives who had been deserted, but instead was '*based on a factual assessment by the Oireachtas of the greater needs of deserted wives'* (at p. 332). Hamilton C.J. (delivering the single judgment of the Supreme Court) explained that in upholding the provisions it was only necessary to conclude '*that deserted wives were in general likely to have greater needs than deserted husbands so as to justify legislation providing for social welfare … to meet such needs'* (at p. 342).

55. It is to be remembered that both *MhicMathúna and anor. v. Ireland* and *Lowth v. Minister for Social Welfare* are binding on this Court. They establish the following in respect of a challenge under Article 40.1 to provisions excluding a claimant from allowances provided for under the Social Protection code:

(i) The court should afford significant deference to the Oireachtas in the allocation of benefits and allowances of this kind.

(ii) Once the State has identified grounds for distinguishing between the needs and requirements of the comparator and of the claimant in the action, the court cannot interfere by seeking to assess what the extent of the disparity should be.

(iii) Where the State has concluded that the needs of the class to which the comparator belongs are greater than those of the class to which the claimant belongs, the provision will not be found unconstitutionally discriminatory if the court is satisfied that *generally* the comparator class was likely to have such greater needs than the claimant's class.

(iv) This is the case even though the ground of distinction is of a kind that might in other contexts require particular scrutiny such as gender (*Lowth*) or marital status (*MhicMathúna*).

The application of MhicMathúna and Lowth to this case

56. The basis for the difference in treatment between the applicants on the one hand, and the parent and child where the latter is being cared for at home on the other, is inherent in the

description of each respective class. HD is being cared for in a hospital and the other child is being cared for at home. The child at home is in the care of its parents and they obtain an allowance for caring for it there. A child in hospital is being maintained by the State, is not being cared for by its parents at home and they therefore cannot obtain the allowance. The applicants and the comparator, thus defined and viewed, are in different positions. On its face, there is no reason why an allowance paid for the care of a child at home must also be made available where the child is not at home.

57. It is difficult to see how it can be said that this difference between the applicants and the comparator is not relevant to the decision made as to who should and who should not benefit from the allowance. It is, generally, relevant to the legitimate objective of avoiding duplication in the provision of state benefits that DCA is paid in recognition of the extra care and attention that is required to be provided in the home by parents of children where they come within the scope of s. 186A and thus that it is paid only when the child is at home. It will be recalled that the definition of '*institution'* in s. 186B of the Act specifically mandates that it is only where a child is resident in a place where the cost of his or her maintenance is being met by the State, that the exclusion from the allowance applies.

58. Thus, viewed from the perspective of the allocation of public resources, the difference between the parents of a child in hospital and the parents of a child at home is potentially relevant to the payment of the allowance in three distinct respects – (a) the State is incurring an expense in providing for the care of the child in hospital which it is not necessarily incurring in the case of the child being cared for by his or her parents at home, (b) the parents are incurring a cost of maintaining a child at home which they are not necessarily incurring when the child is in hospital, and (c) it follows from the very fact that the child is in hospital that it is the State which must, whenever the parent is not with the child, provide for the care of the child. The

cost of meeting that need and of the personnel, facilities and processes required to deliver it, is discharged from public funds. This is not the position where the child is at home.

59. If that is so, it is not sufficient for the applicants to say that the purpose of the allowance is to provide a benefit for parents who care for a child and that therefore all persons who provide care wherever the child is located must receive the allowance. The court must also take account of whether in other respects there are differences between the positions of the two classes of parents and children which are rationally related to the decision to pay that allowance. Here, and insofar as the authorities posit a test under Article 40.1 which inquires as to whether the challenged differentiation is arbitrary, or capricious, or otherwise not reasonably capable of supporting the selection or classification complained of, I cannot see that the classification used by the Oireachtas can be said to fall within any of these descriptions.

The applicants' response

60. The applicants' response to this conclusion (which, essentially, reflects both the position of the State and essence of the High Court judgment), is this. First, they understandably focus on their particular position. They say, as I have already noted, that while HD was in hospital RD and his wife attended to HD's care needs and provided him with ongoing stimulation while in the hospital. I have detailed their extraordinary efforts earlier. They thus undertook a wide range of functions *vis a vis* their child, some of which appear to have crossed over the boundary with medical care. Although they do not give evidence that would allow the Court to conclude that they provided the same level of care to HD when in hospital as they would have provided had he been at home, they say that they did provide him with care and that (given that the legislation does not mandate any particular level of care) they are therefore properly compared with parents affording care to their child at home. That contention is advanced in a more

general context in which (the applicants say) the distinction relied upon by the State is based upon what counsel in oral submissions described as an '*outmoded'* and '*outdated'* view of the role of the parents of a child who is in hospital for a prolonged period *vis a vis* the care of their child.

61. Second, they exhibit a number of reports prepared in the United Kingdom which are advanced to support the proposition that the applicants' experience is common amongst the parents of children with disability who undergo long periods of hospitalisation, the suggestion being that this demonstrates the arbitrariness and lack of proportionality of their exclusion from the allowance.

62. Third, the applicants throughout their written and oral submissions (a) suggest that the approach adopted in *Lowth* has been overtaken by what counsel referred to as a more sophisticated and subtle approach by the Supreme Court to the equality guarantee, (b) stress the importance of applying a proportionality test to the measures, (c) characterise this case as one in which the discrimination alleged by the applicants is experienced in connection with HD's disability and (d) underline some statements in the cases which, they imply, impose a burden on the respondents to justify the differential treatment of which they complain.

Challenges to legislative classifications

63. In considering the applicants' argument thus explained it is important that this case involves a challenge to a legislative classification involving a category of persons whose individual circumstances and requirements will vary. The State may provide more non-medical care to some children in hospital than to others. The savings arising in some circumstances

from the fact that the State is maintaining a child for a period may be relevant in determining the overall financial impact of the unavailability of the allowance. This may differ from family to family. The argument that the State is avoiding duplication of payments by withholding DCA where a child is in hospital may not apply in the same way to some cases because of the cost involved in home care packages or other supports provided when the child is at home (the latter seemingly being viewed by O'Donnell J. as a relevant factor in determining equivalence in *M. v. Minister for Justice* (see para. 26 of his separate judgment)).

64. When deciding whether to confer benefits or impose burdens on citizens, it is invariably necessary for the Oireachtas to define entitlement or liability by reference to categories of person. It has been said that the drawing of lines that create distinctions is peculiarly a legislative task and it is an unavoidable one (*Massachusetts Board of Retirement v. Murgia* (1976) 427 US 307, at p. 314). This is the case across a myriad of circumstances, of which social protection and revenue legislation are particularly good examples. Yet it will not always be the case that everyone in those categories is impacted in the same way by the legislation. It is an inevitable consequence of that exercise in line drawing in this situation that with some legislative schemes there will be persons on the margins of a category who may have a strong claim on the facts to a benefit or, for that matter to be exempted from a liability, but are lawfully denied either. While, of course, it is in theory open to the Oireachtas to accompany each category with an administrative discretion to abate its application in '*hard cases'*, this creates both uncertainty and an administrative burden and it cannot be suggested that there is a general constitutional obligation to do so. As observed by Justice Stevens in addressing legislation providing for social security benefits '*[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce*

seemingly arbitrary consequences in some individual cases' (*Califano v. Jobst* (1977) 434 US 47 at p. 53).

65. In assessing legislation conferring benefits or allowances for the purposes of a challenge under Article 40.1 of the Constitution there will thus be cases in which the fact that the exclusion of a particular claimant from that benefit results in him or her being impacted less favourably than a similarly situated comparator is not sufficient to trigger the invalidation of the provisions pursuant to which those benefits are payable. In a case such as the present where the distinction between claimant and comparator is drawn on a basis that is *prima facie* rationally related to the purpose of the benefit or allowance and the claimant asserts by reference to his own circumstances that in practice the distinction operates in an arbitrary manner, the court must look to the *general*. If *generally* the legislature is justified and acting reasonably in deciding that the needs of Class A are greater than those of Class B, legislation conferring a benefit on the members of the former category but denying it to those in the latter class will not be invalid. What is meant by '*the general'* will of course depend: while some analyses of this issue focus exclusively on the objective reasonableness of the categorisation, at the very least the claim that the categorisation did not meet its objective would require proof that all or a substantial majority of the members of the class in question were being treated adversely compared with like positioned comparators or, as it was put by Lord Hofmann in the context of a claim based upon Article 14 of the European Convention on Human Rights in *R(Carson) v. Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, at para. 41 '*all that is necessary is that it should reflect a difference between the substantial majority of people on either side of the line'*.

66. There is no evidence to this effect before the Court. The Court has certainly received evidence of the care provided by RD and his wife and of the disruption this has entailed for their lives and that of their family. The Court does not know to what extent the care they gave in hospital differs from that that would be given at home. However, proof that RD provides the same care as the comparator does not prove the classification is invalid, because it does not in itself establish that either generally the categorisation is not reasonable nor does it prove that all, many or most parents whose children are hospitalised in these circumstances do, can or must, provide the same care as RD and his wife did. The Court cannot assess what financial loss RD and his wife have sustained, and it has no way of knowing whether any such financial loss is generally sustained by similarly situated parents. The evidence adduced by the applicants may well establish that having regard to the care they provided to HD *they* are treated differently from what they contend are like positioned members of the category of parents and children who obtain DCA, but it does not establish that the category of which they are members are, as a whole, so treated. Therefore, that evidence does not establish that the legislation is invalid. Thus as explained in *Kelly* (at para. 7.2.146):

> *'While it has not yet been accepted or articulated by the Irish courts, the proposition that a statutory scheme based on classification is not necessarily invalid for discrimination merely because it results in unequal treatment of two individuals whose situations are similar is, in principle, compatible with Article 40.1 ... every statutory scheme must generalise ..'*

67. The applicants, it must be remembered, do not make a claim based on a constitutional right to the benefit, but a claim based on discrimination. However, their claim of discrimination is based upon their membership of a class the position of whose members will not necessarily be the same. If they are to say the classification is unconstitutionally discriminatory, they must

prove that *the class* is discriminated against. Yet, there is no evidence before the Court on the basis of which it can conclude that this is so.

The burden of proof

68. That of course begs the question as to where the onus to adduce this evidence lies. Within the commentaries on Article 40.1 there is some discussion about the location of the burden of proof in cases alleging a violation of the provision, the suggestion being that in some cases of alleged discrimination the burden shifts to the State to establish the justification for the treating of seemingly like categories of persons, differently. In particular, it might be said that in a case involving differential treatment on the basis of disability, there is an obligation on the State to substantiate a justification for that difference. Doyle ('*Constitutional Equality Law'* (2004) at pp. 136 to 142) derives from the approach adopted by the Supreme Court in *In Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321 and *An Blascaod Mor Teoranta v. Commissioner of Public Works (No. 3)* [2000] 1 IR 6, the prospect that there is an onus on the State in the case of challenges to some classifications to justify any consequentially differential treatment. The authors of Kelly (*The Irish* Constitution 5th Ed. Para. 7.2.90 *et seq.*) observe both the effect of these decisions in similar terms, and the fact that in *Lowth v. Minister for Social Welfare* (decided between the two cases) a seemingly different approach was adopted by the Court.

69. If that is what is being proposed by the applicants, an issue presents itself as to how this relates to the generally applicable principle that in cases involving the definition of categories for fiscal or social welfare provisions the presumption of constitutionality demands a high degree of deference to the judgments made by the Oireachtas. Indeed, the authors of *The Irish*

Constitution suggest that any shifting of the onus in relation to cases involving '*fundamental attributes of the human person'* would be context dependent and might not apply in cases involving fiscal legislation and legislation regarding matters of social sensitivity (see para. 7.2.98). And, of course, the conclusion that in cases under Article 40.1 the obligation lay on the State to adduce evidence to establish the proportionality of impugned measures would beg the question of whether this applied across the board in all proceedings in which a constitutional right is invoked and an apparent interference with it by law is identified. An argument to that effect when advanced in *Fleming v. Ireland* [2013] IESC 19, [2013] 2 IR 417 (a case, as I have alluded earlier, in which the plaintiff's complaint arose from her treatment by legislation having regard to the extremity of her medical condition) was met with a firm rebuke: '*there is no support in the jurisprudence of this court for such an approach'* (at para. 140).

70. The authorities to date binding on this Court continue – particularly in cases involving legislative judgments in the allocation of resources – to stress the burden on a claimant having regard to the presumption of constitutionality. However, it must be acknowledged that there are statements in the cases indicating that in some circumstances the law may develop in the direction of imposing an onus of some kind on the respondents in such cases. In their written submissions the applicants rely in particular in this regard on comments of O'Donnell J. in *Murphy v. Ireland* at para. 34 which the applicants imply suggests at least a modification in certain circumstances of the onus of proof. Focussing on the reference in Article 40.1 to equality '*as human persons'* he related this 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 having given rise, whether in Ireland or elsewhere, to prejudice, discrimination or stereotyping'*

71. He continued:

> *'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. Differentiation on any of these grounds, while not prohibited**, must be demonstrated to comply with the principles of equality**'*
>
> (Emphasis added).

72. The applicants stress that part of this passage I have highlighted, together with a later statement that significant differentiations between citizens – even if not based on these grounds – may fall foul of Article 40.1 '*if they cannot be justified'*. These developments in the law are prefigured in a penetrating criticism of *Lowth v. Minister for Social Welfare* (see Hogan '*The Supreme Court and the Equality Clause'* (1999) 4 BR 116). It is said there that the Court in *Lowth* grounded its analysis on the discredited test of '*invidious'* discrimination, that it failed to take sufficient account of the fact that the discrimination alleged there was gender based, and that it subjected the justification proffered for that differential treatment to a standard of review that was unduly accommodating of the State.

73. However, and whether or not these criticisms are well placed, and even if (which I doubt) this Court had either the authority to review or any basis for distinguishing them, the applicants in this case face significantly greater hurdles than the plaintiffs in either *MhicMathúna* or in *Lowth.* Even if one assumes that differences of treatment arising from disability should be examined by reference to an enhanced standard of review, even if one accepts that the treatment of which the applicants complain can be properly described as discrimination '*on the grounds*

of disability' and whether or not it is concluded that the burden of proof is on the State to justify the differential treatment, in *Lowth* the difference between the male who did not receive deserted spouse's benefit, and the female who did, required an evidence based justification extraneous to the statute. To explain why men and women were treated differently the State adduced evidence *inter alia* as to the number of women in the labour force as compared with men.

74. Here the legislation requires no such explanation. The differential arises from the definition in the statute itself. The child in respect of whom a care allowance is paid is at home living with his or her parents. The child in respect of whom no such allowance is payable is in a hospital in the care of (whether or not primarily cared by) the hospital. Rather than this apparent distinction requiring some added justification, what has to be justified is the claim that there is no basis for drawing the distinction. I cannot see that in this situation there would be an obligation on the State to both point to an objective justification for the measure *and* to affirmatively prove by evidence that the legislation was not arbitrary, nor capricious and not disproportionate. Such a contention would alter the pre-existing law governing the presumption of constitutionality in cases involving alleged discrimination in the allocation of public funds. Indeed, not even in *Mathieson* – the high point of the applicants' case insofar as issues of legal analysis are concerned – was such an approach adopted. As I will explain when I review that decision in more detail later, there the claimants did adduce evidence that the classification did not achieve its stated purpose, and the United Kingdom Supreme Court decided that it was because no response was adduced by the authorities to that evidence, that the claimants were entitled to some relief.

Ms. Murray's letter

75. Before leaving this aspect of the case, there is one relevant feature of the evidence upon which very heavy reliance was placed by counsel for the applicants, Mr. Shortall BL, in the course of his clear and helpful oral submissions. It merits separate treatment and arises from correspondence exhibited in RD's grounding affidavit from Kim Murray, who is a medical social worker at Our Lady's Children's Hospital Crumlin. This letter records that during prolonged hospitalisation '*parents are required to provide consistent emotional warmth and to respond to the cognitive and emotional need of the child'*. I have quoted from another part of this letter earlier where Ms. Murray said that '*not to provide such care was considered neglect'*.

76. It is certainly the case that these proceedings would have a different hue if parents were to face a sanction of any kind if they were to fail to attend upon their child for over 8 hours per day 7 days each week when he or she was experiencing a prolonged period of hospitalisation. At that point, the State would at the same time be mandating parents to provide care to a child in hospital, refusing an allowance that would be paid to them if the child was receiving that care from them if at home, and creating a situation in which, presumptively, all parents would be taken to comply with that obligation. The evidence from Ms. Murray (which, it should be said, does not purport to present an official position of the Health Services Executive) does not so state. That evidence certainly attests to her view that, in some circumstances parents should provide care and support and respond to the cognitive needs of their child when he or she is hospitalised. She does not prescribe for all parents the time invested by RD and his wife in providing that care. While I fully understand – as Mr. Shortall stressed in his oral submission – that the term '*neglect'* has a particular connotation, I cannot extrapolate from what Ms. Murray says that this means that parents who fail to act as RD and his wife have heroically done would breach a legal obligation. Had it been intended to communicate such an obligation, it is impossible to believe that it would not have been recorded as such.

The evidence from the United Kingdom

77. The applicants exhibit in their affidavits a document prepared in the United Kingdom in 2010 by two organisations - '*The Children's Trust Tadworth'*, and '*Contact a Family'*. These organisations represent the interests of the families of children in that jurisdiction with multiple disabilities. The document is directed to legislation in the United Kingdom which, at that time, also precluded the payment of an allowance ('*Disability Living Allowance'*) where a child with a disability was resident in a hospital for a specified period of time. The report appears to be prepared for the purposes of highlighting an asserted unfairness in this system: it is entitled '*Stop the DLA Takeaway: fairness for families when their child is in hospital.'*

78. The essential point made in the document reflects the grievance underlying the applicants' claims in these proceedings. Parents of children with disabilities who must be treated for extended periods of time in hospital are placed in a situation where they seek to spend as much time as they can with that child. They feel it necessary to do this in order to provide emotional support to the child, and the report records accounts from parents of how their children's condition improved as a consequence of their presence. This, the report explains, imposes a very significant financial burden on parents, and although the level of care provided by them to their children is the same or increases when their child is hospitalised they lost the financial support that would be provided by the Disability Living Allowance were the child being cared for at home.

79. This document was accompanied by a '*Survey Report'* which was prepared in March 2013. That report records that there are up to 500 cases of children affected by the rule each year in the United Kingdom. The survey was conducted amongst 104 families. It finds that 99% of carers provided either a greater (68%) or the same (31%) level of care to their children

when they were hospitalised as they did when the child was in their home. It recorded that 93% of those surveyed had increased their costs relating to their child's disability when the child was in hospital.

80. This material is not probative in these proceedings. The information contained in the reports relates to the position in another jurisdiction. Even were the Court to assume that the essential conclusions it suggests would hold true also in Ireland, I do not see how the High Court could have acted on evidence of this kind. Proof that so many persons in the position of the applicants are in fact in the same position as another class of persons that a distinction between them is constitutionally invalid would require some evidence attesting to the methodology by which the results of the survey were obtained and the reliability of that methodology, together with some assurance that in positing a precise equivalence of position that all relevant factors have been taken into account. Leaving aside the fact that these are going to be jurisdiction specific, the documentation relied upon by the applicants is not independent. It is hearsay and (contrary to a proposition advanced in the applicants' notice of appeal) does not cease to be such because it is exhibited in an affidavit in these proceedings. Insofar as the applicants seek to rely upon this material as the basis for a claim that because all or a substantial number of those affected by the legislation provide the same care to their children when they are in and not in hospital and/or suffer a significant financial loss in the latter eventuality, the legislation does not achieve its purpose and the exclusion is thus arbitrary, the High Court Judge was correct in refusing to act upon it.

Conclusions on the Article 40.1 challenge

81. In my view, the applicants have not advanced any basis on which the decisions in *MhicMathúna and anor. v. Ireland* and *Lowth v. Minister for Social Welfare* are capable of

being distinguished nor have they identified any ground on which it could be said either (a) that the trial Judge misapplied those decisions or (b) that this Court has the authority to depart from them.

82. That being so the applicants' challenge to the validity of their exclusion from DCA must fail. The applicants and the comparator are in different positions, that difference is relevant to the payment or non-payment of the allowance because one is in the custody of, in receipt of treatment, and at the very least some care and maintenance from the institution, while the other is the custody of its parents. It is the parents in the latter situation who are ultimately responsible for the child's care. It is they who must bear the cost of its maintenance. It is they who thus obtain a payment. That allowance is not disbursed where a public institution provides some of the care, all of the medical treatment, pays for all of that maintenance, and bears an ultimate responsibility for the child in its custody the cost of discharging all of which is met by the Exchequer. Once there is a basis for distinguishing between the needs and requirements of the two classes, these two decisions appear to me to require the conclusion that the Court cannot interfere by seeking to assess what the extent of the disparity should be. Equality analysis, it has been said, does not engage in the merits of the treatment, simply in its equality (*Murphy v. Ireland* at para. 35).

83. Even if the Court were to adopt a more intrusive standard of review, the applicants still fall short of establishing a basis on which this Court could strike down these measures as violating Article 40.1. The legislature has adopted a categorisation which is between persons who are differently situated, that difference being at least *prima facie* relevant to the underlying decision to grant the comparator an allowance but not to pay it to the applicants. The fact that both the applicants and the comparator provide care to their children cannot be divorced from

the fact that the legislative decision they challenge is one directed to the allocation of public resources and the rationality of the classification cannot be determined without account being taken of this. Thus, that the legislation has impacted adversely on the applicants cannot in itself render it invalid. Before the applicants could bring their case within the closer scrutiny suggested by their submissions, they would have to prove that the classification lacked any proportionate or rational basis. The Court has not been provided with evidence that would enable it to so conclude.

84. I should stress, however, that even on the basis of the approach adopted in *MhicMathúna and anor. v. Ireland* and *Lowth v. Minister for Social Welfare*, the State cannot simply draw a curtain around legislation such as SWCA and insulate it from challenge under Article 40.1 by asserting that there is no right to social welfare benefits, that the courts must act with deference towards decisions allocating public resources as between citizens and that differential treatment of like positioned persons in the making of provision for social protection for these reasons alone survives challenge. Nor can it say that withholding benefits or allowances from one category of persons in circumstances which would otherwise be discriminatory, is justified simply because the State wishes to limit demands on public funds. As it was put in *M. v. Minister for Social Protection and ors.* at para. 26, it is important that analysis of claims under the provision avoid '*oversimplified justification for any legislative differentiation which would insulate almost any legislation from challenge'* (per O'Donnell J.).

85. Whether or not citizens have a constitutional right to state benefits in certain circumstances (an issue that did not arise in this case and on which I express no view) the State in making provision for such benefits is discharging a critically important function in supporting *inter alia* vulnerable members of society (see the reference to '*necessary social services'* in the thesis quoted with approval by Kenny J. in *Ryan v. Attorney General* [1965]

IR at p. 314). Where it distinguishes between citizens to that end (at least where it affects them in capacities such as those in issue in this case) it must have a rational and defensible basis for so doing. Here, applying the principles in *MhicMathúna and anor. v. Ireland* and *Lowth v. Minister for Social Welfare* there is such a basis: the differences between the classes are both clear and relevant to the decision to pay the allowance in that one child receives care and treatment from the State in an institution and another does not and because, for the reasons I have outlined, it is not an irrational exercise of legislative power in the distribution of public resources to grant the allowances to the parents of the former but not the latter.

Constitutional omission and the 'constitutional lacuna'

86. In the course of their written legal submissions to this Court, the applicants make a distinct argument. They say that the legislation presents a '*constitutional omission'* or, as it is also described, a '*constitutional lacuna'*. This is expressed in slightly different terms throughout. At one point it is said that the respondents have omitted to properly or adequately prescribe the circumstances in which DCA may be claimed by persons such as RD providing full time care in respect of HD. There is, it is contended, no objective or justifiable reason why the legislature could not provide for these circumstances. Thus, it is contended, the Court should make a declaratory order to the effect that ss .186D(1)(a) and 186E(1) of the 2005 Act fail to meet constitutional norms by reason of an unconstitutional omission.

87. The respondents object that this case was not pleaded and that no liberty was given to amend the proceedings so as to seek it. The trial Judge agreed with this proposition, but I do not believe it necessary to rule on it as in my view the applicants' reliance upon this doctrine is misplaced.

88. The point made is that because RD was providing full time care to HD while he was in hospital, the respondents were required by law to prescribe circumstances in which he could obtain the benefit. In seeking to agitate that claim, the applicants are seeking to avoid an issue arising from the decision in *MhicMathúna*, where the Supreme Court held that it had no jurisdiction to strike down legislation because it failed to provide a benefit to one party where that benefit is made available to others by the relevant statute (see pp. 495 to 496 of the judgment). The point being made is that rather than strike down the legislation in this way, they wish the Court to leave it in place and (effectively) direct the Oireachtas to legislate so as to enable parents who provide full time care to their children when in hospital to obtain, under identified conditions, the same relief as they would be granted if they cared for their children at home.

89. Orders having a similar effect have been made in some cases and reference was made to them in the course of the proceedings (see *Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 IR 635, *B.G. v. Judge Murphy* [2011] IEHC 455, [2011] 3 IR 748 and *Byrne (A minor) v. Director of Oberstown School* [2013] IEHC 562, [2014] 1 ILRM 346). However, what all of these cases have in common – as one would expect – is that before the issue of issuing an exceptional remedy of this kind can be even contemplated, the claimant must establish a breach of the Constitution which requires that an order to this effect be made. In *Carmody* it was held that a person charged with a serious criminal offence and who could not afford legal representation had a constitutional right to be provided with such representation by the State as was essential in the interests of justice and having regard to the gravity and complexity of the charge and any exceptional circumstances. The plaintiff was such a person, and was faced with a situation in which s. 2(1) of the Criminal Justice (Legal Aid) Act 1962 limited his entitlement to legal aid before the District Court, to the services of a solicitor. The

Supreme Court held that the provision was repugnant to the Constitution because it did not provide a mechanism whereby an accused person could apply for legal aid including the services of counsel. However, instead of striking the provision down the Supreme Court made an order prohibiting his prosecution until such time as he had that right. The order followed from the power of the court to grant such remedy as it considered necessary to vindicate the constitutional right concerned. However, the issue of making such an order arose only because a constitutional right of the plaintiff had been breached.

90. *B.G. v. Judge Murphy* concerned provisions of the Criminal Law (Insanity) Act 2006, the effect of which was that a person charged with an offence before the District Court and whose mental capacity was in doubt was denied the benefit of a guilty plea before that Court. The reason he was denied the benefit of such a plea was that the District Court did not have the power to determine whether he was fit to plead, being empowered only to send the matter forward to the Circuit Criminal Court for a determination to that effect. However, once before the Circuit Criminal Court the accused could only be sentenced there and would fall to be so sentenced without the benefit of the limitation on the maximum sentence imposed on the District Court. This was an unforeseen consequence of the manner in which the legislation was drafted, and Hogan J. held that the result was to effect a plain inequality of treatment with potentially far reaching consequences between two categories of accused. There was '*no possible constitutional justification'* for that difference (at para. 31 of the judgment). The Court remedied this by granting a declaration that in these circumstances for the Circuit Court to apply a maximum sentence greater than that enabled in the District Court would breach the applicant's constitutional right to equality before the law under Article 40.1 of the Constitution.

91. In *Byrne v. Director of Oberstown School* the Court was faced with a situation in which the applicant, a juvenile detained at Oberstown Boys' School pursuant to an order of the Circuit Criminal Court following his conviction by that Court for certain offences, was precluded from obtaining the benefit of remission of his sentence; such remission would have been available had he been detained at St. Patrick's Institution. Hogan J. found that a custodial regime which brought about such a stark difference in terms of the release dates of offenders simply because of the location of the place where they serve their period of detention as a result of the remission rules to one place of detention but not another, both engaged Article 40.1 and could not be objectively justified. The remedy granted was an order of *habeas corpus*, the applicant being detained beyond the period that would have applied had he obtained the relevant remission.

92. While, unlike *Carmody,* both *B.G.* and *Byrne* were cases concerned exclusively with the equality guarantee in Article 40.1, in each it was found that the applicants were treated unequally by law in a manner that could not be objectively justified and was, thus, in breach of the relevant provisions. In this case, by contrast, the applicants' treatment arises from a legislative preclusion on the obtaining of DCA which, I have found, is not contrary to Article 40.1.

93. In the course of his replying submissions I understood counsel for the applicants to accept that if he had not established that the legislation was otherwise invalid, the issue of a remedy based upon a constitutional lacuna could not arise. That appears to me to be correct. If, however, I have misunderstood his position I should say that I cannot see any basis in any authority for the proposition that where legislation validly distinguished between different categories of person, a member of one of those categories could obtain declaratory relief that he or she had been the victim of a constitutional wrong because, on the facts, he or she had been treated differently from a member of another category with whom he or she was similarly

positioned. This would defeat the whole purpose of the legislative classification in the first place. In both *B.G.* and in *Byrne*, the applicants were subjected to a disadvantage which affected all like positioned persons in precisely the same way: all persons charged with offences whose mental capacity was in doubt had to go forward to the Circuit Criminal Court thereby losing the benefit of the maximum sentence that could be imposed by the District Court, and all persons detained in Oberstown were denied the remission that would have been available to them had they been detained in St. Patrick's. In each case there was no objective justification for that differential treatment. In this case, there is an objective justification for differentiating between parents who care for a child with disability at home and those whose child is in hospital insofar as the provision of DCA is concerned: as I have earlier explained, generally their positions are different.

94. Therefore, even if the applicant were to say that whatever about there being an objective justification for the legislation, having regard to the fact that it addresses the position of a class whose members may be impacted differently by it, there is no justification for treating *them* differently from parents who spend eight hours a day seven days a week caring for their child, the rationale lies in the need for the classification in the first place. A declaratory order that there had been discrimination against the applicants could not, therefore, be granted.

The Regulations

95. There was some discussion in the course of oral argument in this case around the Regulations introduced by the Minister to provide for the making of DCA payments in respect of children in institutions. These arose, it must be emphasised, in a context in which – apart from an assertion which was not pursued before this Court that HD was '*resident'* with RD for the purposes of the relevant provisions - the only claim made in the proceedings in respect of

the Regulations arose from the claim that they were either unconstitutional or contrary to the provisions of the European Convention on Human Rights as creating a discrimination in breach of Article 40.1 and Article 14. Given that I have concluded that the applicants have not established that the legislation draws an unconstitutional distinction between the applicants and the comparator upon which they rely (and given as I explain later that I have reached the same conclusion insofar as the European Convention on Human Rights is concerned) it necessarily follows that the Minister in promulgating regulations would be *empowered* to draw the same distinction, if he thought it appropriate to do so and that where he did think it appropriate to draw that distinction, the Regulations would not be invalid simply because he had done so. Therefore, it would follow, the Regulations cannot be *unconstitutional* because he draws the same distinction. Accordingly, the applicants cannot sustain a claim that the Regulations are contrary to Article 40.1. Thus, there is no pleaded relief they can obtain in respect of the Regulations.

96. At one point in their submissions it appears to be suggested that the Regulations were invalid because they are '*lacking in logic ... unfair and cannot be regarded as being within the intentions of the Oireachtas'*. I cannot see that this case is within the scope of the Statement of Grounds and note that a general *vires* challenge to the Regulations is addressed neither in the High Court judgment nor in the respondents' evidence.

97. However, even if it were, I do not believe it has been made out. The argument is that the evidence suggests that the level of care given to children in the position of RD by their parents is at least equal to and often greater than that required in the home. There is, as I have explained, no such evidence before the Court. In any event, the Regulations reflect the direction in the Act that DCA will be paid in respect of a child who resides with the qualified person and will not extend to a child in an institution. Certainly, there is a facility to provide

exceptions to the latter requirement by way of Regulations, but the exception urged by the applicants is one that overturns the norm envisaged by the Act and I can see no basis for contending that the Minister would be *obliged* to introduce such provisions. I cannot conclude that there is any grounds for the suggestion that the Minister acted other than in accordance with the legislative intent in promulgating the regulations as he did.

The argument under the ECHR

98. Article 14 of the ECHR provides that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination '*on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'*. Article 8 of ECHR secures the right to '*respect for ... family life'* and Article 1 of the First Protocol to the Convention the right '*to the peaceful enjoyment of ... possessions'*. The applicants say that the combined effect of these provisions on the facts of this case is this:

(i) HD comes within the term '*other status'* in Article 14 as a severely disabled child requiring lengthy in-patient hospital treatment;

(ii) In comparison with a severely disabled child who was *not* in need of lengthy in-patient treatment, HD is discriminated against by the 13 week rule in breach of Article 14;

(iii) This is a discrimination against HD in the enjoyment of his rights and freedoms for the purposes of Article 14, because he has a property right in receipt of DCA, duly

protected by Article 1 of the First Protocol. It is thus '*within the scope or ambit'* of his Convention rights.

99. Therefore, it is said, the Court should issue a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003 that the provisions precluding the applicants from obtaining DCA are incompatible with the Convention.

Mathieson

100. Central to this argument was the decision of the United Kingdom Supreme Court in *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47. That concerned a Disability Living Allowance ('DLA') comprising two parts – a mobility component and a care component. The latter was payable to a person who was severely disabled and required frequent attention by way of care from another person, while the former was applicable where a person suffered from physical disablement so that he was unable to walk or virtually unable to do so. The appellant/claimant (who by the time the matter came for hearing before the Upper Tribunal, was deceased) had at the times relevant to the proceedings been a severely disabled child. For a time, DLA was paid to him but was suspended in accordance with the applicable regulations when he had been an inpatient in an NHS hospital for more than 84 days. However, during the time the claimant was in hospital his parents provided him with constant, full time care, suffering a significant and identified financial loss as a result.

101. It was in these circumstances that the claimant asserted that the provisions requiring the suspension of the allowance were repugnant to Articles 8 and 14 of the Convention. The United Kingdom Supreme Court agreed, deciding (a) that by his decision to suspend payment of DLA

to the claimant the respondent violated the claimant's human rights under Article 14 of the Convention when taken with Article 1 of the First Protocol of the Convention, (b) that because under the relevant provisions of English law the Secretary of State was not obliged to suspend that payment, he acted unlawfully in making a decision to that effect and (c) that a declaratory order should be made setting aside that decision and substituting it with a decision that the claimant was entitled to continued payment of the DLA with effect from the date of its suspension. The Court refused to make an order to the effect that the provisions in question did not apply to all children, noting that the decision in the case was individual to the claimant and based upon the specific facts and the extent of the care provided to him by his parents when the claimant was in hospital. This might not be the case, it was said, for all claimants. The ruling – it should be observed – was delivered in a context in which the European Court of Human Rights decided in *Stec v. United Kingdom* (2006) 43 EHRR 1017, that where an individual has an '*assertable right'* under domestic law to a welfare benefit, the importance of that interest should be reflected by holding Article 1 of Protocol No. 1 to be applicable.

102. The principal judgment was delivered by Lord Wilson (with whom Lady Hale and Lord Clarke and Lord Reed agreed). He reasoned that the applicant had a status falling within the grounds of discrimination prohibited by Article 14. There was no reason why discrimination between disabled persons with different needs would engage Article 14 any less than discrimination between a disabled person and an able-bodied person. Given that there was a difference of treatment between the claimant (a severely disabled child in need of lengthy in-patient hospital treatment) and a severely disabled child who was not in need of such treatment, the Court looked to whether '*the rule was manifestly without reasonable foundation'*. One of the factors relied upon in that case focussed on the administrative advantages of a '*bright line rule'*. Referring to an earlier decision of the Supreme Court in which a challenge to rules

whereby child tax credits were paid to the parent with main responsibility for the child was rejected, although claimed to prejudice more fathers than mothers (*Humphreys v. Revenue and Customs Comrs.* [2012] UKSC 18, [2012] 1 WLR 1545), Lord Wilson (at para. 27) approached this as follows:

> *'One of the rule-makers' arguments in the Humphreys case, as in the present case, was that a bright-line rule has intrinsic merits in particular in the saving of administrative costs. The courts accept this argument – but only within reason. In R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15, [2008] 1 AC 1312, Lord Bingham accepted at para 33 that hard cases which fell on the wrong side of a general rule should not invalidate it provided that it was beneficial overall. And when the Carson case had been considered, with another case, by the House of Lords, in R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37, [2006] 1 AC 173, Lord Hoffmann had observed at para 41 that a line had to be drawn somewhere. He had added:*
>
> > *"All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line."*

103. In *Mathieson* (as in this case) the respondent justified the suspension of the payment where a person otherwise entitled to it was in hospital for an extended period, by reference to a rule against '*overlapping benefits'*. What the State termed '*double provision'* - NHS in-patient care and payment of DLA – for the same need should not be made from public funds. The evidence in that case was that in the case of the Mathiesons it was they who provided the claimant's care. Central to the resolution of the claim was whether their case was a hard one, unreflective of the position of most parents in their situation.

104. In answering both of these questions in the negative, Lord Wilson attached considerable significance to the evidence before the lower courts. The respondent's own evidence included a published paper explaining the evolution of the position of hospitals to parental involvement in the care of children in-patients from one of active discouragement of such contact (the orthodoxy, it seems, until the 1980s) to one that promoted the humanitarian and cost saving advantages of parental participation in the care of a child in hospital. The latter, the paper observed, has ultimately become the norm.

105. The claimants had relied upon the reports from the *Children's Trust Tadworth* and *Contact a Family* to which I have referred earlier. As my summary shows, these demonstrated the significant proportion of parents who cared for their children when in hospital, the numbers who faced increased costs in consequence, and the impact upon families where DLA was withdrawn. Lord Wilson stressed that while these reports had been produced as part of a campaign and must thus be considered critically, the evidence was not contradicted and the Court had '*nothing to set against them'*. The reports themselves demonstrated that the Mathieson's case was not a hard one unreflective of the position of most parents in their situation, and that:

> *'the personal and financial demands made on the substantial majority of parents who help to care for their disabled children in hospital are, to put it at its lowest, no less than when they care for them at home'*.

106. Lord Wilson also attached significance to the fact that the respondent had never conducted an evaluation of the possible impact of the decision to suspend DLA on children concerned with the result that there had been a breach by him of an aspect of the concept of the

best interests of children reflected in various international instruments. It was said, from there, that the conclusion that the respondent had failed to establish justification for the difference in treatment of those severely disabled children who were required to remain in hospital for a lengthy period harmonised with the conclusion that his different treatment of them violated their rights under international conventions addressed to the interests of children generally and of disabled children in particular.

107. This led to the following conclusions, expressed at para. 47 of Lord Wilson's judgment:

(i) The focus in determining justification for the differential treatment should be upon whether the disability related needs exhibited by the claimant at home continued to exist throughout his stay in hospital and whether to a substantial extent his parents continued to attend to them there.

(ii) While the Upper Tribunal had adopted the position that once the NHS would meet all in-patient disability related needs the position had a rational foundation, Lord Wilson felt that '*what the nursing staff need to do in the event that parents fail to perform the role expected of them is irrelevant.'*

(iii) The number of families which incurred additional costs as a result of their child's admission to hospital was '*far from being a small minority'*.

108. Lord Mance delivered a separate judgment, although Lord Clarke and Lord Reed also agreed with it. He expressed himself of the view that the appeal was '*more finely balanced'* than Lord Wilson had found it to be. In particular, he was of the view that the principle that lines had to be drawn between situations in the formulation of general rules required emphasis

in terms more forceful than suggested in Lord Wilson's judgment. However, the respondent's essential argument was that the basic criterion of hospitalisation free of charge drew a readily applicable line reflecting a view that in an NHS hospital '*the patient's disability-related needs will be met by the hospital'*. That, Lord Mance said, failed to reflect the modern emphasis on the importance of parents in continuing to provide care, and in particular, assistance in connection with their child's bodily functions, while the child is undergoing hospitalisation. Therefore, he said, the Upper Tribunal was in error in seeing it as an answer to the point that the NHS would itself have to act if the parents had not done so. He also stressed that on the evidence before the Court '*a significant group of children with severe disability needs is adversely affected by the present regulations and continues to receive in hospital attendance in respect of disability by home carers such as parents no less than when at home'*.

109. Lord Mance also alluded to other social benefits paid throughout the claimant's hospitalisation, to the fact that his meals were provided in hospital and noted that the '*swings and roundabouts'* argument – while not particularly attractive in the context of a claim based upon disability-related needs – might have been given more weight if more fully developed and shown to be significant on the facts. He said (at para. 59):

> *'I do not consider that it can counterbalance the prima facie conclusion that the withdrawal of DLA after 84 days was not justified in Cameron's case by any matching reduction in his needs for disability-related attention by his parents.'*

This case and the ECHR

110. The respondents submit that for three reasons the decision in *Mathieson* is distinguishable from the instant action. First, they say that in *Mathieson*, the Court was concerned with an

allowance which, under the governing legislation in that jurisdiction, was payable to the child and not the parent. Second, they stress that *Mathieson* was concerned with the legality of the withdrawal of the allowance, not with whether it should be granted in the first instance. Thirdly, they point to the evidence that was before the Court in *Mathieson*, urging that the absence of such evidence in this case is fatal to the reliance placed by the applicants upon it.

111. I cannot accept the first or second of these contentions. The fact that the allowance was payable to the child rather than the parent is, in my view, not relevant to the equality analysis because (as I have already explained in the context of my consideration of the domestic legal position) the entitlement to the payment is so dependent upon the status of the child that any consideration of whether the legislation is discriminatory must, necessarily, take account of the reason the allowance is paid in respect of him or her, and the reason payment is excluded.

112. Similarly, while it is certainly the case that *Mathieson* was addressed to the legality of the withdrawal of the allowance in issue in that case, I cannot see how this affects matters. If the State is precluded from withdrawing an allowance when the child is in hospital for an extended period because this is to effect a discrimination between the child and a child who is being cared for at home (or between their parents) then it must similarly be discriminatory to refuse to pay the allowance on the same basis.

113. However, the third point made by the respondents is both correct, and critical. In *Mathieson* the Court granted relief – comprising not an order declaring the legislation to be contrary to the European Convention but an order that the claimant's rights had been breached - because of the evidence before the Court which showed that the assumption underlying the '*bright line'* rule which precluded the applicant from obtaining the allowance, was groundless in fact. This is why both judgments focus so heavily on the evidence establishing that the

assumption underlying the *general* preclusion from DLA where a child was an inpatient for a substantial period was without foundation (see the judgment of Lord Wilson at paras. 28 to 37 and 47 and that of Lord Mance at para. 57).

114. The claimants in *Mathieson* were entitled to declaratory relief that the child's human rights had been breached by denying him the allowance not simply because his parents provided the same level of care to him in hospital as they provided at home, but because the respondent's justification for treating him so (that his was a hard case representing the position of a minority of similarly situated patients) was shown by the claimants on the evidence adduced by them, to be so without factual foundation. Had it been the case that in actuality the NHS ended up providing care to most such positioned patients, the claimant in *Mathieson* would have been refused any relief even though his parents provided the same level of care to him. Were the position otherwise, there would have been no particular need to have regard to any evidence other than that relating to his particular position. In this case, it will be noted, the only relief claimed under the European Convention on Human Rights Act was for a declaration of incompatibility.

115. In the absence of such evidence here as to the position in this jurisdiction, this Court cannot reach the same conclusion as did the United Kingdom Supreme Court. It follows, having regard to the factors I have outlined above in the context of the claim for relief under domestic law, that no basis for granting the relief claimed under the Convention has been made out.

Conclusion

116. The legal issues arising in this appeal are in some respects complex, and this judgment should be read in full to understand why I have concluded that it should be dismissed. However, the essential basis for my decision can be summarised as follows:

(i) Before the applicants can succeed in this challenge to the validity having regard to Article 40.1 of the Constitution of certain provisions governing the grant of DCA contained in the SWCA, the Court must be satisfied that these provisions treat the applicants differently from a like positioned comparator and that the distinction thus drawn by the Oireachtas is arbitrary, or capricious, or otherwise not reasonably capable of supporting the selection or classification complained of.

(ii) In this case the treatment of which the applicants complain is their preclusion from an entitlement to DCA during a period when the second named applicant was in hospital. The comparator is the parent of a child (together with the child itself) who has a severe disability requiring continual care in excess of that normally needed by a child of the same age who resides at home with his or her parents. While the person who would have received the payment had it been made is the first named applicant, the Court in determining whether there has been a breach of Article 40.1 must do so in a context where the reason for the payment is the disability from which the child suffers, and where the reason for the exclusion from the benefit is that the extent of that disability is such that the child is in hospital.

(iii) The first named applicant and the comparator parent are in one sense in a like position as both provide care to a child who has a severe disability requiring continual care in excess of that normally needed by a child of the same age. In

another sense they are in a different position because the second named applicant was at the relevant times in hospital, while the comparator child was at home.

(iv) Because the second named applicant was in hospital at the relevant time at least some of his care was provided by a public institution, and all of his maintenance and all of his medical treatment were funded by the State. When the parents of the child were not in a position to attend upon him in the hospital, it was the State which was responsible for his care. None of this is necessarily the case when the child is at home. Therefore, the child at home and the child in hospital are in distinct positions when it comes to the funding of their care.

(v) That difference between the applicants and the comparator is relevant to a decision made in the allocation of benefits and allowances from public funds. Moreover, even though the first named applicant was providing care in hospital and the comparator parent providing care at home, the Court must have regard in reviewing legislation providing for benefits and allowances from public funds to the legislative choice made by the Oireachtas as to who should and who should not obtain such supports. The Court must exercise very considerable caution in second-guessing that judgment.

(vi) Therefore, while there are similarities between the position of the applicants and the comparator, the reason they are treated differently in connection with the provision of DCA is not arbitrary or capricious and is reasonably capable of supporting that difference of treatment.

(vii) For very similar reasons, the applicants' claim for relief under the provisions of the European Convention on Human Rights Act 2003 must fail. The decision in

Mathieson v. United Kingdom, upon which reliance was placed by the applicants in these proceedings and in which the United Kingdom Supreme Court determined that the withdrawal from the claimant there of the Disability Living Allowance provided for under the law of that jurisdiction was, by reason of a similar exclusion, contrary to the European Convention on Human Rights was rooted in the evidence in that case which disclosed that the categorisation provided for under the law there was not supported by the facts. There was no equivalent evidence in this case establishing that this is so in this jurisdiction.

117. The issues presented by this case were in some respects, novel. The Court was greatly assisted in addressing them by the very helpful, clear and insightful written and oral submissions of counsel, Mr. Shortall BL (for the applicants) and Ms. Carroll BL (for the respondents). It is my provisional view that the importance and difficulty of the issues in the case are such that, exceptionally, the Court should make an order for the payment by the respondents of a contribution to the costs of the applicants. That contribution should, in my provisional view, equate to 50% of the costs of the appeal. I believe that no order should be made as to the costs of the High Court proceedings. This is but a provisional view, and either party is free to dispute it. If either party does wish to dispute this proposal they should notify the Court of Appeal office within ten days of the date of this judgment whereupon the Court will fix a hearing on the issue of costs.

118. Noonan J. and Haughton J. are in agreement with this judgment and the order I propose.