Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

O'Meara & Ors v. The Minister for Social Protection & Ors

On appeal from: [2022] IEHC 552

Judgment delivered on 22 January 2024 **[2024] IESC 1**

Headline

The Court finds that s. 124 of the Social Welfare Consolidation Act, 2005 is invalid having regard to the provisions of Article 40.1 of the Constitution.

Composition of Court

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

Judgments

O'Donnell C.J. (with whom Dunne, O'Malley, Murray and Collins JJ. agree)
Woulfe J. (with whom Hogan J. agrees)
Hogan J. (with whom Woulfe J. agrees)

Background to the Appeal

The appellants appeal the judgment and order of the High Court ([2022] IEHC 552 (Unreported, Heslin J., 7 October 2022)), which dismissed a challenge to a decision of the first respondent to refuse the first appellant's application for the payment of Widow's, Widower's or Surviving Civil Partner's (Contributory) Pension ("WCP") provided for by Chapter 18 of Part 2 of the Social Welfare Consolidation Act, 2005 ("the 2005 Act") under which a pension is payable to the surviving spouse or civil partner (as defined) on the death of their spouse or civil partner, and which pension is increased in respect of each dependent child. The first appellant was the long-term partner of M.B., who died in 2021. The second, third and fourth appellants are the minor children of the first appellant and M.B. The first appellant and M.B. had been living together and in a committed relationship for 20 years but they had not married or entered a civil partnership. The appellant's application for WCP was refused on the grounds that he was not the widower or surviving civil partner of M.B. as required by s. 124 of the 2005 Act (as amended). The appellants challenged the constitutionality of Chapter 18 of Part 2 of the 2005 Act. Heslin J. dismissed the challenge for reasons set out in that judgment. This Court granted leave to appeal directly to this Court pursuant to Article 34.5.4° on the issues of whether the non-payment of WCP in the circumstances here is consistent with Article 40.1 and 41 of the Constitution and/or compatible with the European Convention on Human Rights particularly Article 14, read with Article 8 and/or Article 1 of the First Protocol.

Reasons for the Judgment

The Court concludes, unanimously, that the provisions of s. 124 of the 2005 Act, as amended by s. 17(4) of the Social Welfare and Pensions Act, 2010 are invalid having regard to the provisions of

Article 40.1 of the Constitution insofar as it does not extend to the first appellant as a parent of the second, third and fourth appellants.

The Court unanimously, grants an order of *certiorari* quashing the decision of the Respondent of 27 May, 2021 refusing the first appellant's application for WCP.

O'Donnell C.J. (Dunne, O'Malley, Murray and Collins JJ. concurring) concludes that the provision is a contributory social welfare benefit addressed to a loss giving rise to a recognised need for support, where that loss, both emotional and financial, is not in any way different whether the survivor is married or not. **[30]** Furthermore, WCP is increased when there are dependent children which recognises the survivor may not just be a spouse (or civil partner) but is also a parent and the survivor will have additional costs and expenses associated with maintaining any dependent children. The Constitution as interpreted recognises the rights of all children irrespective of the status of their parents. Nor is there any difference in the duties and obligations which parents, married or unmarried, owe to their dependent children. **[31,32]** The differentiation made by the section is not made on the basis of present marital status: the definition of spouse and civil partner includes a divorced spouse and civil partner after dissolution. **[33]** Furthermore, the section recognises cohabitation but only negatively: s. 124(2) and (3) removes the entitlement to WCP on remarriage, entry into a new civil partnership or if and so long as the recipient is a cohabitant. Thus, the Act recognises that an unmarried partner supplies the same benefits to a partner and children as a married partner does, but only for the purpose of removing the benefit. **[35]** Accordingly, viewed in this way, applying the test in *Donnelly v. Ireland* [2022] IESC 31, [2022] 2 I.L.R.M. 185 ("*Donnelly*"), insomuch as the section permits payment of WCP to be made to a surviving spouse with dependent children, but refuses any such payment to a surviving partner of a non-marital relationship with dependent children, it makes a distinction that is arbitrary and capricious, and one which is not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the precise classification challenged and fails to hold them as parents equal before the law contrary to Article 40.1. **[35-38]**

In his judgment, Woulfe J. addresses the second question referred to in *Donnelly*, in terms of the rationality of the legislative differentiation, and whether the discrimination is arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of. He notes that the answer to this question would entail consideration of proportionality, insofar as proportionality may be seen as an intrinsic aspect of rationality. **[105]** As regards application of this test to the current case, Woulfe J. was satisfied that the discriminatory provisions in the 2005 Act cannot meet the test of rationality and proportionality, notwithstanding the presumption of constitutionality and the principle of deference to the Oireachtas in matters of social welfare, for the following reasons. **[108]**

He concludes that the differential treatment as regards payment of increased WCP between the marital family/civil partnership family and a non-marital family cannot be objectively justified, as the factors which give rise to the increased rate of WCP payment, i.e. payment of the social insurance contributions, the responsibilities of the deceased and the survivor towards their children, bereavement and consequential financial loss, are experienced in exactly the same way by the

appellants' family as by the families who are given entitlement to increased rate WCP. The impact of the death upon the appellants, and the financial and other needs of the family members, are precisely the same. There is no rational connection between the legitimate aim of promoting and encouraging marriage and civil partnership and the means employed in the 2005 Act, which involves denying the appellants the benefit of the PRSI contributions paid by both the first appellant and by M.B., thereby adversely impacting upon the children. While couples may have a choice whether or not to marry, children cannot make the choice between marriage and cohabitation. **[111]** The manner in which "spouse" is defined in s. 2 of the 2005 Act has an arbitrary and capricious aspect by including a party to a marriage that has been dissolved, so that a widower may include a divorced former husband, or a surviving civil partner post dissolution, irrespective of how long the marriage or civil partnership lasted. These elements of the legislative selection or classification are not consistent with the stated aims of promoting and encouraging marriage and civil partnership, and consistent with excluding a surviving long-term partner like the first appellant from payment of the benefit. **[112]**

Woulfe J. concludes that the relevant provisions of Chapter 18 of Part 2 of the 2005 Act are invalid, having regard to Article 40.1 of the Constitution, insofar as they exclude payment of increased rate WCP to the first appellant as a parent of the second, third and fourth appellants.

Woulfe and Hogan JJ. would find that the statement made in *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 ("*Nicolaou*") that the family referred to in Article 41 is limited to the family based on marriage is wrong and the case and the subsequent case law accepting and endorsing it should be overruled, and the appellants were a Family for the purposes of Article 41. Hogan J. held that the decision was plainly wrong and totally unsatisfactory at almost every level, and it was based on an incomplete interpretation of the text of the relevant constitutional provisions, including Article 41.2, Article 41.3, Article 42.1, Article 42.3, Article 42.4, the "old" Article 42.5 and Article 44.2.4°, which had not been fully considered by the Court in that case. **[49]** Hogan J. held that the reasoning in *Nicolaou,* had, in any case, been overtaken by the "new" Article 42A.2.1°. **[27-29, 49]** Although not every form of cohabitation will come within the scope of Article 41 and 42, in these circumstances, the entitlement of the appellants to constitutional protection *qua* family for the purposes of Article 41 and 42 was considerable, approximating to a couple who were married, even if it fell slightly short of that status. As such, there was no justification for their differential legislative treatment as compared with married couples and their children and that treatment was a direct and obvious infringement of Article 40.1. **[35-38, 40, 47]**

Woulfe and Hogan JJ. would also overrule the decision in *O'B. v. S.* [1984] I.R. 316 ("*O'B. v. S.*"). That judgment upheld the constitutionality of legislation which had effected the real and tangible discrimination of the kind in respect of non-marital children which Article 40.1 was designed to protect against.

O'Donnell C.J. (Dunne, O'Malley, Murray and Collins JJ. concurring) holds that it is clear that it is not necessary to consider the correctness of the statement made in *Nicolaou* (and upheld thereafter) that the Article 41 Family is limited to the marital family, in order to resolve this case. **[57]** If the matter was to be addressed and views expressed in this case, then the statement made in *Nicolaou*

is correct as a matter of interpretation, and in any event, has not been shown to be "clearly wrong" to require it to be overruled (*Mogul of Ireland v. Tipperary (NR) C.C.* [1976] I.R. 260 ("*Mogul*") and *Jordan v. Minister for Children and Youth Affairs* [2015] IESC 33, [2015] 4 I.R. 232).The fact that a later Court, particularly a divided Court, might prefer a different conclusion is not in itself sufficient to justify overruling an earlier decision (*Mogul*). **[54]** Furthermore, it has been repeatedly endorsed in subsequent case law and in particular in relatively recent considered decisions of the Supreme Court (*W.O'R. v. E.H.* [1996] 2 I.R. 248 and *J. McD. v. P.L.* [2009] IESC 81, [2010] 2 I.R. 199) **[115-123]** and has become the accepted basis for proposed and actual law reform. **[124-129]** Moreover, precedent is an important part of the rule of law. **[51-54]** The coming into force of Article 42A did not purport to, and could not be understood to, alter, the well-established interpretation of Article 41. **[131-136]** O'Donnell C.J. (Dunne, O'Malley, Murray and Collins JJ. concurring) further consider that it is not necessary to consider, still less overrule, *O'B. v. S.* to come to a conclusion in this case. **[158]**

While the UK cases cited (*Re McLaughlin* [2018] UKSC 481, [2019] 1 All E.R. 471 and *R (Jackson) v. The Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin), [2020] 1 W.L.R. 1441) in relation to the ECHR were instructive and helpful in the analysis of the claim by reference to the Constitution, they had to be approached with some caution in the light of further developments in that jurisdiction in the approach to the interpretation of the ECHR. In the circumstances, it was unnecessary to come to a conclusion on the compatibility of the section with the ECHR in the light of the conclusion the Court has reached on the constitutional claim. **[39-49]**

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case history

23-24 October, 2023	Oral submissions made before the Court
13 July, 2023	Oral submissions made before the Court
[2023] IESCDET 25	Supreme Court Determination granting leave
[2022] IEHC 552	Judgment of the High Court