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Equality and social welfare payments: Donnelly -v- The Minister for Social Protection

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The Supreme Court has (perhaps surprisingly) granted leave to appeal from the Court of Appeal's decision in *Donnelly v Minister for Social Protection*.[1] In that case, the Court of Appeal (CA) rejected a challenge to the rule in social welfare law that domiciliary care allowance (DCA) is not payable in respect of a child in an institution, both as regards the so-called Constitutional guarantee of equality (article 40.1) and article 14 of the European Convention of Human Rights. The Supreme Court (unusually) provides almost no clue as to why it granted leave although it is clear that the leave concerns article 40.1 rather than the ECHR.

Facts and law[2]

In short, DCA is a monthly payment to assist with the costs of caring for a severely disabled child who needs full-time care and attention substantially beyond what is normally required by a child of the same age. The CA accepted that the child did have such a disability and did require such care.[3] Payments are not, however, made where a child is in an institution and where the cost of her maintenance is met by public funds (subject to some exceptions which did not apply here).[4]

The issues

It was argued that the failure to pay DCA was discriminatory in breach of art 40.1 or article 14 of the ECHR. The Court correctly turned first to the constitution.

The Court (Murray J) referred to Henchy J's formulation of the test in relation to art 40.1 in *Dillane v. Attorney General*:

> 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.[5]

Having carefully reviewed the legal position, the CA concluded that in respect of an article 40.1 challenge to provisions excluding a claimant from allowances provided for

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[1] [2021] IECA 155. See [2021] IESCDET 89, the panel consisted of Clarke CJ, O/Malley J and Baker J.

[2] For a more detailed discussion, see my note on the High Court decision ([2018] IEHC 421) at https://works.bepress.com/mel_cousins/112/

[3] At [11].

[4] See ss. 186B, 186C(1), 186D and 186E of the Social Welfare (Consolidation) Act 2005. The child must also be resident with the carer and this appears to be the primary basis on which DCA was initially refused (at [16]). Strangely this issue was not discussed in the proceedings though it does not appear that this would have affected the analysis of the constitutional issue.

[5] [1980] ILRM 167 at [169].

under the Social Welfare 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 the claimant, 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 comparator class are greater than those of the claimant's class, the provision will not be unconstitutional if the court is satisfied that generally the former class was likely to have greater needs than the latter.[6]

The State had argued, on the basis of the Supreme Court's decision in *Michael v Minister for Social Protection*[7] (cited as *M v Minister for Social Protection* in the ruling) that, as DCA was payable to the parents and not the child, it was wrong to frame the inquiry by reference to a comparison between a child in an institution and a child being cared for at home. The earlier case involved a claim for child benefit in respect of a child who was an Irish citizen but whose parent was not, the parent being the one legally entitled to the payment. The Supreme Court construed this as involving a form of 'secondary' discrimination.[8]

However, the CA distinguished that case on the basis that, in *Michael*, the justification advanced for the differential treatment revolved around the status of the person in receipt of the payment (the *parent*) whereas in the instant case '[t]he 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.'[9]

Turning to justification for a difference in treatment, the Court accepted that Mr. Donnelly had provided exceptional care but emphasised that 'the court must look to the general'.[10] It found that

> 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

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[6] CA at [55]. The Court's analysis would deserve further elaboration were it not for the leave to appeal. However, it is perhaps fair to say that the Court correctly summarised the law as it stands and did not go beyond what the Supreme Court has said in this area.

[7] [2019] IESC 82.

[8] See the discussion in the 'Social Welfare Law' chapter in the *Annual Review of Irish Law 2019*.

[9] At [42]-[43]. My emphasis.

[10] At [65].

> the child, provide for the care of the child.[11]

It was '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.'[12] Accordingly the Court ruled that it could not find that the challenged differentiation was arbitrary, or capricious, or otherwise not reasonably capable of supporting the relevant classification.

The Court emphasised that '[w]hen 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'.[13] Citing both US and UK authority, the Court highlighted that 'the drawing of lines that create distinctions is peculiarly a legislative task'.[14]

The Court concluded that

> 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.[15]

The Court also rejected the applicant's argument that the case involved a 'constitutional omission' on the basis that, in order to make such an argument, the applicant had to show a breach of the Constitution which he had failed to do.

Finally, the Court rejected the ECHR argument, distinguishing on evidential grounds the (somewhat similar) UK case of *Mathieson* in which the UK Supreme Court had ruled that a ban on payment an analogous UK payment (Disability Living Allowance) in respect of a child in hospital was in breach of article 14 ECHR.[16] The CA correctly rejected the State spurious attempts to distinguish the case on the basis that in the UK the payment was made to the child rather than the parent and that the case had involved withdrawal of the payment rather than its award. However, it did find that the UK Supreme Court had accepted that the evidence in the UK showed that the assumption that parents did not generally provide significant care to children in hospital was incorrect. In contrast, there was no such evidence as to the position in Ireland.[17]

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[11] At [58].

[12] At [59].

[13] At [64].

[14] Ibid citing *Massachusetts Board of Retirement v. Murgia* (1976) 427 US 307 at 314; *Califano v. Jobst* (1977) 434 US 47 at p. 53; and *R(Carson) v. Secretary of State for Work and Pensions* [2005] UKHL 37.

[15] At [65].

[16] [2015] UKSC 47.

[17] At [115].

Discussion

The CA decision, which broadly follows that of Binchy J in the High Court, would appear to be fully in line with Supreme Court precedent. Given the history of article 40.1 and (in Ireland) of the ECHR, it is unsurprising that the Court did not uphold the claim. If one compares this decision to *Mathieson*,[18] apart from the evidential issue which the Court explicitly relied on, the Court of Appeal was (i) more prepared to accept the 'overlapping benefit' argument, i.e. that the State should not have to both meet the costs of care in the institution and the cost of family care; and (ii) more focussed on categories of persons and less on the individual case.[19]

Given the Supreme Court's general approach to equality issues – as in the recent *Michael* case which included both the current Chief Justice and O'Malley J – it might have been expected that the Supreme Court would not have granted leave to appeal. It will be interesting to see the composition of the court to hear this case – given the appointment as Chief Justice of O'Donnell J and the recent appointment of Hogan J to the Court – and the eventual outcome.[20]

[18] It should be emphasised that *Mathieson* itself is something of an outlier in the UK Supreme Court's approach and the courts below had all upheld the withdrawal of benefit. Part of the reasoning in the case (concerning international law) has recently been described as 'having been made per incuriam' in *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26 at [91] although the outcome of the case was not overturned..

[19] As the Court notes, the UK Supreme Court did not strike down the challenged provision but rather granted declaratory relief that the individual child's human rights had been breached.

[20] The latter's latest attempt (as a member of the CA at [2018] IECA 155) to give some force to the 'guarantee of equality' was rejected by the Supreme Court in *Michael.*