THE HIGH COURT

[2023] IEHC 359

Record No. 2022/219JR

BETWEEN

BM AND JM (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND BM)

APPLICANTS

AND

CHIEF APPEALS OFFICER

-and-

SOCIAL WELFARE APPEALS OFFICE

-and-

MINISTER FOR SOCIAL PROTECTION

-and-

IRELAND

-and-

THE ATTORNEY GENERAL

RESPONDENTS

<u>JUDGMENT of Ms. Justice Hyland of 21 June 2023</u>

Summary

1. The applicants' challenge is directed to an alleged failure on the part of the Minister for Social Protection to make regulations under the Social Welfare Consolidation Act 2005 (the "2005 Act") varying the current rules on entitlement to carer's allowance, in particular in relation to the application of a means test to that entitlement. The first applicant is a full time carer of her son JM, who was born in 2006. She receives a reduced rate of carer's allowance due to the application of the means test to her and her partner's income.
2. Having analysed s.186(2) of the Act, I am satisfied that the Minister has an entitlement but not an obligation to make regulations thereunder. The Minister has chosen not to exercise her power to date. That is not unlawful given the permissive nature of the section. Accordingly, although I have a great deal of sympathy for the first applicant, given the onerous nature of her caring responsibilities having regard to JM's medical and behavioural issues, I cannot agree with her contention that the Minister has acted unlawfully in not making regulations under s.186(2).

Facts

3. The first applicant is the mother, and carer, of the second applicant. JM is a young man who has Down's syndrome and epilepsy and epileptic seizures. He suffers from autism spectrum disorder (borderline) and developmental delay. He suffers from hypothyroidism. He suffers from hyperactivity behavioural issues, including repetitive head banging, a condition that must be deeply distressing for JM and his family. He requires a head brace to protect him from injury. His sleep is chronically poor, he cannot sleep a full night and he constantly wakes during the night. He is on a significant amount of medication, but this has unfortunately not addressed his sleep or behavioural issues. Counsel for the applicants

indicated that absent the time JM is in a day care setting, the first applicant is essentially required 24 hours a day, including at night-time, having regard to the nature of her son's condition.

4. I am quite satisfied from the evidence that it is enormously demanding caring for JM and that the reduction of the full rate of carer's allowance by €85 per week has had a profound adverse effect on the first applicant and causes significant personal and financial strain to her as JM's full time carer, and to her family unit. She has no means of her own or in her own right and she cannot seek or obtain employment or earn an income because of her commitments as JM's full time carer.

5. The first applicant had been receiving one parent family payment and half rate carer's allowance. When she ceased to receive one parent family payment, the Department of Social Protection re-rated her carer's allowance to the full rate but then reduced it on the basis of her means and decided she was entitled to a weekly amount of €84 plus the increase for qualified children of €22.50. At the time, the full amount a carer could obtain under the terms of the 2005 Act as amended and the accompanying regulations was €219, not including the allowance for the additional child. The first applicant appealed that decision. On 10 May 2021 the Appeals Officer rendered a decision under s.317 of the 2005 Act. The first applicant sought to review that decision. The decision challenged in these proceedings is that of the first respondent of 21 January 2022 under s.318 of the 2005 Act declining to review the decision of the Appeals Officer.

6. By his decision of 10 May 2021, the Appeals Officer determined that, based on the applicant's means as calculated under the Rules contained in Part 5 of Schedule 3 to the 2005 Act, the first applicant was not entitled to the full rate of carer's allowance, but rather at a rate that reflected her means. Her entitlement was determined in the following way. First, her means were determined to be an amount of €848.16 per week, the income from

employment of her partner, JM's father, with whom she and JM live. A maintenance payment from JM's father to her of €100 a week was disregarded, as she and JM's father were living together as a couple. After the application of a disregard amount of €665, prescribed by S.I. 142/2007 (Consolidated Claims, Payments and Control) Regulations 2007 as amended (the "2007 Regulations"), the couple's weekly means were assessed at €183.16. BM's means were calculated as half that amount, a total of €91.58. By letter dated 16 June 2021, BM was informed that the allowance to which she was entitled was assessed at an amount of €134.00 per week, on the basis of assessed net means of €91.58 per week, with an increase for one qualified child of €22.50.

7. The Review Decision of the Chief Appeals Officer under s.318 of the 2005 Act declined to review the Decision of the Appeals Officer under s.317 of the 2005 Act, concluding that the Appeals Officer had not erred in fact or law in his interpretation and application of the 2005 Act.

Legislation

8. Carer's allowance is a non-contributory form of social assistance provided for under Part 3, Chapter 8 (ss. 179–186A) of the 2005 Act. It is subject to a means assessment. Section 179(1) of Part 3, Chapter 8, provides that:

> *"carer" means—*
>
> *(a) a person who resides with and provides full-time care and attention to a relevant person, or*
>
> *(b) a person who, subject to the conditions and in the circumstances that may be prescribed, does not reside with but who provides full-time care and attention to a relevant person.*
>
> *"relevant person" means a person (other than a person in receipt of an increase*

of disablement pension under section 78 in respect of constant attendance) who has such a disability that he or she requires full-time care and attention, and who—

(a) has attained the age of 16 years, or

(b) is under the age of 16 years and is a person in respect of whom a payment under Chapter 8A of Part 3 is being made.

"weekly means" means, subject to Rule 1(1) of Part 5 of Schedule 3, the yearly means divided by 52"

9. Section 179(3) provides:

   (3) For the purposes of this Chapter, means shall be calculated in accordance with the Rules contained in Part 5 of Schedule 3.

10. Section 179(4) of the 2005 Act stipulates how to interpret what it means for a "relevant person" to require full-time care. Section 180 provides:

    "180. (1) Subject to this Act, an allowance (in this Act referred to as "carer's allowance") shall, in the circumstances and subject to the conditions that may be prescribed, be payable to a carer.

    (2) A carer shall not be entitled to an allowance under this section unless he or she is habitually resident in the State"

11. Section 181(1) provides for the scheduled rate at which Carer's Allowance shall be payable by reference to Part 1 of Schedule 4 to the 2005 Act, and provides for increases to the scheduled rate, *inter alia*, in respect of each qualified child.

12. Section 181(2) provides for the scheduled rate, or a reduced scheduled rate to be payable depending on the weekly means of the carer, as follows:

    "(2) (a) A carer's allowance shall be payable where—

(i) the weekly means of the claimant or beneficiary do not exceed €7.60, at the scheduled rate, and

(ii) subject to paragraph (b), the weekly means exceed €7.60, at the scheduled rate reduced by €2.50 for each amount (if any) of €2.50 by which those weekly means exceed €7.60, any fraction of €2.50 in those weekly means being treated for this purpose as €2.50.

(b) Where the rate calculated under paragraph (a)(ii) at which, but for this paragraph, the carer's allowance would be payable is less than €2.50, the allowance shall not be payable."

13. Part 5 of Schedule 3 contains a series of Rules for calculating the means of persons for the purpose of carer's allowance, and also of blind pension, widow's and widower's (non-contributory) pensions, guardian's payment (non-contributory) and one-parent family payment.
14. As noted earlier in this judgment, the essence of the applicants' case is that the Minister was obliged, but failed to, make regulations under s. 186(2). The text of s.186 is set out later in this judgment where I discuss the correct interpretation of same.

Part 5 of Schedule 3 to the 2005 Act

15. Rule 4(1) explains how to apply the means test. It provides, as relevant:

" (1) In the case of ... a carer's allowance, the following apply when calculating the means of a person who is one of a couple living together:

(a) the means of the person shall be taken to be one-half of the total means of the couple;

(b) the person is deemed to be entitled to one-half of all property to which the

person or the other member of the couple is entitled or to which the person and the other member of the couple are jointly entitled;

(c) for the purposes of this Rule, the means of each member of the couple shall first be determined in accordance with these Rules (each being regarded as an applicant for a pension or a pension at a higher rate or carer's allowance, as the case may be) and the total means shall be the sum of the means of each member as so determined;

(d) […]

16. Rule 4(3) provides:

"(3) In the case of carer's allowance, in calculating the weekly means of the couple (other than means derived from any benefit, pension, assistance, allowance or supplement under this Act or a social security payment payable under the legislation of another state), the amount that may be prescribed shall be disregarded."

17. This is what is known as the "disregard" amount, and as may be seen from the decision of the Appeals Officer in this case, the relevant disregard amount at the date of his decision was €655 and so that was disregarded from the couple's means. This is provided for at Article 144 of the 2007 Regulations, as follows:

"Assessment of means — carer's allowance

144. …. (b) The amount prescribed for the purposes of Rule 4(3) of Part 5 of Schedule 3 to the Principal Act shall be €665 per week."

The proceedings

18. The applicants seek an Order of *certiorari* quashing the decision of the first respondent of 21 January 2022 whereby she refused to revise the decision of the second and third respondents determining that the first applicant was not entitled to the full rate of carer's allowance in respect of her son, the second applicant. Further, the applicants seek various declarations that the legislation providing for means assessment of persons who apply for carer's allowance, namely ss.179(1), 179(3), 181(2), 181(4) and Rules 4(1) and 4(3) in Part 5 of Schedule 3 of the 2005 Act, and Chapter 4 of Part 3 and art. 144(b) of the 2007 Regulations is unlawful and unconstitutional.

19. On 14 March 2022 an *ex parte* docket was filed on behalf of the applicants, accompanied by consent to institute proceedings on behalf of a minor applicant (the second applicant). On 21 March 2022 leave was sought and obtained to bring the within proceedings. The Statement of Grounds was filed on 14 March 2022 and was grounded on an affidavit of BM (the first applicant) sworn on 14 March 2022. On 3 October 2022 Pamela Keegan, assistant principal officer of the Department of Social Protection swore an affidavit. On 3 October 2022 Micheál O Méalóid, an appeals officer in the office of the second respondent, swore an affidavit. A Statement of Opposition was filed on 7 October 2022. Both the applicants and the respondents filed helpful written legal submissions.

<u>Applicants' arguments</u>

20. In their written arguments, the applicants focused heavily on alleged breaches of various Articles of the Constitution. I summarise those arguments below. However, it is fair to say that at the hearing, the focus of the applicants was quite different. The challenge was to what was described as the "under-inclusivity" of the 2007 regulations made under the 2005 Act. It was argued that the entitlement of the Minister under s.186(2) to make regulations that would provide for a more generous approach to the setting of a means test and the payment of carer's allowance than that currently provided for under the 2005 Act and

regulations made thereunder, was in fact an obligation. The Minister was, on the correct construction of s.186, obliged to make such regulations, and the failure to do so was unlawful.

21. The applicants contend that it was the intention of the Oireachtas that the carer's allowance scheme would provide income to carers and recipients who require full time care and while it is means tested, s.186(2)(b) contemplates the Minister regulating to (i) provide the allowance to those who do not meet the means requirement, and (ii) provide an enhanced rate in certain circumstances. In this light it is submitted that the principles and policies contained in the 2005 Act require that persons such as the applicants, who have the greatest need for the allowance, should be able to access the full rate regardless of the fact that they do not satisfy the means test, given the express provision allowing the Minister to so regulate the operation of the Act.

22. In this vein it is submitted that the Minister is bound by the terms of s.186 to give full effect to the principles and policies of the Act by way of regulation and that this includes the principles and policies identified by s.186(2)(b) notwithstanding the use of the word "may" in that subsection. It is identified that the Minister as yet has failed to make regulations giving effect to the derogations set out in s.186(2)(b)(i) or (ii). In the applicants' submission this failure by the Minister has resulted in a lacuna in the 2007 Regulations which leaves the applicants, whose need for the allowance is greatest, excluded from the full rate.

23. It is argued, by analogy with the decision of the Supreme Court in *Reeves v Disabled Driver's Medical Board Appeal* [2020] IESC 31 that the 2007 Regulations are under-inclusive in circumstances where they fail to allow persons such as the applicants to avail of the full rate where same was contemplated by the Oireachtas by way of s.186 and further that the 2007 Regulations are *ultra vires* the 2005 Act in that the claimed exclusion of the

applicants is arbitrary, capricious, disproportionate and unjust and is contra the clear intention of the Oireachtas in s.186.

24. Counsel frankly conceded that the core relevance of the articles of the Constitution relied upon were that they necessitated a particular approach to the interpretation of s.186, i.e., one that treated it as creating a mandatory obligation on the Minister to legislate for the outcome identified in s.186(2)(b)(ii). The applicants submit that the impugned provisions of the 2005 Act and the 2007 Regulations engage their rights as guaranteed by Articles 40.1, 40.3, 41.2 and 42A and 43 of the Constitution and that the impugned provisions are substantively unconstitutional in that they are under-inclusive and thus disproportionately interfere with the rights of the applicants as guaranteed by Articles 40.1, 40.3, 41, 42A and 43 of the Constitution.

25. Counsel for the applicants submit that the protection afforded by Article 41.2 is engaged in this case, relying on *Sinnott v Minister for Education* [2001] 2 I.R. 545 at 566, in which Denham J. (as she then was) stated that Article 41.2 constituted: "*a recognition of the work performed by women in the home'* a recognition which '*…must be construed harmoniously with other articles of the Constitution when a combination of articles fall to be analysed"*. It is argued that insofar as the impugned provisions exclude the applicants from the full rate of carer's allowance, there is a failure by the State to recognise the work performed by the first applicant in the home contrary to Article 41.2.

26. Counsel for the applicants also submit that the first applicant's right to earn a livelihood guaranteed under Article 40.3 (as established in *Murtagh Properties v Cleary* [1972] I.R. 330) is infringed by the impugned legislative and regulatory provisions as this right cannot be exercised due to the combined effect of the second applicant's profound level of dependency and her inability to avail of the full rate of the carer's allowance.

27. The applicants also argue that the first applicant's right and duty under Article 42.1 to provide education to JM within the home (and JM's derived freedom to receive such education) is impermissibly interfered with by virtue of the first applicant's exclusion from the full rate of carer's allowance. They further argue that insofar as the impugned provisions of the 2005 Act and the 2007 Regulations exclude the applicants from the full rate of carer's allowance, they diminish and interfere with the rights of the second applicant guaranteed by Article 42 and Article 42A, in particular, his constitutional right to realise his full personality and dignity as a human being.
28. The applicants submit that the impugned provisions of the 2005 Act and the 2007 Regulations engage the rights of the applicants as guaranteed by Articles 40.3, 41, 42A and 43 of the Constitution, and as such the constitutionality of the impugned provisions of the 2005 Act and the 2007 Regulations is dependent on the satisfaction of a full proportionality test and/ or analysis. The applicants advert to the objective of the carer's allowance namely, to give recognition to informal caring and to give a secure and independent source of income to persons caring at home for children or adults with significant care and support needs. Thus, they submit that, considering said objective, the exclusion of the applicants, who are members of the class of persons whose need for the full rate of carer's allowance is greatest, is disproportionate and thus fails the proportionality test as set out in *Heaney v Ireland* [1996] 1 I.R. 580.
29. Next, the applicants submit that the impugned provisions of the 2005 Act and the 2007 Regulations discriminate against the applicants as human persons contrary to Article 40.1 of the Constitution insofar as the effect of the impugned provisions is that the applicants are not entitled to the full rate of carer's allowance, referring to *Donnelly v Minister for Social Protection* [2022] IESC 31. The applicants point out that Article 40.1 permits different treatment of categories of persons where differences of capacity or social function

are identified. If no difference of capacity or social function can be found as between the claimant and the appropriate comparator, the discrimination is contrary to Article 40.1. The applicants identify the appropriate comparator to the first applicant as a person who provides full-time care to a care recipient in the home and who has no means of their own and who does not live with a spouse or partner with means as part of the family unit and say that the comparator, who has identical capacity to the first applicant and who performs an identical social function to the applicants, is entitled to the full rate of carer's allowance whereas the applicant is excluded from the entitlement to the full rate of carer's allowance.

30. Finally, it is argued that the discrimination fails the test of rationality on various grounds and that proportionality may be seen as an intrinsic aspect of rationality (*Donnelly,* paragraph 197). They contend that since the impugned provisions of the 2005 Act and the 2007 Regulations fail the proportionality test and/or analysis, said provisions fall foul of Article 40.1.

31. Additionally, the applicants submit that the impugned provisions of the 2005 Act and the 2007 Regulations are incompatible with the respondents' obligations under the European Convention on Human Rights (the "ECHR" or "Convention"), in particular Article 14 of the Convention, read in conjunction with Article 1 of the First Protocol. The applicants rely upon s.5 of the European Convention on Human Rights Act 2003 (the "2003 Act") and claim a declaration that the impugned provisions of the 2005 Act and the 2007 Regulations are incompatible with the respondents' obligations under the Convention. However, as with the arguments based upon the Constitution, at the hearing, counsel made it clear that the argument based on the ECHR was dependent upon the success of the statutory interpretation argument.

Respondents' arguments

32. The respondents make several arguments in respect of the applicants' contention that the 2007 Regulations are *ultra vires* or under-inclusive. They begin by identifying that while s.186(1) of the 2005 Act provides that the Minister "shall" make regulations for the purpose of giving effect to Part 3 of Chapter 8, s.186(2) provides that such regulations "*may, in particular and without prejudice to the generality of subsection (1)*" make provision for the matters contemplated by s.186(2)(b) of the 2005 Act. It is submitted that the use of the word "may" in this section makes it clear that power of the Minister is entirely discretionary. The respondents rely on *Kenny v Dental Council* [2004] IEHC 29 for the proposition that the normal rule is that where the word "may" is used, it is to be read as conferring a discretionary power. Separately it is noted that per the decisions in *The State (Sheehan) v The Government of Ireland* [1987] I.R. 550 and *Reeves*, the Minister cannot be compelled to exercise a discretionary power under s.186(2) of the 2005 Act.
33. Beyond this, the respondents argue that the premise relied on by the applicants; that the failure of the Minister to exercise the discretion established in s.186(2) renders Chapter 3 of Part 4 of the 2005 Act and Article 144(b) of the regulations under-inclusive or *ultra vires*, is unfounded. To this end they emphasise that the means test for the carer's allowance is regulated by detailed provisions of primary legislation in Part 3, Chapter 8 of the 2005 Act, and Part 5 of the schedule to the Act. In their submission the Oireachtas envisaged that the carer's allowance would be subject to a means test and thus there is no lacuna where the 2007 Regulations do not provide for an exemption to that test for the applicants. The respondents are also at pains to distinguish *Reeves*. In that case the Minister made regulations which were under-inclusive, as they added more restrictive medical criteria than were necessary, thus narrowing the class of beneficiaries of a set of tax concessions for the adaptation of vehicles for persons with a disability in a manner that

was, per O'Malley J., neither in the contemplation of the legislature nor within the scope of the Minister's power to formulate criteria for the implementation of s.92 of the Finance Act 1989. It is submitted that in this case, by contrast, the first applicant was not excluded from the carer's allowance by regulations made by the Minister but rather the first applicant receives her allowance on the basis of the scheduled rate identified by the Oireachtas.

34. The respondents also argue that the election by the Minister not to provide an exemption from the means test for the second applicant cannot be construed as unreasonable, arbitrary, or irrational, referring to *Meagher v Minister for Social Protection* [2015] IESC and arguing by analogy with that case that is not arbitrary to make non-contributory benefits subject to a threshold requirement and a means test. It is argued that the adherence by the Minister to that policy, as set out expressly in Chapter 8 of Part 3 of the 2005 Act is not irrational.

35. Turning to the arguments in relation to the first applicant's constitutional right to earn a livelihood and the recognition of work within the home, the respondents contend that the means test does not interfere with the first applicant's right to earn a livelihood either within or without the home. It is submitted that the allowance is intended as financial assistance to those providing care and is not intended to function as a salary in remuneration for fulltime care. It is identified that no provision of Chapter 8, Part 3 of the 2005 Act or the 2007 Regulations prevents the first applicant from seeking work outside the home. To the contrary, the respondents submit that as identified at paragraph 23 of Ms. Keegan's affidavit, the purpose is to give recognition to those providing informal care and to give them a secure and independent source of income to allow them to support persons with significant needs. The respondents do not accept that the first applicant's right to earn a livelihood is engaged yet alone interfered with by the impugned provisions. To this end

they submit that the provisions do not fail to recognise the work performed by the first applicant contrary to Article 41.2 but rather are expressly supportive of the work of carers like her.

36. It is argued that the recognition by the State of the place of women within the home cannot be interpreted as a right to a pecuniary benefit and rely by analogy on the decision of the Supreme Court in *L v L* [1992] 2 I.R. 77 for the proposition that to interpret Article 41.2 in this manner would not be clearly and unambiguously warranted by the Constitution or for the protection of either a specified or unspecified right under it. Further, the applicants cannot rely on any property right under Article 40.3 or Article 43 of the Constitution to the allowance as a purely statutory entitlement in the light, *inter alia*, of *PC v Minister for Social Protection* [2017] IESC 63.

37. In respect of the argument that the first applicant is entitled to a higher rate of the allowance, the respondents argue that the legislature should be afforded significant latitude in the complex task of directing the financial affairs of the State, referring *inter alia*, to *Ryan v Attorney General* [1965] I.R. 294 and *Lowth v Minister for Social Welfare* [1998] 4 I.R. 321.

38. The respondents reject the argument that the impugned provisions fail to hold the applicants equal before the law as required by Article 40.1 of the Constitution. They identify that the test for an Article 40.1 equality review requires that the Court be satisfied that the legislation treats an applicant differently from a comparator in the same position, and that this distinction is arbitrary, capricious or otherwise unreasonable per *Dillane*. It is further submitted that per *Brennan*, a legislative classification must be for a legitimate purpose, relevant to that purpose, and must treat each class fairly. It is further noted that the Supreme Court in *Donnelly* has recently set out that it is for the applicants to show a *prima facie* case that the legislation is discriminatory.

39. Additionally, the respondents maintain that the applicants must demonstrate that they are the same or similar to the comparator selected by them and explain how the treatment of their situation under the provisions is unfair and unjustified when compared with the position of the comparator under the provisions. Finally, the respondents argue that the applicants have failed to show in evidence a sufficient adverse effect on them so as to ground the Court's equality review.

40. The respondents assert that there is no basis for the applicants to succeed in their claims predicated on the ECHR. The respondents identify that Article 1 or Protocol No. 1 of the ECHR does not require that signatories create a welfare scheme, but when they elect to do so, the system can be considered as creating a property right per, *inter alia, Efe v Austria* (Application no. 9134/06, 8 January 2008). The respondents maintain that in a case at the nexus of the Article 14 protection against discrimination and Article 1, the relevant test is whether the applicant would have had a right enforceable under domestic law to the entitlement but for the putative discriminatory condition of entitlement, relying on *Stec v UK* (Application nos. 65731/01 and 65900/01, 12 April 2006) and *Richardson v UK* (Application no. 26252/08, 10 April 2012). The respondents argue that the applicants have failed to demonstrate the that the policy choice made by the Oireachtas in enacting Chapter 8 of Part 3 and Part 3, Chapter 4 of the 2005 Act, and s.144(b) of the 2007 Regulations and specifically the means test for the carer's allowance, meets the standard of a manifestly unreasonable discrimination.

DISCUSSION AND DECISION

41. The essence of the applicants' case is that the Minister is obliged to make regulations under s.186(2) providing for an unspecified class of persons to be entitled to carer's allowance at a rate higher than that calculated in accordance with the existing rules under the 2005 Act and regulations made thereunder. To succeed in their application, the applicants must

persuade me that there is an obligation on the Minister to make regulations under s.186, as opposed to the Minister having a discretion in this regard.

42. I must approach the question of the construction of the section on the basis of the approach recently identified by the Supreme Court in *Heather Hill v An Bord Pleanala* [2022] IESC 43. That case indicates that, faced with a question of statutory interpretation, the words of any section are the first port of call in its interpretation. The Court should construe those words having regard to the context of the section, of the Act in which the section appears, the pre-existing relevant legal framework and the object of the legislation insofar as it is discernible. The overriding approach was identified by Murray J. in the following terms:

> "*What, in fact, the modern authorities now make clear is that with or without the intervention of that provision, in no case can the process of ascertaining the ' legislative intent' or the ' will of the Oireachtas' be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted*."

Existing scheme under Chapter 8

43. Given the approach identified above, it is necessary to first consider precisely what is envisaged by s.186. To understand this, it is in turn necessary to describe briefly the existing scheme for carer's allowance. The history of the allowance is set out in the affidavit of Ms. Keegan, Assistant Principal in the Department of Social Protection as follows:

> *"13. The objective of Carer's Allowance under Part 3, Chapter 8 of the 2005 Act is to give recognition to informal caring and give a secure and independent source of income to persons caring at home for children or adults with significant care and support needs.*

14. Carer's Allowance was introduced in November 1990 to replace an existing allowance, the Prescribed Relatives Allowance (PRA)….

15. The new Carer's Allowance payment allowed the payment to be made directly to the carer…

16. Carer's Allowance is a non-contributory form of social assistance that is subject to a means assessment. Means assessments are features of a wide variety of benefits under the 2005 Act, including, inter alia, the State pension (non-contributory), blind pension, disability allowance, and one-parent family payment. A key aim of the means assessment is so that support in the form of a Carer's Allowance available to persons caring at home for children or adults with significant care and support needs is targeted to those who most need it."

44. She identifies that under s.179(3) of the 2005 Act for the purposes of Part 3, Chapter 8, means shall be calculated in accordance with the Rules contained in Part 5 of Schedule 3 to the 2005 Act, read together with Article 144 of the 2007 Regulations. Article 144 identifies the disregard amount. In short, the approach is that described by the Appeals Officer in his decision of 10 May 2021 described earlier in this judgment. To recap, where a person is co-habiting with another, the weekly means of both persons are totalled. An amount is disregarded from that total (the "disregard amount") and the result is halved. The carer's half is treated as the weekly means of the applicant. Thereafter, a mathematical formula identified at s.181(2)(a) and (b) is applied to calculate the amount by which a carer's means will reduce the carer's allowance payable.

Terms of regulations under s.186(2)

45. Section 186(2)(b), the subject of the controversy in this case, permits the Minister to depart from the scheme in relation to carer's allowance established by the 2005 Act and the regulations made thereunder. Section 186(1) is cast in general terms in relation to the

making of regulations. Section 186(2) is in specific terms, providing for the making of a particular type of regulation. Section 186 provides as follows:

> *(1) The Minister shall make regulations for the purpose of giving effect to this Chapter.*
>
> *(2) Regulations under this section may, in particular and without prejudice to the generality of subsection (1)—*
>
> *…*
>
> *(b) provide for-*
>
> *(i) entitling to carer's allowance the class or classes of person that may be prescribed who would be entitled to that allowance but for the fact that the conditions as to means as calculated in accordance with the Rules contained in Part 5 of Schedule 3 are not satisfied, or*
>
> *(ii) entitling to carer's allowance at a rate higher than that calculated in accordance with section 181(2) the class or classes of person that may be prescribed, and the rate of allowance so payable may vary in accordance with the claimant's means."*

46. The first category at sub section (b)(i) entitles the Minister to make regulations providing for a discrete category of persons i.e., those who are not entitled to carer's allowance at all because they do not satisfy the conditions as to means in Part 5. The subsection permits the Minister to provide that those persons are entitled to carer's allowance despite the failure to satisfy the conditions specified. Having regard to the terms of s.180, which provides that a carer's allowance shall, in the circumstances and subject to the conditions that may be prescribed, be payable to a carer, I am satisfied that this subsection applies to people who have entirely failed to establish an entitlement to carer's allowance, and not

just those who have had their entitlement reduced according to their means. That is because the wording of s.180 strongly suggests that a carer's allowance includes persons entitled to the top rate of allowance and those entitled to a reduced allowance by reference to the means of the carer. Accordingly, the reference to a person who "*would be entitled to carers allowance but for the fact that the conditions as to means are not satisfied*", in my view must refer to a person who does not qualify for a carer's allowance at any level.

47. The first applicant is not a person who falls into that category, as she is in receipt of a carer's allowance, albeit at a level significantly lower than the maximum amount a carer can receive, being €219 at the relevant time. Insofar as the first applicant contends that the Minister has failed in his duty to make regulations, she only has *locus standi* to make that argument in relation to regulations that would potentially benefit her. Regulations made under s.186(2)(b)(i) would not benefit her and she cannot therefore challenge the alleged failure to make such regulations in these proceedings. Nonetheless, it is still helpful to consider the terms of subsection (i) as part of the interpretive exercise in respect of s.186.

48. Turning to subsection (ii), this enables the making of regulations providing for an entitlement to carer's allowance in respect of a prescribed class of person or persons at a rate higher than that calculated in accordance with section 181(2) i.e., under the existing scheme, and permits the rate of allowance payable to be varied in accordance with the claimant's means. Section 181(2) provides for both full carer's allowance and a reduced rate having regard to means. The subsection therefore appears to permit both the making of regulations that would simply increase the standard rate, as well as regulations that would increase the amount payable having regard to the means of the person. The subsection is not prescriptive as to the way in which the revised allowance shall be calculated. The reference to the rate of allowance payable varying "*in accordance with the claimant's means*" appears to be intended to maintain the entitlement to apply a means test

if the Minister so wishes. Alternatively, the Minister could decide to introduce a variation that would be payable on a basis other than means. In any case, it certainly entitles the Minister to adopt regulations varying the approach identified in the 2005 Act, and regulations made thereunder, in respect of the payment of carer's allowance.

49. Importantly, s.186(2)(b)(ii) neither identifies the people who may obtain the benefit of the enhanced regime nor the nature of the enhancement. The respondents have pointed out that there is no reason to assume that the first applicant would be in the class of persons who would benefit from any regulations made under that section. I agree that the class of persons targeted by that subsection are not defined in the same way as those identified by s.186(2)(b)(i). That is because the class of persons under subsection (b)(i) may be described as a closed class i.e., those who cannot obtain the carer's allowance, whereas the potential class covered by subsection (b)(ii) is much more fluid. Any regulations adopted under that subsection, if adopted, would have to prescribe the "*class or classes of person that may be prescribed*" entitled to carer's allowance at a rate higher than that which is presently available on the basis of the regime. The nature of the enhancement to any entitlement is left entirely open ended. In other words, the class of people who may benefit from any regulations made under this subsection are elastic. The Minister has total discretion as to the class of persons that would be covered by any regulations made, and the extent to which they will benefit.

50. The first applicant is essentially asking me to assume that she is a person who would benefit if regulations were made. I cannot assess whether that is or is not the case. Certainly, one can imagine that if regulations were made under this subsection, she might well benefit from them given the impact that the means test has on her carer's allowance. She identifies the nature of the deduction at paragraph 41 of her grounding affidavit, noting that the full amount of carer's allowance is €219 but that she is only entitled to a reduced

weekly rate of €134. Having regard to her assessed means of €91.58, the weekly amount of carer's allowance has been reduced by €85 weekly, according to her a reduction of 38.9%. This is a very significant reduction, particularly given the intense caring responsibilities that she bears, and one can entirely understand why she would not consider €134 weekly sufficient to support her in the work she is obliged to do, day in day out, without a break save when JM is provided with day services.

51. Given that she is a person who at least potentially might be the beneficiary of regulations made under s.186, even if there is no certainty about this prospect, it seems to me that I should accept for the purposes of this judgment that she is entitled to make the argument in respect of the mandatory nature of s.186(2) that she seeks to advance.

Obligation to legislate

52. I turn now to the relevance of the use of the word "may" in respect of the making of the regulations under s.186(2), with the subsection providing that "*Regulations under this section may, in particular ... provide for*".

53. Helpfully, much of the case law on the use of the word "may" in a statutory context was recently summarised by the Supreme Court in the decision of *Heneghan v Minister for Housing* [2023] IESC 7. In that case, the Court was in fact considering the terms "may" and "shall" in the context of the Constitution. Nonetheless, Murray J. drew on case law arising in a statutory context as follows:

> *"130. There is no sentence using the word 'may' that is – without further explanation or elaboration – unambiguously permissive. Undoubtedly, the law proceeds on the basis that normally the term has the effect of conferring a power, not of imposing a duty (see State (Sheehan) v. The Government of Ireland [1987] IR 550 and Kenny v. Dental Council [2004] IEHC 105, [2009] 4 IR 321). But sometimes, 'may' when placed in context is in fact clearly intended to describe a*

mandatory obligation, and sometimes even when it is permissive, circumstances can arise in which in a particular situation a power becomes a duty.

131. … But decisions in the construction of statutes illustrate the acknowledgement by the law of the fact that sometimes when the word 'may' is viewed in the light of the circumstances in which it is uttered, it is understood and intended to be understood not as the extension of an opportunity, but as a command. Similarly, in the construction of a legal instrument permissive language will in certain circumstances be construed so as to impose a duty (and indeed the converse is also the case). Doyle v. Hearne [1987] IR 601 is one example. There, the Court held that the use of the word 'may' in a provision relating to the adjournment of proceedings in the Circuit Court while a question of law was referred to this Court, was mandatory. Finlay C.J. said (at p. 607):

> *'I have come to the conclusion that the terms of s. 16 of the [Courts of Justice] Act of 1947 are not so unambiguous as to prohibit an interpretation of them aided by a consideration of the apparent intention of the legislature in enacting these provisions. I accept that the provision for the adjournment of the pronouncement of the judgment or order must be construed as mandatory. Any other construction would create a total absurdity for it would be giving to a Circuit Court judge a power to consult the Supreme Court as to the determination of a question of law, but leaving him free to decide the case in which it arose and thus, presumably, the question of law as well, prior to that determination.'*

132. That case affords an example of a seemingly permissive provision which was construed as mandatory because to conclude otherwise would have been to enable an absurdity. There are other situations in which the same conclusion has followed

for different reasons. Provisions intended to protect the rights of the public are said to be in a category in which it is more likely the court will find the provision to be mandatory (Dodd Statutory Interpretation in Ireland (2008) at para. 12.11), but this same conclusion can also arise from the overall context of the provision (O'Donnell v. South Dublin Co. Co. [2015] IESC 28 at para. 47). Indeed the law has developed some special rules, so that a power which exists for the benefit of a class of persons subject to exhaustive conditions will be treated as imposing a duty where those conditions are shown to have been met (see Application of Dunne [1968] IR 105)."

54. Applying those principles to the instant case, I am satisfied that the reference to "may" in s.186(2) is truly permissive and confers a power on the Minister rather than imposing a duty. I have so concluded for the following reasons. First, the ordinary meaning of the words suggests this – "*Regulations under this section may, in particular and without prejudice to the generality of subsection (1), (b) provide for -.*" This suggests that the Minister when making regulations may make provision for the matters in the subsection but is not obliged to do so. The use of the word "may" connotes a choice or discretion on the part of the Minister. Nor do any of the factors that might suggest a contrary intention exist here. As noted above, one of the special rules in respect of the interpretation of the word "may" is that, where that a power which exists for the benefit of a class of persons subject to exhaustive conditions, it will be treated as imposing a duty where those conditions are shown to have been met (see *Application of Dunne* [1968] I.R. 105). There, Walsh J. stated as follows:

"it is a well-recognised canon of construction as Lord Cairns said in Julius v. Lord Bishop of Oxford [1880] 5 App. Cas. 214 , that "where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are

specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised. "

55. But that is not the case here. The power of the Minister to make regulations to achieve the ends identified in subsection (ii) has not been deposited for the purpose of being used for the benefit of persons who are specifically pointed out. It is clear from subsection (ii) that, as discussed above, the class of persons to whom the regulation may benefit are not identified in the subsection. Nor has a definition been supplied by the legislature of the conditions upon which any persons are entitled to call for the exercise of the power to make regulations. In other words, insofar as subsection (ii) is concerned, this is not a situation where the legislature has identified that, if certain conditions are met, legislation is to be adopted in respect of a particular class of persons. The subsection simply provides that regulations may provide for an entitlement to carer's allowance at a rate higher than that calculated under the present provisions of the Act. There is no set of circumstances that triggers the making of those regulations.

56. In sum, the legislature has neither identified a class of persons who will be the beneficiaries of the action, nor specified any events that will trigger the obligation to act in respect of that class of persons and therefore the applicants cannot seek to avail of what I might describe as the *Julius v Lord Bishop* exception to the normal meaning of the word "may".

57. Naturally, s.186(2) must be read in the wider context of s.186 as a whole. The applicants placed heavy emphasis upon the obligation to make regulations under s.186(1). That section provides that the Minister shall make regulations for the purpose of giving effect to Chapter 8. The applicants argue that this provision means that regulations must be made to give effect to the situations identified in s.186. If s.186(2) did not exist, there might be some force in that argument. But s.186(2) qualifies s.186(1) such that it renders the making

of the type of regulations identified in s.186(2) a matter entirely within the discretion of the Minister. Its existence strongly suggests that s.186(1), if it does indeed mandate the making of regulations (and it is possible that the "shall" there in fact is discretionary), does not do so in respect of regulations of the type identified by s.186(2)(b).

Relevance of Chapter 8

58. My conclusion in this respect is informed by the construction of Chapter 8 as a whole. Chapter 8 provides, in a highly prescriptive manner, the conditions a person must meet in order to claim carer's allowance, going so far as to identify in Schedule 5 of the Act the precise amounts to which a person is entitled. There is a provision for those amounts to be increased by regulation in order to adjust for cost of living and inflation and that has been done on a number of occasions over the years. That applies both to the primary amount, the disregard amount, and the reduction having regard to the means of the carer. Insofar as the means test is concerned, again the mathematical approach to be adopted is identified with precision by Part 4 in the Schedule.
59. All of this goes to show that, in my view, the context in which s.186(2) was adopted was that, absent its existence, the Minister would very likely not have been entitled to vary either the entitlement *per se* or the amounts payable without primary legislation unless the Act explicitly provided for the making of regulations in relation to same. The general power or obligation to make regulations to give effect to the Chapter as contained in s.186(1) would likely not have been sufficient as the legal basis for regulations departing comprehensively from the approach set out in the Chapter. The Chapter and the accompanying Schedule set out in most precise terms the way in which the amount of carer's allowance payable will be calculated. Having regard to that level of precision, s.186(2) was necessary to ensure that the Minister could depart from the scheme if necessary, without having to enact primary legislation to do so.

60. That explanation of context in my view supports the literal wording i.e., the making of the regulations is a matter for the Minister to decide in his or her discretion and is not obligatory. There is nothing in the Chapter that suggests that the Minister is under any obligation to make regulations varying the scheme that has been set out in the chapter. Indeed, quite the opposite is the case.

61. The most that counsel for the applicants has been able to point to in support of his argument in relation to "under-inclusivity" is the fact that the Minister has made regulations in relation to the amount of the disregard. It is argued that this shows that regulations ought to have been made under s.186 and the failure to do so means the 2007 Regulations are unlawful as they are under inclusive. But this argument assumes an existing obligation to make regulations under s.186. That has not been established. Without that, it is impossible to agree with the applicants' suggestion that the making of the 2007 Regulations, either in relation to the disregard sum or more generally, demonstrates an under-inclusivity on the part of the Minister and that the 2007 Regulations ought to have included a variation of the carer's allowance under subsection (ii). The making of the 2007 Regulations, including the amount of the disregard, was a step pursuant to s.186(1) i.e., the Minister was making regulations for the purpose of giving effect to Chapter 8. The Fifth schedule to Chapter 8 provides for a disregard amount and therefore the Minister was required to provide for the precise sum. That was all the Minister was doing when adopting the 2007 Regulations.

62. The argument that the adoption of a regulation intended to facilitate the means testing regime contemplated by Chapter 8 and established by the Schedule to the Chapter necessitated the inclusion of provisions under s.186(2) that explicitly departed from that regime is one difficult to understand. There is no reason in logic that this should be so. The argument as made by counsel for the applicants appears to be that the mere making of a

regulation under s.186(1) sparked an obligation to enact measures under s.186(2)(b). But the applicants do not explain why this should be so.

63. Separately, the applicants suggest that s.186(1) requires the making of regulations for each of the matters addressed in the chapter and that only s.186(2) has not been the beneficiary of any such regulations and that, accordingly, there is a lacuna that requires to be filled. But in my view, there is no general obligation to make regulations in respect of each and every matter identified in Chapter 8. Even if I am wrong about that, for the reasons I identify above, there is certainly no such obligation to make regulations in relation to the matters identified under s.186(2).

Under-inclusivity

64. The applicants placed heavy reliance upon the argument that the 2007 Regulations were under-inclusive and sought to draw an analogy with the decision of the Supreme Court in *Reeves* where the regulations were found to be under-inclusive. However, the finding of under-inclusivity in *Reeves* was arrived at in very different circumstances. That case concerned a challenge to s.92 of the Finance Act 1989. This enabled the Minister for Finance to make regulations providing for the payment of excise, road tax, and VAT in respect of vehicles and fuel in the case of vehicles used or driven by persons who are severely and permanently disabled. The Minister chose to make regulations, in that case the Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations 1994. Section 92(2) dealt with the content of the regulations to be made, and provided that regulations shall provide for "*the criteria for eligibility for the remission of the taxes specified in subsection (1), including such further medical criteria in relation to disabilities as may be considered necessary*". In making the regulations, the Minister provided that the eligibility on medical grounds of disabled persons who were severely and permanently disabled was to be assessed by reference to identified medical criteria,

including for example persons who are wholly or almost wholly without the use of both legs, persons without one or both legs and so on.

65. Both sets of applicants applied for a medical certificate in respect of their disabled children, which could have entitled them to some repayments and remissions of motor vehicle costs. Both children were deemed not to satisfy the criteria set out in Regulation 3 of the Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations 1994. This was despite the fact that each of the children were agreed to be severely and permanently disabled.

66. O'Malley J. observed that the question, as with any delegated legislation, was whether the terms of regulations were authorised by the Act. She noted that delegated legislation can clearly be *ultra vires* where it creates a regulatory scheme that goes beyond the principles and policies of the statute and brings about something not intended by the Oireachtas. Equally, the legislative purpose may be thwarted if the intended scope of operation of the statute is curtailed by reason of a failure to fulfil the statutory principles and policies. She observed as follows:

> *"51. Returning to s.92 of the Finance Act 1989, it is clear that in the first instance it was left to the discretion of the Minister (having consulted with two other relevant departments) to decide whether or not a scheme of concessions should be introduced. The Minister could not have been compelled to introduce the scheme, for the reasons discussed in The State (Sheehan) v. The Government of Ireland [1987] I.R. 550. However, it would not be correct to conclude from that proposition that the section itself confers no rights upon severely and permanently disabled persons. Once the Minister exercised his power to make regulations, he was bound by the terms of the statutory provision. Any person having the appropriate locus standi may argue that he or she is entitled to the benefit of the section, having*

regard to the principles and policies therein, and to challenge the Minister's interpretation of it."

67. She went on to consider whether the power of the Minister to make regulations permitted the designation of a subset of severely and permanently disabled persons who will be eligible for the concessions to the exclusion of other severely and permanently disabled persons. She held that to construe s.92 as permitting the Minister to make what could amount to a personal choice as to the qualifying conditions would fall foul of the principles in Article 15.2. If further medical criteria were to be set out, they must be such as can reasonably be described as necessary in relation to a scheme dealing with the construction and adaptation of vehicles. In short, she held that the Regulations excluded some people who came within the ambit of s.92 i.e., who had a severe and permanent disability that greatly limits their mobility and creates a need for the adaptation of a car used for their transport. She concluded that the problem was not with what Regulation 3 set out, but with its under-inclusive nature.

68. In that case, the under-inclusivity was because the relevant Regulations excluded persons who were entitled to come under the scheme as identified in s.92. Their entitlement to be included only arose once the Minister decided to make regulations. As found by the Supreme Court, he had no obligation to do so. The section was in explicitly permissive terms, with s. 92(1) providing that the Minister for Finance may make regulations.

69. Here, the first applicant is in a situation where, on my construction of the section, the Minister has a discretion as to whether to make regulations or not. If regulations had been made and the first applicant could show that those regulations excluded her in circumstances where she ought to have been included, then the situation might be analogous to *Reeves*. But no decision to legislate was made by the Minister. There cannot be under-inclusivity where there is no inclusivity. Nobody was included as the beneficiary

of a scheme varying the existing scheme, as no variation scheme has been made under s.186(2) and there was no obligation to do so. In those circumstances I cannot see how the decision in *Reeves* is of any assistance to the applicants.

Remedial statute

70. Finally, the applicants relied upon *McDonagh v Chief Appeals Officer* [2021] IESC 33 in support of their assertion that the 2005 Act ought to be treated as a remedial statute. But *McDonagh* does not assist the applicants. I fully accept that the 2005 Act is a remedial statute and should be interpreted on that basis. But there is no question here of the first applicant being excluded on narrow or technical grounds. That is because there is no scheme from which the first applicant is excluded. The core question is whether the Minister has an obligation to adopt regulations varying the existing scheme such that persons receiving carer's allowance will receive an amount different to that currently prescribed. I have found the Minister has no such obligation. In so deciding, the principles applicable to the interpretation of a remedial statute simply do not come into play. Those principles cannot dictate an interpretation not otherwise warranted by either the wording, the surrounding provisions, the general context, or any other matter.

Constitutional arguments

71. The applicants have argued that s.186(2) must be interpreted in a constitutionally compliant manner. As a general principle, that is uncontroversial. But the applicants have failed to persuade me that any of the articles of the Constitution necessitate a different interpretation of s.186(2) to that identified above. In particular, the applicants sought to argue that a failure to accept their approach to the interpretation of the legislation would undermine the constitutional guarantee in Article 41. I cannot accept that. Even accepting for present purposes that the provision of a carer's allowance vindicates the life of the

woman within the home by making it possible to stay at home and care for a child with a disability, Article 41 cannot be treated as dictating the level at which the State must provide a carer's allowance and cannot be used to mandate the adoption of regulations otherwise within the discretion of the Minister to ensure the increase (to an unspecified level and in respect of an unidentified group of persons) of the level of carer's allowance. To so find would represent a trespass into the executive function of the State by the Court. Moreover, given that there can be no certainty about whether the first applicant would benefit from any regulations, it is difficult for her to argue that their absence constitutes a breach of Article 41.2.

In relation to the discrimination argument, the applicants have failed to identify a similarly situated comparator. The applicants say the appropriate comparator is a person who provides full-time care, has no means of their own and who does not live with a spouse or partner with means. They say such a person is entitled to the full rate of carer's allowance whereas the applicant is not. But this is clearly not a person in a comparable situation as such a person does not enjoy the benefits of a partner with means. In fact, an obvious purpose of the existing means test is to put differently situated persons in a similar position insofar as the entitlement to carer's allowance is concerned. The means test reduces the entitlement to carer's allowance by reference to the means of the carer, as assessed by reference to her means and that of her partner. A carer with a partner who has means is clearly in a different factual situation to that of a carer without a partner with means. For that reason, the argument alleging breach of Article 40.1 falls at the first hurdle. No substantive submissions were made at the hearing in relation to an alleged breach of Article 40.3.1 or the rights of the child under Article 42 or 42A and therefore I do not propose to spend any further time on these arguments.

Nature of reliefs sought

72. Finally, I should address the nature of the relief sought. The applicants have challenged the constitutionality of various sections of the 2005 Act but have not explained why any given section is in breach of the Constitution. Counsel has explained that their inclusion was for "technical reasons" and that the pleadings were drafted on a "belt and braces" basis in this respect, to preclude any observation by a court that there had been a failure to challenge any particular section. None of that cannot amount to a stateable basis to challenge a provision by reference to the Constitution. In the absence of a substantive complaint explaining why ss.179(1), 179(3), 181(2), 181(4), Rules 4(1) and 4(3) in Part 5 of Schedule 3 of the 2005 Act, and Chapter 4 of Part 3 and Regulation144(b) of the 2007 Regulations are unconstitutional, I conclude that the applicants have failed to make out a case in respect of the alleged unconstitutionality of the sections identified in the Statement of Grounds.
73. In relation to the alleged illegality of the 2007 Regulations, as I have discussed above, the core complaint of the applicants appears to be that they are under-inclusive as they do not include provision under s.186(2) for an enhanced carer's allowance. Because I have found there is no obligation to make such regulations, the challenge based on the omission from the 2007 Regulations in this respect must fail.
74. As a result of the applicants failing to establish any illegality in the approach of the respondents, their application for an Order of *certiorari* in respect of the decision of 21 January 2022 must also fail since it is contingent on the applicants establishing that there was a legal frailty in the regime due to the failure to adopt regulations. The applicants having failed to so establish, their challenge to the decision made under the impugned regime must also fail.

75. An application was also made for a declaration pursuant to s.5 of the Convention that the 2005 Act is incompatible with the obligations of the respondents under the 2003 Act. However, no argument was made in oral submission as to why this was so, and the success of that argument appears to hinge exclusively on the applicants persuading me that the approach of the Minister to the making of regulations was unlawful. In those circumstances I cannot find for the applicants on that ground either.

76. Finally, in the course of submissions, the applicants' counsel withdrew the claim based on the Charter of Fundamental Rights of the European Union and the claim for damages and therefore I do not need to adjudicate on same.

Conclusion

77. I therefore refuse the applicants claim in its entirety and will put the matter in for submissions on costs and final orders on **28 June** at **10am.** No written legal submissions are required.