THE SUPREME COURT

Record no. S:AP:IE:2021:000068

O'Donnell C.J.

MacMenamin J.

Dunne J.

O'Malley J.

Baker J.

Between/

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

Appellants

-and-

THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

Respondents

-and-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

Judgment of Ms Justice Iseult O'Malley delivered the 4th of July, 2022

Introduction

1. This appeal concerns a challenge to legislation that excluded the first named appellant ("Mr. Donnelly") from eligibility for a social welfare payment in respect of his severely disabled son Henry, the second named appellant, during a prolonged period when Henry was in hospital. The challenge is based on the constitutional guarantee, enshrined in Article 40.1º, that "*all citizens shall, as human persons, be equal before the law*". That statement of principle is, of course, followed by what is known as the proviso: *"This 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*".

2. The appellants contend that they have been unlawfully discriminated against as compared to families who are in a similar position but caring for a severely disabled child in their home. The case involves consideration of the appropriate test to be applied to such a challenge, the allocation of the burden of proof and a potential question as to the appropriate choice of comparators. Apart from the constitutional issue, the appellants also argue that the exclusion is incompatible with the non-discrimination principle set out in Article 14 of the European Convention on Human Rights, read in conjunction with Article 8 (the protection of family and private life) and Article 1 of the First Protocol (protection of the right to peaceful enjoyment of possessions).

3. The payment in question is Domiciliary Care Allowance ("DCA"). This allowance was first introduced by way of a circular in 1973 and was later put on a statutory footing. As there is now no dispute as to the interpretation and application of the provisions relevant to this appeal, they may be conveniently summarised here.

4. DCA is payable in respect of a "qualified child", being a child under 16 who has a severe disability requiring continual or continuous care substantially in excess of the care and attention normally needed by a child of the same age. The level of disability must be such that the child is likely to require full time care and attention for at least 12 consecutive months. The allowance, which is not means-tested, is payable to a

"qualified person", being a person with whom the child normally resides and who provides for the care of the child.

5. There is no dispute about the fact that Henry is a qualified child, who is severely disabled and suffers from a number of serious medical conditions, or about the fact that Mr. Donnelly has provided admirable parental care and is a qualified person when Henry is residing at home. Happily, that is currently the position and Mr. Donnelly is, at this point in time, in receipt of the allowance.

6. The issues between the parties arise from the fact that, when the proceedings were initiated, the allowance was not considered to be payable to Mr. Donnelly because Henry, who was born with several serious medical conditions, was in hospital for a lengthy period after his birth. The effect of ss. 186B and 186E(1) of the Social Welfare Consolidation Act 2005, as amended, is that in principle DCA is not payable when a child is resident in an "institution". An "institution" is a "hospital, convalescent home or home for children suffering from physical or mental disability", or ancillary accommodation. The definition includes "any other similar establishment" that provides residence, maintenance or care, if the cost of the child's maintenance there is met in whole or in part by or on behalf of the Executive or the Department of Education and Science. However, regulations made under the statute provide for some limited exceptions to the exclusion – in particular, DCA may be paid for up to 13 weeks in a 12-month period while a child is in hospital. A payment may be made at a reduced rate where a child is mostly resident in an institution but is at home for not less than two days a week.

7. The appellants consider that the legislation creates an unjustifiable discrimination against them in comparison with parents caring for severely disabled children in the home. They say that Mr. Donnelly and his wife did, as a matter of fact, provide care, for between eight and 12 hours a day, seven days a week, while Henry was in hospital, and that this level of care was considered necessary by the professionals treating him and liaising with the family. Mr. Donnelly gave up his employment for this purpose and the family thereby lost income.

8. Apart from an order of *certiorari*, the appellants seek a declaration that the relevant provisions are invalid having regard to the Constitution and a further declaration, pursuant to the European Convention on Human Rights Act 2003, that they are incompatible with the Convention. Like the constitutional claim, the Convention argument is based on an equality claim – it is not contended that the legislation breaches any right other than the right to equal treatment. A claim for a declaration that the appellants are resident together for the purposes of the Act and Regulations is not now pursued. There is, therefore, no dispute as to the meaning, effect or application of the legislation.

9. Relief was refused in the High Court (Binchy J. – see [2018] IEHC 421) and the Court of Appeal (judgment delivered by Murray J. – see [2021] IECA 155). The appellants were granted leave to appeal to this Court by determination of the 29th July 2021 (see [2021] IESCDET 89).

The factual background

10. The material facts of the case, insofar as they relate to the individual position of the appellants, are not in dispute. They are fully set out in the judgment of Binchy J. and need only be summarised here. Henry was born with Down Syndrome in June 2015 and has suffered from other serious medical conditions, which are listed in the judgment as recurrent aspiration, oral aversion, gastro-oesophageal reflux, hypotonia, hypothyroidism, intermittent stridor and severe tracheomalacia. He suffered a cardiorespiratory arrest in November 2015. Because of these issues, he was hospitalised, mostly in Dublin, for all of the time from his birth until November 2017. The family lives outside Dublin.

11. During the time when Henry was in hospital, Mr. Donnelly gave up his employment in order to be able to be with and provide care to his son. He stayed for five days each week in accommodation provided by a charitable body and spent some eight to 12 hours a day at the hospital. He received training from the staff and was able to carry out many of the procedures necessary for the management of Henry's physical conditions including care of the PEG and of the Hickman line, and managing the side effects of chemotherapy. He fed and bathed Henry and delivered his medication. He

also engaged in social and motor skills development programmes and provided daily speech and language therapy. Henry's mother cared for his siblings at home during the week. She came up to the hospital for three days a week and also assisted with Henry's care.

12. It is apparent from the evidence that the level of care provided to Henry by his parents during this time, while undoubtedly extremely onerous, was to an extent expected by the hospital. The appellants rely in this respect on a letter from the hospital medical social worker, who confirmed that during prolonged hospitalisation parents were "*required*" to provide "*consistent emotional warmth and to respond to the cognitive and emotional need[s] of the child*". She continued:

> "*Mr & Mrs Donnelly were advised by the multidisciplinary team that one parent was required to provide daily care for Henry for the duration of his admission, not to provide such care was considered neglect. Mr Donnelly provided daily care for his son Henry for the duration of his treatment."*

13. Mr. Donnelly applied for DCA in July 2016. The application was refused, in a decision dated 6th April 2017. Mr. Donnelly sought an internal Departmental review of the decision which came to the same conclusion. However, he was informed that DCA would become payable when Henry returned home. These proceedings issued in May 2017. Henry was discharged home in November 2017, and DCA has been paid to Mr. Donnelly since then.

14. The appellants have not adduced specific evidence relating to any financial expenditure or loss consequent upon Henry's stay in hospital and his parents' role in giving him care, or relating to the loss of earnings on the part of Mr. Donnelly. They did, however, exhibit a report by two non-governmental organisations in the UK: the Children's Trust Tadworth and Contact a Family. Both of these organisations support the families of severely disabled children in the UK and their research concerned the financial and other impacts upon families when a child was in long-term hospital care. This report was ruled inadmissible and/or lacking in probative value in both the High Court and the Court of Appeal, and no appeal has been taken against that finding.

15. The position of the respondents is that the purpose of DCA is to recognise the additional effort and expense imposed upon parents caring for a severely disabled child at home. Looked at through a historical perspective, the allowance enabled parents to care for their children at home where previously some, at least, would have relied upon State-funded residential care. The legislative distinction drawn in respect of parents of severely disabled children who are receiving long-term care and treatment in an institution is said to be justifiable by reference to the fact that the State funds the care and treatment in the latter instance. There is, thus, a cost to the State that is not incurred when children are cared for at home.

The judgment under appeal

16. Judgment in the Court of Appeal was delivered by Murray J., with whom Noonan and Haughton JJ. agreed.

17. In his assessment of the proper approach to the constitutional issues, Murray J. observed that the case presented in a legislative and factual context defined by three features. Firstly, in principle, discrimination in connection with exclusion from a social welfare payment could at least in some circumstances give rise to a complaint under Article 40.1º. Secondly, the presumption of constitutionality applied with particular force to decisions of the Oireachtas involving the distribution of public resources as between citizens. Thirdly, no constitutional provision was being relied upon other than the right to protection under Article 40.1º.

18. In that context, it was necessary to determine, firstly, which of the appellants was properly viewed as being the subject of the allegedly discriminatory treatment and, secondly, whether there was a constitutionally adequate justification for the withholding of DCA from persons in the position of the appellants, having regard to the fact that it was payable in respect of a qualified child cared for at home.

19. On the first of these issues, Murray J. emphasised that in making a comparison between a claimant and the person who is said to have been treated differently, the court must, as O'Donnell J. said in *MR and DR v. An tArd Chláratheoir* [2014] IESC 60, [2014] 3 I.R. 533 focus very clearly on the context in which the comparison was

being made. The claimant and the comparator must be the same for the purposes in respect of which the comparison was made.

20. The respondents had argued (in reliance on the decision of this Court in *M. (A Minor) v. Minister for Justice and Equality* [2019] IESC 82) ("*M. (A Minor)*") that, since DCA was payable to the parent and not to the child, it was wrong to frame the inquiry by reference to a comparison between Henry and a child being cared for at home. On their analysis, the status of Henry was irrelevant. This argument was rejected by the Court of Appeal on the basis that the instant case was unlike *M. (A Minor),* which related to entitlement to child benefit. The issue in that case was the status of the parent and not that of the child. In the instant case, the position and needs of the child were in fact the determining factor in distinguishing between those parents who were entitled to DCA and those who were not. If Mr. Donnelly's entitlement to DCA was derivative from his child's disability, and if (as he contended) it was the extremity of that disability that resulted in the withholding of the allowance, then the fact of that disability was central to an assessment of the validity of the non-payment.

21. Moving on to the test to be applied to the question of justification, Murray J. referred to *O'Brien v. Keogh* [1972] I.R. 144*, Murphy v. Attorney General* [1982] I.R. 241 ("*Murphy v. Attorney General*")*, Lowth v. Minister for Social Welfare* [1998] 4 I.R. 321 ("*Lowth*"), *Dillane v. Attorney General* [1980] I.L.R.M. 167 ("*Dillane*"), *Brennan v. Attorney General* [1983] I.L.R.M. 449 ("*Brennan*") and *An Blascaod Mór Teo v. Commissioner for Public Works* [1998] IEHC 38 ("*An Blascaod Mór*"), together with some of the scholarly commentary thereon.

22. In particular, the formulation adopted by Henchy J. in *Dillane* was relied upon. There, the issue was the validity, having regard to Article 40.1º, of a provision in the District Court Rules 1948. Such rules are made under a power delegated by primary legislation. The rule in question permitted an award of costs against an ordinary person prosecuting as a common informer but precluded an order against a member of the Garda Síochána who used the same procedure if he was acting in discharge of his duties as a police officer. This Court held that the discrimination was justifiable on the ground of social function. The test was formulated by Henchy J. as follows:

"When the State, whether directly by statute or mediately through the exercise of a delegated power of subordinate legislation, makes a discrimination in favour of, or against, a person or category of persons, on the express or implied ground of a difference in social function, 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."

23. It may be noted that Henchy J., having found that the distinction in question was within the discretion allowed by Article 40.1º, continued:

"Whether the Court supports or approves of that distinction is irrelevant: what matters is whether it could reasonably have been arrived at as a matter of policy by those to whom the elected representatives of the people delegated the power of laying down the principles…."

24. Murray J. considered that this formulation meant that the social function involved must be reasonably capable of supporting the classification in question. To that extent it reflected the judgment of Kenny J. in *Murphy v. Attorney General* holding that the mere fact that a statute imposed a heavier liability on a defined person or persons did not, of itself, offend against Article 40.1º:

"*…an inequality will not be set aside as being repugnant to the Constitution if any state of facts exists which may reasonably justify it*".

25. This was seen as being consistent also with the approach of Walsh J. in *O'B. v. S.* [1984] I.R. 316, according to which the object and nature of the legislation concerned must be taken into account, and the distinctions or discriminations created by the legislation "*must not be unjust, unreasonable or arbitrary and must, of course, be relevant to the legislation in question*".

26. The judgment of the Court of Appeal then (commencing at paragraph 45) discusses the role of the concept of proportionality. It appears that the respondents argued in the

High Court that proportionality was not relevant, in circumstances where the appellants did not assert a constitutional right to payment of DCA. This, in the view of the Court of Appeal, was incorrect.

> "*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*".

27. Murray J. next examined the approach of the courts to differential treatment in the context of social protection and the allocation of public resources. In particular, he considered the two leading authorities – *MhicMhathúna and anor. v. Ireland* [1995] 1 I.R. 484 ("*MhicMhathúna*") and *Lowth* (paragraphs 50 to 55 of the judgment).

28. *MhicMhathúna* concerned a challenge by a married couple to various tax and social welfare measures. As summarised in the judgment delivered by Finlay C.J., they challenged *inter alia* their exclusion from certain measures providing a tax-free allowance to widows and unmarried mothers as an invidious discrimination against themselves, as well as a failure by the State to fulfil its duties to them. They also challenged provisions introducing what was then known as the unmarried mother's allowance. The complaint made in that latter respect was that unmarried mothers and other lone parents were provided with greater financial support than married couples.

29. Insofar as the challenge was based on Article 40.1º it was rejected by this Court. For the purposes of the instant appeal, the salient conclusion was that the decision of the High Court was correct on the following propositions:- (i) single parents were in a different position to, and performed different functions from, two parents living together and it was a justifiable social policy to see their needs as different, and (ii) the Oireachtas was specifically charged under the Constitution with deciding what kind of taxes should be imposed and what allowances would be given. The Court

found that there were "abundant" grounds for distinguishing between the needs and requirements of single parents and those of married parents living and rearing a family together. Further:

> "*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*."

30. In *Lowth*, the plaintiff was a deserted husband who complained of the fact that eligibility for the deserted wife's benefit was confined to women. The defendants adduced evidence demonstrating the relatively small number of married women in the workforce at the time, and the relative financial disadvantage of those women as compared to men. The High Court found that the legislation was based on a factual assessment of the greater needs of deserted wives, rather than on any assumption that husbands deserted by their wives were to be treated as in some way inferior to wives deserted by their husbands.

31. On appeal the plaintiff argued that the appropriate comparison would have been between the numbers of deserted husbands in paid employment and deserted wives in paid employment. However, it is noted in the judgment, delivered by Hamilton C.J., that the plaintiff did not produce any evidence on this issue. The burden of establishing the unconstitutionality of a statute was described as "*formidable*", with reference made to the presumption of constitutionality and the standard set in *Pigs Marketing Board v. Donnelly (Dublin) Ltd* [1939] I.R. 413. The particular difficulty of establishing the unconstitutionality of legislation dealing with economic matters had been recognised in *Ryan v. Attorney General* [1965] I.R. 294 (the water fluoridation case), where Kenny J. had said:

> *"When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of*

the citizen. Moreover the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to this type of legislation."

32. Hamilton C.J. went on to describe taxing statutes as being, in one sense, the converse of social welfare legislation in that the former were the means by which public revenues were raised so that welfare payments could be made. The relevance of this lay in the recognition (as explained in *Madigan v. Attorney General* [1986] I.L.R.M. 136) that tax laws were in a category of their own, and that very considerable latitude must be allowed to the legislature in relation to them.

33. Having referred to the authorities on the interpretation of Article 40.1º, the Court in *Lowth* went on to hold that the evidence showed clearly that women in employment at the material time were at a financial disadvantage compared to men, and that a relatively small proportion of married women were in the work force. Noting that it was not the function of this Court to adjudicate upon the merits or otherwise of the impugned legislation, it held that 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 a social welfare payment to meet the needs of the former.

34. Having considered these authorities Murray J. found the following principles to be established.

(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 (*MhicMhathúna*).

35. Applying this analysis (in paragraphs 56 to 59), Murray J. observed that a child being cared for at home was in a different position to a child being cared for in hospital. In his view, the difference was inherent in the description. Parents could obtain an allowance when the child was at home in their care, while a child in hospital was being maintained by the State and was not being cared for at home. It was difficult to see how this difference would not be relevant to a decision as to who should benefit from the allowance.

36. Three facts were considered relevant in this regard – that the State incurred an expense in providing for the care of a child in hospital that it would not necessarily incur in the case of a child cared for at home; that parents caring for a child at home were incurring a cost which they would not necessarily incur when the child was in hospital; and that the State must provide for the care needs of a child in hospital whenever a parent was not there. The cost of meeting that need and of the personnel, facilities and processes required to deliver the necessary care was discharged from public funds, which would not be the position when a child was at home. There were, therefore, differences between the two classes of parents and children which were rationally related to the decision when to pay the allowance. It could not be said that the differentiation was arbitrary, capricious or otherwise not reasonably capable of supporting the classification used by the Oireachtas.

37. The judgment then gives detailed consideration to the case presented by the appellants. They had argued that Henry's parents did in fact provide him with care while he was in hospital, and that the State's analysis was based on an outdated view of the role of a parent whose child is in hospital for a prolonged period. In this regard they relied upon the letter from the medical social worker, referred to above. They also sought to rely upon the Children's Trust Tadworth/Contact a Family report, which, they argued, would support the view that their experience was common amongst the parents of children with a disability who undergo long periods of hospitalisation. The point sought to be made here was that many or most parents of

severely disabled children provide the same level of care when the children are in hospital as when they are at home.

38. Characterising the case as one in which the discrimination complained of was experienced in connection with Henry's disability, the appellants argued that the approach in *Lowth* had been overtaken by a more sophisticated and subtle approach, that it was important to apply a proportionality test to the measures and that the authorities supported the proposition that there was a burden on the respondents to justify the differential treatment.

39. Murray J. observed (in para. 63 of the judgment) that, in any situation where a legislative classification involved a category of persons, the individual circumstances and requirements of the persons concerned would vary. Not all would be affected by the legislation in the same way. In cases of this nature there would be differences between the cost to the State of medical treatment in respect of different children; differences in the level of any financial impact on families; and differences in the level of any saving to the State by reason of a child being cared for at home (because of the cost of home care packages or other supports).

40. It was further observed that to legislate requires the drawing of lines, and that in any situation there would be persons on the margins of a category who might have a strong claim to be included but were lawfully excluded. In this context, the judgment refers (in para. 64) to *Massachusetts Board of Retirement v. Murgia* (1976) 427 US 307 ("*Murgia*") and *Califano v. Jobst* (1977) 434 US 47 ("*Jobst*"), as illustrating the unavoidable nature of the line-drawing task. In *Murgia* a Massachusetts law required police officers to retire at the age of 50. The appellant was in excellent physical and mental health, and there was no dispute about his capacity to continue performing the duties of an officer. The U.S. Supreme Court held that the law did not require "strict scrutiny", since it did not interfere with the exercise of a fundamental right or operate to the particular disadvantage of a "suspect class." The test, therefore, was the "rational-basis" standard. Since physical ability generally declined with age, mandatory retirement at 50 removed those whose fitness had presumptively diminished. The Court observed:

"This clearly is rationally related to the State's objective. There is no indication that [the provision] *has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.*

That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect'…"

41. In *Jobst*, a statutory provision terminated benefits to dependent disabled children upon their marriage, unless the spouse was also entitled to benefit under the statute. The appellant had married a person who was permanently disabled but did not qualify for benefits in her own right. The Court noted that, rather than requiring proof of dependency in individual cases, Congress had enacted the measure on the basis of factual assumptions about the connection between dependency, age and marital status. On this aspect it said:

"There is no question about the power of Congress to legislate on the basis of such factual assumption. General 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."

42. The Court of Appeal accordingly held that the fact that the exclusion of a particular claimant from a benefit resulted in him or her being affected less favourably than a similarly situated comparator was not sufficient to trigger the invalidation of the measure. Murray J. continued (in paragraph 65):

"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 Hoffman 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'."*

(Emphases in the original.)

43. It is then pointed out (in paragraphs 66 and 67) that the appellants had not put evidence to this effect before the court. While there was evidence that Henry's parents had provided care, and that this had caused disruption in their lives and that of the family, that did not prove that the classification was invalid. It did not in itself establish either that the categorisation was not reasonable or that all, many or most parents in the same situation did, or could, or must, provide the same care that Mr. and Mrs. Donnelly did. There was no basis on which the court could assess their financial loss and no way of knowing whether any such loss was generally sustained by similarly situated parents. That being so, while their evidence might establish that they, personally, had been treated differently from what they contended were similarly positioned members of families that obtained DCA, it did not establish that the *category* of which they were members were, as a whole, so treated. Therefore, the evidence did not establish that the category was discriminated against and hence did not establish that the legislation was invalid.

44. In connection with this issue, Murray J. considered the question of where the burden to adduce such evidence lay. He noted that some of the commentary on the Article 40.1º jurisprudence suggested that in the case of certain kinds of classifications the onus might be on the State to justify any consequentially differential treatment. However, he queried how this concept could relate to the principle that the presumption of constitutionality demanded a high degree of deference to be paid to judgments made by the Oireachtas in relation to fiscal and social welfare legislation. Further, there would be a question as to whether the proposed shifting of the burden would apply across the board. There was no support for such a proposition in relation to, for example, a claim that the State had, by legislation, interfered with the exercise of a constitutional right.

45. Murray J. acknowledged that in *Murphy v. Ireland* [2014] IESC 19, [2014] I.R. 198 ("*Murphy v Ireland*") O'Donnell J. had said that where there was differentiation in relation to matters that could be said to be "*intrinsic to human beings' sense of themselves*", such as gender, race, religion, marital status and political affiliation, such differentiation "*must be demonstrated*" to comply with the principles of equality. He also acknowledged that the *Lowth* approach had been criticised by commentators, as being unduly accommodating of the State.

46. However, he considered that even if it were to be accepted that differences of treatment arising from disability should be examined by reference to an enhanced standard of review, and if one could accept that the treatment of which the appellants complained could properly be considered to be discrimination on the grounds of disability, there were major difficulties in the way of the appellants. In *Lowth*, a gender-based distinction in the legislation had been justified by extraneous evidence. In the instant case, by contrast, the legislation itself defined the difference and required no extraneous explanation. Rather than there being a requirement for added justification for the distinction between children at home and children in the care of a hospital, what had to be justified was the claim that there was no basis for drawing the distinction. There was no basis for finding that the State was obliged both to point to an objective justification and also to prove by evidence that the legislation was not arbitrary, capricious or disproportionate. Such an approach would alter the law relating to the presumption of constitutionality.

47. The court went on to find that the evidence adduced by the appellants was insufficient to discharge the onus of proof that lay upon them. The letter from the medical social worker did not purport to be the official position of the Health Services Executive and did not suggest that parents would face a legal sanction if they failed to attend upon a child for over eight hours every day. (It was accepted that the position would be different if such a sanction did, in fact, apply.) While it was accepted that the term "neglect" had a particular connotation when used in this context, it was not accepted that it meant that parents who failed to act as the Donnellys heroically had would be in breach of a legal obligation.

48. The report from the United Kingdom NGOs was found not to be probative in these proceedings. The information contained therein related to another jurisdiction. Even if it was assumed that the essential conclusions would also hold true in Ireland, the High Court could not have acted upon it. Proof that persons in the position of the appellants were in fact in the same position as those in another class would require some evidence as to the methodology of the survey conducted and as to the reliability of that methodology, together with some assurance that all relevant factors had been taken into account. The documentation was not independent, and was hearsay. The High Court had, accordingly, been correct to refuse to act on it.

49. Accordingly, the Court concluded that the Article 40.1º challenge must fail. The appellants and the comparator were in different positions, with the difference being relevant to the payment or non-payment of the allowance. One child was in the custody of an institution and receiving treatment and at least some care and maintenance from it, while the other was in the custody of its parents. In the latter situation the parents were ultimately responsible for the care and the cost of the maintenance. On the other hand, where a public institution was providing some of the care, all of the medical treatment and was paying for all of that maintenance, the cost was met by the Exchequer. Once there was a basis for distinguishing between the needs and requirements of the two classes, *Lowth* and *MhicMhathúna* required the conclusion that the Court could not interfere by seeking to assess what the extent of the disparity should be.

50. Even if a more intrusive standard of review were to be adopted, the Court considered that the appellants would still fall short of establishing a basis on which a violation of Article 40.1º could be found. The legislature had adopted a categorisation between differently situated persons, in circumstances where the difference was at least *prima facie* relevant to the decision to grant a payment to a comparator and not to pay it to the appellants. The legislative decision was directed to the allocation of public resources and the rationality of the classification could not be determined without regard to that fact. It would be necessary for the appellants to prove that the classification lacked any proportionate or rational basis, and no evidence had been provided that could enable such a finding.

51. However, Murray J. did stress that the *MhicMhathúna/Lowth* approach did not mean that the State could "simply draw a curtain" around legislation such as the Social Welfare Consolidation Act, and insulate it from Article 40.1º, on the arguments that there was no right to a social welfare benefit, 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 survived 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.).*"

52. Whether or not there might be a constitutional right to State benefits in some circumstances, the State in making provision for such benefits was discharging a critically important function in supporting *inter alia* vulnerable members of society. Where it distinguished between citizens in that context, at least where they were affected in capacities such as those at issue in this case, it must have a rational and defensible basis for so doing.

53. The appellants had mounted an argument in the High Court that the case disclosed a "constitutional lacuna", or "constitutional omission". This had not been pleaded, and the respondent objected on that basis. In any event, the Court of Appeal found that it was misplaced. The argument raised was one that would have relevance only if it was first established that there had been a breach of the Constitution such as to necessitate an order that would, in effect, require the Oireachtas to legislate.

54. Finally, the Court of Appeal rejected the argument under the ECHR. The case made here turned on Article 14, Article 8 and Article 1 of the First Protocol. Article 8 enjoins respect for family life, while Article 1 of the Protocol protects the right to the peaceful enjoyment of possessions. Article 14 provides:

> *"The enjoyment of the rights and freedoms set forth in this 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."*

55. The appellants submitted that the combined effect of these provisions was that:

(i) Henry came within the term "*other status*" as a severely disabled child requiring lengthy inpatient hospital treatment;
(ii) In comparison with a severely disabled child who was not in need of such treatment, he was discriminated against by the 13-week rule;
(iii) This was discrimination against him in the enjoyment of his rights and freedoms for the purposes of Article 14, because he had a property right to DCA that was protected by Article 1 of the Protocol.

56. The debate and analysis on this aspect centred (in this Court as well as in the Court of Appeal) on the decision in *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250 ("*Mathieson*"), which will be considered in detail below. In brief, the United Kingdom Supreme Court ("the UKSC") found a violation of Convention rights where a payment similar to DCA was suspended in the case of a severely disabled child who required inpatient NHS hospital treatment in excess of 84 days. The suspension appears to have resulted from the application of a

statutory rule against overlapping benefits. During that time his parents provided constant care. According to the report of a senior nurse, the clinic relied heavily upon them and they remained the child's primary caregivers. They gave up their business, exhausted their savings and became reliant upon benefits. When the payment was suspended they were forced to borrow money although still in receipt of certain other benefits. It is relevant to note that evidence was adduced in respect of both the extra expenditure incurred by them while their son was in hospital, and the loss of income consequent upon the suspension of the payment. The Children's Trust Tadworth/Contact a Family report referred to above was accepted as evidence of the impact of the suspension rule upon other similarly situated families.

57. In the instant case, the respondents put forward three arguments in the Court of Appeal for distinguishing *Mathieson*. The first was that the payment in the UK was payable to the child and not the parent. The second was that the case was concerned with the withdrawal of the allowance and not with the question whether it should be paid in the first place. Finally, they pointed to the evidence that had been before the court in *Mathieson* and contrasted the evidential situation in the instant case.

58. The Court of Appeal rejected the first and second contentions. The fact that the allowance was payable to the child in the UK was not relevant, given that eligibility for the payment in this State was so dependent upon the status of the child. Secondly, for the purposes of a discrimination argument, there was no relevant distinction to be drawn between refusal of the allowance and its withdrawal.

59. However, the Court found the third point to be critical. The UKSC had found, on the evidence, that the assumption underlying the "bright line" rule was in fact groundless. In the view of the Court of Appeal, the Mathiesons would have lost if in fact the NHS provided the necessary care to most patients in the same position, even though the parents provided the same level of care in their own case. In the absence of evidence relating to this jurisdiction, the Court here could not reach the same conclusion as the UKSC.

The issues in the appeal

60. As will be seen from the terms of the determination granting leave to appeal, the parties were requested to reach agreement insofar as was possible in order to group the numerous grounds of appeal thematically. They have furnished a useful issue paper in the following terms.

> *(i) Are Section 186(d)(1)(a) and Section 186E of the Social Welfare Consolidation Act, 2005 as amended and/or the relevant regulations thereunder incompatible with Article 40.1 of the Constitution? Does §45 – 67 of the judgment of the CoA correctly identify and apply the appropriate test for determining whether a legislative provision is repugnant to Article 40.1? What is the appropriate test and how should it operate?*
>
> *(ii) Who is the appropriate comparator for the purpose of assessing whether Section 186D(1)(a) and Section 186E of the Social Welfare Consolidation Act, 2005 as amended and/or the relevant regulations made thereunder are compatible with Article 40.1 of the Constitution? What circumstances are to be attributed to the comparator?*
>
> *(iii) In a challenge to the compatibility of legislation with Article 40.1 of the Constitution, does the entire burden of proof to establish that legislation is incompatible rest on the Appellant? What burden of proof does the appellant bear regarding the effect of the legislation on non-parties who are also members of a defined legislative category?*
>
> *(iv) Are Section 186D(1)(a) and Section 186E of the Social Welfare Consolidation Act, 2005 as amended and/or the relevant regulations made thereunder incompatible with the European Convention on Human Rights and Fundamental Freedoms, having regard to the case law of the European Court of Human Rights and the decision of the Supreme Court of the United Kingdom in Mathieson v. United Kingdom [2015] UKSC 47?*

61. It is apparent that the first three paragraphs raise issues that go to the heart of the obligation of the courts when dealing with claims based on Article 40.1º of the Constitution. In summary, the questions concern the appropriate test to be applied, the proper allocation of the burden of proof and the appropriate choice of comparator in a challenge to social welfare legislation. However, as matters progressed it became apparent that the third issue was not really in dispute.

The appellants' submissions

The first issue – the test for a challenge grounded upon Article 40.1º

62. On the first issue, the appellants make a preliminary submission that, even if the *MhicMhathúna/Lowth* approach, as analysed by the Court of Appeal, is appropriate to this case, the respondents have not identified grounds for distinguishing between a claimant and comparator that would "justify" the legislation. In both *MhicMhathúna* and *Lowth*, evidence had been adduced of a "state of facts". No such evidence was furnished by the respondents in the instant case – all that was put before the court was the statement that DCA was paid in recognition of the additional obligations and expense imposed on parents caring for children in their own home, and the assertion that children in a hospital have their care funded by the Exchequer.

63. The appellants accept that the presumption of constitutionality applies with particular strength to legislation of this type, and acknowledge that very few cases will succeed on the basis of the established jurisprudence. However, they emphasise that the two sentences in Article 40.1º must be read conjunctively rather than disjunctively. As explained by Denham C.J. in *M.D. (A Minor) v. Ireland* [2012] IESC 10, 1 I.R. 697 ("*M.D. (A Minor) v. Ireland*") they are not to be read as if they were in separate compartments, and it is not correct to look at legislation to see if it offends against the first sentence before turning to the second to seek justification. The second sentence is concerned with what the first sentence means. The appellants therefore submit that a legislative differentiation, claimed to be based on a legitimate objective, must be analysed by reference to the qualifications in the second sentence. Here, it is argued that the parents of severely disabled children fulfil the same social function – that of

providing care substantially in excess of that required by other children – in the hospital as in the home.

64. The appellants accept the observation in the Court of Appeal judgment to the effect that the personal circumstances and requirements of persons within a legislative category will vary but say that this misses the point – were it not for the impugned exclusion, the qualifying criteria would in fact cover all variations within the category of parents who are, as a matter of fact, providing the care needed by a severely disabled child.

65. It is submitted that the Court of Appeal's view of *Lowth* and *MhicMhathúna* led it into the error of not adopting a proportionality analysis as formulated in *Heaney v. Ireland* [1994] 3 I.R. 593 ("*Heaney*"). In *Heaney*, the plaintiffs' challenge, based on the constitutionally protected right to silence, was to legislation requiring arrested persons to give an account of their movements in certain circumstances. Costello J. held that, if it was established that legislation restricted a constitutional right, the court must then go on to examine the validity of such restrictions. He set out the test in the following terms:-

> *"The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:*
>
> > *(a) be rationally connected to the objective and not be arbitrary, unfair or biased on irrational considerations;*
> > *(b) impair the right as little as possible, and*
> > *(c) be such that their effects on rights are proportional to the objective."*

66. The appellants accept that there are few examples of the *Heaney* test being applied directly in the context of a claim under Article 40.1º. They rely, on this aspect, on *Dokie v Director of Public Prosecutions* [2010] IEHC 110, [2011] 1 I.R. 805 ("*Dokie*") and on *Murphy v. Ireland*.

67. In *Dokie*, the High Court granted a declaration of unconstitutionality in respect of certain penal provisions of the Immigration Act 2004. Kearns P. found that the statutory words creating the offence in question were so vague and uncertain as to give rise to a potential for arbitrariness, and lacked the precision necessary for an individual to anticipate the consequences of his or her actions. In this context he referred to *King v. Attorney General* [1981] I.R. 233, (where this Court had, *inter alia*, found a breach of Article 40.1º). He also considered that the provision could (in making a failure to give a "satisfactory explanation" an ingredient of the offence) have the potential to breach the right not to incriminate oneself. He noted the jurisprudence to the effect that the State was entitled to impose measures of control on non-nationals and that a wide latitude had to be afforded to the Oireachtas in this regard. However, he stated that it was "*well established*" that "*any legislative infringement on rights contained in Article 40.1 must satisfy a proportionality test*". The test to be applied was stated to be that in *Heaney*.

68. In *Murphy v. Ireland*, the plaintiff challenged the provisions of the Offences Against the State Act 1939 empowering the Director of Public Prosecutions to certify that the ordinary courts were inadequate for the purpose of trying him on charges relating to revenue offences. He relied, *inter alia*, on Article 40.1º, on the basis that he was being treated differently to other persons charged with the same offence, who would be tried before a jury. The judgment in this Court was delivered by O'Donnell J., who noted the position occupied by the equality guarantee as a vital and essential component of the constitutional order. Observing that the phrase "as human persons" had been problematic in earlier years, he referred to the statement by Walsh J. in *Quinn's Supermarket v. Attorney General* [1972] I.R. 1 that it was a guarantee against any inequalities grounded upon an assumption or belief that some people were to be treated as inferior, or superior, by reason of their human attributes or their ethnic or racial, social or religious background. To this statement of principle, the Court in *Murphy v. Ireland* added that it was increasingly understood that the phrase was intended to refer to those immutable characteristics of human beings, or choices made in relation to their status, which were central to their identity and sense of self and which have on occasions given rise to prejudice, discrimination or stereotyping. Matters such as gender, race, religion, marital status and political affiliation might not

all be immutable, but they could be said to be intrinsic to human beings' sense of themselves. Where matters such as these were in issue, differentiation on any such ground must be demonstrated to comply with the principles of equality. Even in cases not involving these grounds, it might be that significant differentiations between citizens could still fall foul of the provision if they could not be justified. It may be noted that the Court did not, in *Murphy v. Ireland*, find it necessary to determine the level of scrutiny that would be required in these latter circumstances.

69. Reference is also made by the appellants to the dictum of Barrington J. in *Brennan* (cited with approval in the judgment of this Court in *Lowth*):

> *"There is a sense in which to legislate is to discriminate. The legislature in its efforts to redress the inequalities of life or for other legitimate purposes may have to classify the citizens into adults and children, employers and workers, teachers and pupils and so on. Pringle J. stated in O'Brien v. Manufacturing Engineering Co. Ltd. [1973] I.R. 334 that such division of the citizens into different classes was envisaged by the second sentence of Article 40.1. He then added:*
>
> > *'Therefore it would appear that there is no unfair discrimination provided every person in the same class is treated in the same way.' (at 341)*
>
> *No doubt this is true, but it might be prudent to express, what is perhaps implied in it, that the classification must be for a legitimate legislative purpose, that it must be relevant to that purpose, and that each class must be treated fairly."*

70. The appellants say that this is consistent with the initial stages of the *Heaney* test, which requires that any intrusion on constitutional rights should serve a sufficiently important objective and be rationally connected to that objective. However, as an alternative, they submit that if proportionality is not applicable in this context, then it is all the more important that the State should demonstrate justification.

71. It is also argued, separately, that in any event the exclusion fails the rationality test. Here, a distinction is drawn between the objective of the DCA generally and the

objective of the exclusionary measure. It is submitted that, since it is the latter that is the subject of the challenge, it is the measure that must be analysed in the first instance so that it can be seen whether there is a rational connection to its purpose. However, the objective underlying the payment of DCA is said to be relevant to the overall analysis. On the basis of the legislation, the historical non-statutory schemes and the description by Dunne J. in *McDonagh v Chief Appeals Officer* [2021] IESC 33, [2021] I.L.R.M. 385 ("*McDonagh*") of the allowance as being designed "*to provide assistance to those who have a particular need for assistance over and above that of the average parent in circumstances such as these, by reason of having a child with a severe disability*", the appellant says that the DCA is paid in respect of disabled children who require constant care or supervision which is in fact being provided by the parents or by arrangement with another person. This purpose is entirely distinct from the purpose of funding hospitals. Further, not all children in hospital will require constant care and supervision from a parent.

72. The appellants refer to a submission made on behalf of the respondents to the effect that the allowance was introduced to encourage and assist parents of severely disabled children to keep their children at home rather than having them cared for in an institution at State expense. They point out that Henry was in hospital because he required medical treatment, not because his parents were unable or reluctant to care for a disabled child. They submit that the proposed rationale for the exclusion fails to take account of this fact.

73. The appellants submit that the High Court and the Court of Appeal erred in holding that the purpose of the exclusion provision was to avoid duplication of State benefits. DCA is a universal payment to persons who meet the criteria of providing the necessary extra care and attention to severely disabled children. It is not means-tested, so is not designed to make up a deficiency of income related to the maintenance of the child. If it is designed to recognise extra care and attention paid by the parent, no duplication arises if it is paid to the parents of children in hospital. Quoting the words of Hogan J. in *B. v. Director of Oberstown* [2013] IEHC 562, [2020] 2 I.R. 338 ("*B. v Director of Oberstown*") the appellant submits that the care provided by Mr. Donnelly to Henry in the hospital was not "*essentially different*" and did not serve "*fundamentally different purposes*" to the tasks that a parent providing care in the

home must carry out. It is suggested that, in fact, it was because of the extremity of Henry's needs that he was in hospital and that the extra care and attention he required while there was arguably greater than for a child at home.

74. *B. v. Director of Oberstown* was about the differentiation, for the purpose of the availability of remission on custodial sentences, between male juveniles who commenced serving their sentences in St. Patrick's Institution and those who were sent directly to Oberstown. Hogan J. held that a law differentiating between offenders so far as eligibility for remission was concerned engaged, in the first instance, the application of Article 40.1º. He accepted that a good deal of latitude must be allowed where the Oireachtas differentiated between classes of persons for reasons of social policy, "*provided always that the differentiation is intrinsically proportionate and reasonable*". It was possible to envisage circumstances in which the remission rules might justifiably differ for different categories of offender, but in the circumstances of the particular case the only difference was the location of the place of detention.

75. It is further submitted that the Court of Appeal erred in attaching weight to the fact that Henry's hospital care was funded by the State. The appellants say that this is not relevant to the question of care and attention, in the context of a non-means-tested payment. They point out that the State has funded a home care package provided to Henry since he was discharged, but Mr. Donnelly's entitlement to DCA is not affected by that factor. The appellants say, therefore, that if the purpose of the exclusion is to avoid duplication of benefits, the distinction drawn between children in hospital and children at home does not further that purpose and is irrational.

76. Turning to the letter from the medical social worker, the appellants submit that the analysis of the Court of Appeal does not engage with the implications of the use of the word "*neglect*" by a social worker when speaking about children and parents. In that context it is a term which raises the possibility of child protection proceedings. The appellants submit that, arguably, it implies a legal obligation on Henry's parents to be with him in the hospital. It is also said to further support the argument that the exclusion of parents whose children are in hospital is irrational.

77. In this context, reference has been made to the Children First Act 2015. The definition of "harm" for the purposes of that enactment includes "neglect of the child in a

manner that seriously affects or is likely to seriously affect the child's health, development or welfare". In general terms, the Act obliges medical personnel and social workers to report their knowledge, belief or suspicion that a child has been harmed.

The second issue – the comparator

78. On the question of the appropriate comparator, the submissions of the appellants do not appear to differ in any significant way from the conclusion of the Court of Appeal. They acknowledge that Article 40.1º permits different treatment of categories of persons where differences of capacity or social function are identified. Social function is therefore seen as a significant aspect of the analysis. It is submitted that if no difference of social function can be found with the comparator, the discrimination is presumptively illegitimate. The appellants identify the relevant social function as that of providing daily repetitive and essential care to a sick child, and say that Mr. Donnelly performed that function in the hospital in the same manner as it would be carried out in the home. The appropriate comparator is therefore a parent of a severely disabled child who is providing constant care and supervision in the home and not in a hospital. The rights of both parent and child are engaged. It is contended that Mr. Donnelly has been excluded, although he carried out an identical social function, because he did so in a different venue.

The third issue – burden of proof

79. The appellants accept that the presumption of constitutionality applies, and say that they do not go so far as to claim that the burden should be reversed. However, they do argue that they have adduced sufficient evidence to shift the onus onto the State to demonstrate justification. In *Lowth* and *MhicMathúna*, the State provided significant statistical evidence. In *S.M. v. Ireland [2007] 4 I.R. 369 ("S.M.")* there was an expert report on the consequences of underage sex.

80. The appellants submit that the Court of Appeal went too far in requiring them to prove the effect of the exclusion on an entire category rather than on themselves. Reference is made to the judgment of O'Donnell J. in *M. (A Minor)*, where he said:

> *"Claims made by reference to Article 40.1 of the Constitution pose undoubted difficulties of analysis… It is important, therefore, that analysis of claims under Article 40.1 avoids the twin hazards of oversimplified justification for any legislative differentiation which would insulate almost any legislation from challenge on the one hand, and an overly rigid structure of analysis and a demanding scrutiny from which no provision can escape, on the other."*

81. It is argued that the burden of proof imposed by the Court of Appeal is an example of oversimplified justification. The appellants submit that there is a line of authority in which a lower burden has been imposed on certain categories of claimant. In this regard they refer to an analysis of the case law in some commentary, most notably in *Kelly: The Irish Constitution* (5th ed), as supporting the argument that there has been a trend in Irish law on equality towards a shifting of the burden of proof in cases where the legislative classification is based on an essential attribute of human personality. The learned authors of *Kelly* commence their discussion of this possibility that there is a "two-tier" approach with reference to the judgment in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321 ("*Re Article 26 and the Employment Equality Bill 1996*").

82. Two aspects of that judgment are relevant. One argument related to certain age-related exemptions from the obligations imposed in the Bill, which were said by counsel opposing the Bill not to be objectively justifiable and to violate Article 40.1º. At p.346 of the report, the Court said that such an interpretation would defeat the purpose of the second sentence, which put beyond doubt the legitimacy of measures placing individuals in different categories for the purposes of the relevant legislation. It went on:

> "*In particular,* ***classifications based on age cannot be regarded as, of themselves, constitutionally invalid.*** *They must, however, be capable of justification on the grounds set out by Barrington J. in Brennan v. A.G…*" (Emphasis added.)

83. The Court then addressed, and rejected, an argument by the Attorney General that Article 40.1º was essentially a prohibition against unjustifiable discrimination in

legislation that could not be violated by conditions set out in legislation intended to prevent discrimination.

> *"The Court is satisfied that this submission goes too far. The guarantee of 'equality before the law' is in its terms not confined to the State in its legislative role. It is unnecessary, in the context of the present case, to consider to what extent, if any, the provisions of the Article may be applicable in the area of private law. It is sufficient to say that the Article, in common with other Articles of the Constitution which are concerned with fundamental rights, does not confer a right on any person which, in the absence of the Constitution he would not in any event enjoy as a human being. As Walsh J. said, speaking for this court in The State (Nicolaou) v. An Bórd Uchtála [1966] I.R. 567 at p. 639, Article 40.1 is:-*
>
> > *'An acknowledgement of the human equality of all citizens and that such equality will be recognised in the laws of the State.'*
>
> ***The forms of discrimination which are, presumptively at least, prescribed by Article 40.1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions.***
>
> ***Discrimination based on age would not seem, at first sight, so clearly within the ambit of Article 40.1****…"*
> (Emphasis added.)

84. The emphasised sentences in the two quoted passages are seen by the authors of *Kelly* as suggesting that the burden in a challenge might shift, at least initially, depending on the basis for the particular statutory classification. They see *Lowth* as a retreat from this position, but *An Blascaod Mór* as a return to it with Barrington J.'s description of "an unusual and dubious classification with ethnic and racial overtones" as "suspect" and lacking in legitimate legislative purpose. The context for those remarks was a challenge to legislation that permitted compulsory acquisition of properties on the Great Blasket, but exempted a category of landowners on what was in effect a test of ancestry. This is seen in *Kelly* as giving rise to a rebuttable presumption that

classifications based on suspect grounds would not satisfy the rationality limb of the *Brennan* test. Reference is also made to *D. v. Residential Institutions Redress Committee* [2009] IESC 59, [2010] 1 I.R. 262 ("*D.*"), where Murray C.J. said that the judgments in *Re Employment Equality Bill 1996* and *Brennan* should not "*be interpreted as imposing a burden of justification on the Oireachtas, save, it may be, for cases of invidious categories of the sort considered to be 'presumptively, at least, proscribed [sic] by Article 40.1 [though] not particularised…*' "

85. The background in *D.* was a claim made by a woman who had been briefly placed in a residential institution some days after reaching the age of 18 in 1968. Her claim for redress was rejected because she had not been a "child" within the meaning of the Act providing for redress, although she was a minor, or infant, under the law as it stood at the time she was placed in the institution. She contended that this decision was a violation of Article 40.1º, because it discriminated between two categories of persons who were, in law, all children at the time of entry into an institution. The High Court held that the setting of an age limit was discriminatory and that the State had failed to discharge the burden of justifying it.

86. The appeal was allowed by this Court. Delivering the judgment of the Court on the constitutional issue, Murray C. J. stated in clear terms that any person wishing to challenge the compatibility of a provision of an Act with the Constitution must overcome and rebut the fundamental principle of the presumption of constitutionality. He noted the fact that almost all legislation addressed to the regulation of society resorts to some form of classification, and that age was frequently used for this purpose. There was nothing in such a classification, taken on its own, to suggest that it was invidious, unfair, or, in the legal sense, discriminatory. Age did not raise the sort of concerns posed by the types of discrimination referred to in the passage above from *Re The Employment Equality Bill 1996.* The Court was satisfied that it was for the claimant to demonstrate a *prima facie* basis for the claim that the classification was discriminatory.

87. *Kelly* sees the decision in *M.D. (A Minor) v. Ireland* as another retreat from the potential new approach. There, the Court rejected a challenge brought to provisions of the Criminal Law (Sexual Offences) Act 2006, which made certain conduct a criminal

offence when engaged in by a male under the age of 17 but not when engaged in by a female under 17. As described in the High Court, this amounted to a limited immunity for girls in the one area of sexual activity that could result in pregnancy. The adverse effects of underage sexual activity were not the same for boys as for girls, and the distinction was not irrational.

88. The judgment of the Court, delivered by Denham C.J., does not address the question of the burden of proof. However, it describes the fundamental constitutional question as being whether it was for the Oireachtas or the Court to make a judgment as to whether the risk of pregnancy justified the exemption of girls but not boys. The conclusion was that decisions of such sensitivity and difficulty were matters for the legislature, since courts should be deferential to the legislature on social policy.

89. Finally, the authors refer to *Fleming v. Ireland* [2013] IESC 19, [2013] 2 I.R. 417 ("*Fleming*") and O'Donnell J's judgment in *Murphy v. Ireland* (referred to above) as affirming that certain classifications would be "closely scrutinised" (*Fleming*) or "must be demonstrated to comply with the principles of equality" (*Murphy v. Ireland*). In *Fleming*, the appellant contended *inter alia* that the law making it an offence to assist a person to commit suicide discriminated against disabled persons, who might, by reason of their disability, require assistance to end their lives. Her objective in the proceedings was to ensure that any person who gave her such assistance would not be subject to criminal prosecution.

90. The case was, obviously, a complex and difficult one and a number of significant issues were considered. For present purposes, it is relevant to note, firstly, that the Court reaffirmed the centrality of the presumption of constitutionality and said that it should be regarded as having particular force in cases where the legislature was concerned with implementing public policy in respect of sensitive matters of social or moral policy. Secondly, the judgment refers to a submission made on behalf of the appellant, derived from Canadian jurisprudence, that the court should firstly determine in general whether the right for which she contended existed, whereupon the onus should shift to the State to justify by evidence any limitation on that right, by reference to the principle of proportionality. It was observed that there was no support in the jurisprudence of the court for such an approach and the court accordingly reserved its position for a case in which the issue properly arose, and was the subject

of focussed argument as to whether it, or any part of it, was compatible with the Constitution.

91. The scope of the guarantee under Article 40.1º was the subject of detailed consideration. The following passage commences at p.451 of the report:

> *"If a law makes a distinction on its face between citizens, it may be necessary, depending on its context, to inquire into its justification. The justification for the application of a law to a particular category of persons may be obvious. Where a law is concerned with the regulation of a particular type of economic or other activity, it will necessarily be framed so as to apply only to people carrying on the activity in question. Even then, it may in principle be possible to show that the category of persons regulated is unfairly under or over inclusive. It may be unfairly targeted against one class of persons.*
>
> *More generally, a law will be closely scrutinised if it classifies people by reference to such classes as race, religion, gender or nationality. These are categories where, as a matter of history, it is possible to detect the operation of conscious or unconscious prejudice…as the case of MD (a minor) v. Ireland [2012] IESC 10, [2012] 1 I.R. 697 shows, a distinction based on gender may be so closely related to the very nature of gender difference that it is justified. Classification by reference to age or disability may be suspect or may be easily explained. Benefits granted by reference to age or disability may be easy to justify."*

92. The burden of proof prescribed by the Court of Appeal in respect of social welfare legislation is said by the appellants to contrast with the decision of this Court in *McDonagh*. The issue there was the interpretation of the statutory provisions governing the appeals procedure where a claim for DCA had been refused, and there is, therefore, no consideration of the substantive merits. The Court accepted that DCA was designed to provide assistance to those with a particular need, over and above that of the average parent, by reason of having a child with a severe disability. Accordingly, the Court considered that it was proper to approach the interpretation of

the Act on the basis that it was a remedial statute. The appellants in the instant case submit that the approach taken suggests an expansive reading of social welfare entitlements for those caring for sick children.

93. It is contended that to require the appellants to show that "*all, many or most parents whose children are hospitalised in these circumstances do, can or must provide the same care as [Mr. Donnelly] and his wife did*" would place an insurmountable burden on them. It is said to be unreasonable to expect parents in this position to provide a detailed statistical analysis, particularly when the respondents have available to them all the relevant information relating to applications for DCA. The appellants are privy only to their own circumstances, and no applicant would be able to afford the expense involved if what is required is a commissioned professional survey proving the effect on all or most of the others in the class. In any event, it is submitted that all members of the class of parents whose children are in hospital are excluded, while the key issue is that the care and attention provided by a parent.

94. It is submitted that, at a more fundamental level, where the justification for differential treatment is based on a "state of facts" then it is for the State to adduce evidence of those facts. Again, it is argued that since DCA is not means-tested, and since the State funds a home care package for Henry, the justification cannot lie in any alleged duplication of benefits.

95. The final issue in relation to the Constitutional aspect relates to the argument about the "constitutional lacuna". The appellants accept that this only arises if a substantive unconstitutionality is established.

The fourth issue

96. The appellants rely upon the jurisprudence of the ECtHR for the proposition that, while there is no obligation on States to provide any particular social welfare payment (because there is no Convention right to acquire property), payments that are in fact provided generate a proprietary interest and must be administered on a non-discriminatory basis. The cases referred to as illustrating these principles are *Stec v. United Kingdom* (2006) 43 EHRR 1017 ("*Stec v. United Kingdom*") (a difference in the pensionable ages for men and women was objectively justified because it addressed "factual inequality" in their earnings) and *Carson v. United Kingdom*

(2010) 51 EHRR 13 ("*Carson v. U.K.*"). Child benefits have also been found to be a demonstration by States of their respect for family life within the meaning of Article 8 (*Niedzwiecki v. Germany* (2006) 42 EHRR 33).

97. As in the courts below, the appellants place heavy reliance on *Mathieson* for their arguments in relation to the ECHR. They take issue with the grounds upon which the Court of Appeal distinguished it, arguing that the imposition of a high burden of proof is not in line with the judgments in *Mathieson*. They argue that there was no suggestion in the judgments that the Secretary of State would automatically have succeeded if evidence controverting the NGO reports had been adduced. The UK Supreme Court undertook a detailed analysis of how the rule actually affected the family in question.

Submissions of the Irish Human Rights and Equality Commission

98. The Commission was given leave to appear as *amicus curiae* in the appeal.

The first issue – the test

99. On the question of the proper approach to a challenge based on Article 40.1º, the Commission agrees with the Court of Appeal in relation to the general principles governing the justification of differences of treatment. At a minimum, a legislative classification which distinguishes between comparable persons or classes of persons must have a legitimate purpose, must be relevant to that purpose and must not be unfair, unjust or unreasonable. The Commission submits that this test has increasingly been regarded as incorporating an element of proportionality, and that this is as appropriate an approach to the equality guarantee as it is to cases involving other fundamental constitutional rights. It is also said to be consistent with the caselaw of the Court of Justice of the European Union regarding the Charter and that of the ECtHR regarding the Convention.

100. However, the Commission submits that the Court of Appeal fell into error in treating *MhicMhathúna* and *Lowth* as laying down what it sees as, in effect, a distinct test for

the assessment of legislation in the field of social protection. Four factors are addressed in this regard.

101. Firstly, it is submitted that, while the courts should afford due deference to the Oireachtas in the allocation of benefits and allowances, there must nonetheless be careful consideration in a case where it is claimed that a particular difference of treatment discriminates contrary to Article 40.1º. The Court must take the nature of the legislation into account, but the fact that it relates to social welfare or taxation does not mean that a distinct test for compatibility is to be applied.

102. Secondly, the Commission takes issue with the proposition that, once the State has "identified" grounds for differentiating between the claimant and the comparator, the court cannot seek to assess what the extent of the disparity should be. Looking at *MhicMhathúna*, the Commission points out that what Finlay C.J. said was "*Once such justification for disparity arises, the Court is satisfied that it cannot interfere by seeking to assess what the extent of the disparity is."* The Commission sees a distinction between a finding that a justification "*arises*" as opposed to a finding that it has been "*identified*", and submits that the latter is not sufficient as a defence to a challenge. For a justification to "*arise*", it is submitted that it must be established to the satisfaction of the court. Otherwise, it is suggested, it is not possible to engage in any meaningful assessment as to whether the measure is contrary to Article 40.1º.

103. Thirdly, the Commission addresses the statement in the judgment that, 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 to be unconstitutionally discriminatory if the court is satisfied that, *generally*, the comparator class was likely to have greater needs. Insofar as this formulation may have come from the judgment of Hamilton C.J. in *Lowth* – "*deserted wives were in general likely to have greater needs than deserted husbands*…" – the Commission submits that it is open to doubt as to whether those words were intended to lay down a test of general application. It was specifically stated in the following paragraph of the *Lowth* judgment that the Court was not purporting to review the established jurisprudence. The Commission therefore submits that it is not sufficient for the State simply to conclude that the needs of one class are in general greater than another, for the constitutionality of the resulting differentiation to be upheld. There must also be

an assessment of rationality and proportionality by reference to the facts and circumstances of the case.

104. Fourthly, it is submitted by the Commission that the absence of reference in the *MhicMhathúna* and *Lowth* judgments to the nature of the grounds for the different treatment (e.g. marital status or gender), or to the possibility of different standards of scrutiny for particular types of grounds, does not mean that the judgments should be interpreted so as to exclude the application of a different form of scrutiny according to the ground of discrimination claimed, simply because of the particular legislative context. It is now recognised that Article 40.1º involves particular protection against legislation that differentiates on the basis of "*immutable human characteristics or features intrinsic to the human personality and sense of self*", and the Court of Appeal was correct in identifying disability as being among such grounds. It is contended that the differentiation between children at home and children in hospital is a differentiation based on the severity of their disability, and that it does, therefore, derive from disability.

105. Having regard to the foregoing, the Commission submits that the exclusion of the appellants on the basis of Henry's hospitalisation does give rise to *prima facie* discrimination on the ground of disability. The distinction drawn by the State, based on the fact that it discharges the costs of care for children in hospital, does not reflect either the overarching role and responsibility of a parent in the care of the child (pursuant to the Constitution) or the practical reality of caregiving for children with severe disabilities. A parent may not be able to provide medical care of the kind that may be required in a hospital but, even where such medical care is provided, the child is also likely to require the care of a parent. Where the child is otherwise eligible for the purposes of DCA, the role and responsibility of the parent will not, as a matter of practicality, stop and start according to whether the child is in hospital, and is likely to require significant adjustment to the parent's personal and professional life.

106. It is submitted that if the two objectives of the allowance are to recognise carers who, because of the severity of the disability of the child being cared for, deserve a non-means tested payment and to facilitate home care, those objectives are not served by the different treatment of children in hospital. The need for support for the care does

not change when the child is in hospital, and the evidence establishes that the training of parents in care in the hospital is necessary if care is to be subsequently provided in the home. In those circumstances, the Commission says that it is not apparent that the exclusion is rational or proportionate.

The second issue – the comparator

107. On the second issue, the Commission agrees with the assessment of the Court of Appeal as to the appropriate comparator.

The third issue – the burden of proof

108. The Commission makes a detailed submission in relation to the question regarding the burden of proof. Its overall submission is that, in accordance with the presumption of constitutionality, it is for the claimant to prove that the legislation is in breach of the Constitution but that in certain cases the burden may shift to the State to justify a difference of treatment that is shown to constitute *prima facie* discrimination. It considers that this approach is implicit in the caselaw of this Court (with particular reference to *Re Article 26 and the Employment Equality Bill 1996*, *An Blascaod Mór Teo v. Commissioners of Public Works* and *D. v. Residential Institutions Redress Committee*).

109. Further, it is suggested that this principle is reflected in EU law (legislation and the Charter as well as CJEU judgments) in the field of anti-discrimination. While these matters are not directly applicable to the interpretation of Article 40.1º, it is submitted that they are relevant insofar as they are an integral part of the State's wider constitutional framework. It would be undesirable if significantly higher levels of protection were to be available to persons who could bring their claim within the scope of EU law. It is said that the principle is also consistent with the jurisprudence of the ECtHR and with the guidance issued by the Committee on the Rights of Persons with Disabilities (relating to the UN Convention on the Rights of Persons with Disabilities, which this State ratified in 2018).

110. Reference is also made to the jurisprudence of the Supreme Court of Canada which applies a similar principle with the effect that once a claimant has established a *prima facie* case of discrimination the onus shifts to the respondent to rebut a presumption of discrimination.

111. The Commission submits that a burden on a claimant to prove that a justification relied upon by the respondent has not been established would be difficult to discharge in most if not all cases, and would be inconsistent with the fundamental nature of the equality guarantee.

112. Finally, on this aspect, the Commission refers to s.42 of the Irish Human Rights and Equality Commission Act 2014, which requires a public body to have regard, in the performance of its functions, to *inter alia* the need to eliminate discrimination and to promote equality of opportunity and treatment of its staff and the persons to whom it provides services. A public body is also required to assess, address and report on the human rights and equality issues which it considers to be relevant to its functions and purposes. It is suggested that these obligations may apply to a Minister discharging regulatory functions and that they do apply to Departmental officials assessing the application of a scheme. It is argued that where these duties are properly discharged it will result in ready access by the public body to a record of any consideration of the disparate or discriminatory impact a measure may have produced, and of any justification for same. The Commission suggests that the Court's approach to the burden of proof should take this enactment into account, since it may be seen as giving a mandate to the courts to hold public bodies to a duty to demonstrate the "equality proofing" of measures effected in discharge of public law functions. To do so would not offend the separation of powers, but would in fact demonstrate respect for the legislature.

113. The Commission therefore submits that, once the appellants put forward a *prima facie* case of discrimination on grounds of disability, it should be for the respondents to justify the impugned difference in treatment. It considers that a *prima facie* case has been shown in the instant proceedings. The lack of evidence as to the effect on members of the class generally should not be fatal to the claim, since in the vast majority of cases a claimant would have very significant difficulty in accessing or

assembling such evidence. The fact that the difference in treatment is expressly provided for in the statute does not alter that position, or mean that an evidence-based justification is not required. While due deference must be afforded to choices made by the Oireachtas in the field of social protection, that factor cannot be determinative either.

114. It is submitted that at the level of principle the UKSC analysis in *Mathieson* is applicable in this case. The Court of Appeal distinguished it by reference to the evidence put before the respective courts. However, the Commission submits (in accordance with its other arguments as summarised here) that the evidential deficit is not as significant as believed by the Court of Appeal. The assessment of a claim must be carried out primarily by reference to the facts and circumstances of the individual case, and the appellants have, it is said, put forward compelling evidence of their own circumstances. Their case was supported by the letter from the medical social worker. The appellants in *Mathieson* had adduced evidence that was based primarily on material prepared by charitable bodies for advocacy purposes – in the ordinary course such material would be examined critically, but it was accepted by the UKSC because it was not controverted by the respondents. In any event, the Commission repeats its view that there must be a shifting of the burden of proof when a *prima facie* case is established.

Submissions of the respondents

115. The respondents, represented at the hearing by the Attorney General, say that DCA is designed to help the parents or guardians of children with a severe disability with the costs of constant care and attention that is substantially in excess of that needed by a child of the same age who is not severely disabled. The history of the allowance is pointed to, with the purpose behind its introduction being to encourage and assist parents to care for a disabled child at home with the family in circumstances where, because of the additional obligations and expense involved, the child might otherwise have to reside in an institution at the expense of the State. The payment, it is said, has never been linked to the level of care actually provided by individual parents. The scheme is described as soundly based on reason, clearly non-discriminatory and not based on a suspect ground. For the Court to accede to the argument that the legislature

cannot provide only for children cared for in the home would be an impermissible intrusion into the freedom of the Oireachtas to make policy choices about the qualifying criteria of welfare schemes.

116. That being so, it became clear at the hearing that the respondents regard the debate about the nature of the evidence that might be required in an equality claim as being, to a significant extent, irrelevant. They take the position that, if their analysis is correct, the appellants could not succeed in a case of this nature, no matter what level of evidence they adduced in relation to the level of care given or the loss of income involved for the parents of children in hospital.

117. Addressing the first of the issues identified in this appeal, the respondents submit that the manner in which the appellants have framed the case does not properly take into account the factual situation. At the relevant times, Henry was in the care of the State, was in receipt of significant support from public funds in the form of medical and other treatment and was not resident with his parents. In such a situation, the State must take the ultimate responsibility for the child despite the fact that parents are also providing care.

118. The legislation is described as reflecting social policy choices made by the Oireachtas and governing the expenditure of public funds. Of necessity, the drawing of distinctions is an integral part of the legislative process. All welfare schemes have limited resources available and must therefore have qualifying criteria. A wide margin of appreciation must be allowed, since the courts should not intrude on the freedom of the legislature to make such choices. The Act benefits from a strong presumption of constitutionality (*Lowth*) and the Court plays a limited role in assessing it (*MhicMhathúna*). Payment of a social welfare benefit does not give rise to a constitutionally-protected property right (*O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181, *P.C. v. Minister for Social Protection* [2017] IESC 63).

119. The respondents submit that the relevant test is that of rationality, formulated by Henchy J. in *Dillane* and cited in the Court of Appeal judgment. This approach does not incorporate the *Heaney* proportionality test, although it does have an element of proportionality in it. The *Heaney* test was formulated for a different purpose, and to

apply it in the context of a general equality claim would simply lead to a breach of the separation of powers. The rationality test requires the court to look at the different classifications created by the legislation, and to ask whether there is a legitimate basis for the distinction. As Barrington J. C.J. said in *Brennan,* the classification must be for a legitimate purpose and relevant to that purpose. Each class must be treated fairly.

120. It is accepted that the analysis of a given measure might change over time, if it is based on assumptions that turn out to be, or become, unfounded, but it is submitted that such a possibility would never affect the rationality of a policy stipulating that a benefit paid in the home setting, where parents have exclusive responsibility, should not be paid while the State is paying for institutional care.

121. They respondents argue that the principles deduced by Murray J. from the judgments in *Lowth* and *MhicMhathúna* are correct. This approach strikes a suitable balance between protecting the right to equality, respecting the separation of powers and allowing for the competing objectives of assistance and affordability that must be accommodated within the social protection code. They disagree with the submission of the Commission to the effect that the Court of Appeal has created a separate test for the assessment of social welfare legislation, saying that what the Court did was to apply the established principles relating to the presumed constitutionality of social and economic legislation.

122. However, the respondents do contend that in any event separate considerations arise in respect of a challenge that is based purely on Article 40.1º, where there is no claim of an infringement of an individual's other constitutional rights. The Court of Appeal's summary of the principles derived from *MhicMhathúna* and *Lowth*, in acknowledging the significant deference that had to be given in this area, was not applying a "distinct test". Rather, it was acknowledging the different roles of the Court and the Oireachtas. The *Heaney* test is applied where there is a claim that legislation infringes a person's constitutional rights but not to an equality assessment of legislation, and insofar as *Dokie* suggests otherwise it is wrong. If it were to be applicable in the latter class of case, the Courts would risk breaching the separation of powers in relation to the validity of social and economic policy choices that must be made in the context of social welfare legislation. In any event, an attempt to insert a *Heaney* test into this context would miss the point of a proportionality test for the

infringement of a constitutional right. It is noted that in *S.M.* Laffoy J. declined to apply *Heaney*, since it was not for the court to determine what the legislation in respect of sentencing should be.

123. It is contended that when children are in hospital "*their medical and other care is provided by the State and funded entirely by the State*". That is the "*state of facts*", in the language of *Lowth* and *MhicMhathúna*, identifying a distinction between two classes of persons which the State was entitled to recognise. This, it is submitted, is a classic case of the Oireachtas determining that it will treat differently situated persons in a different manner, having regard to the circumstances arising for each group. It was a reasonable and rational choice in relation to the expenditure of public funds in the implementation of social policy. It was also reasonable for the Oireachtas to determine that there should not be duplication of expenditure.

124. In those circumstances, the respondents argue that it is not the role of the courts to examine the nature or extent of any disparity further. They do not accept the suggestion put forward by the Commission that the use of the word "*arises*" in *MhicMhathúna* would permit the Court to do otherwise.

125. The respondents agree with the analysis of the Court of Appeal in paragraph 58 of the judgment. The difference cannot, on that view, be described as arbitrary or capricious or otherwise not reasonably capable of supporting the selection or classification complained of. There is no support in the authorities for the proposition that a "full scale" *Heaney* proportionality test is required in the case of legislation relating to social policy and the expenditure of public funds, and the application of any such analysis would probably require the courts to engage in assessing the extent of any disparity. That would, contrary to well-established principles, require engagement with the social and economic choices made by the Oireachtas.

126. In any event, the respondents contend that there is no basis for suggesting that any form of proportionality requirement has not been met in circumstances where there is a reasonable relationship between the exclusionary provisions and the aim of providing greater support for parents caring for children at home while protecting the public purse. There is a rational relationship between any adverse consequences of like positioned persons and the objective of that differentiation.

127. It is argued that the submissions of the appellants and the Commission in relation to the objective of the exclusion are based on a misunderstanding of the purpose of DCA. It is not simply to provide assistance to parents where a child with a disability has substantial additional care needs. It is to recognise the additional expense and obligations placed on such parents caring for the child in their own home. Therefore, the preclusion on payment while the child is resident in an institution is said to be "inexorably" linked to the nature of the payment and the reason why it was introduced. It is not affected by the fact that, as in this case, care is indeed also provided by the parents.

The comparator

128. In relation to the question of the appropriate comparator, the respondents accept in their written submissions that the comparison must be carried out by reference to Mr. Donnelly's role as the parent, guardian and carer of a child with a disability. It is submitted that, for the purposes of an Article 40.1º analysis, the focus must be not only on the relevant comparator but the context in which the comparison is being made (with reference to the judgment of O'Donnell J. in *MR and DR v. An tArd Chláraitheoir* [2014] 3 I.R. 533). It is argued that the appellants' analysis of the social function of Mr. Donnelly in this regard is too narrow and ignores the significant distinction between his situation and that of parents caring for their children at home. It is incorrect to say that the only difference is the venue in which care is provided, since there is a significant difference in how the care is provided, how it is funded and who provides it.

129. This position shifted to some extent in the hearing, with the Attorney General also arguing that the purpose of payment itself is based on the assumption that parents of *severely disabled children* who are cared for *at home* have greater needs and obligations than the parents of *non-disabled* children who are cared for *at home* – hence the statutory criterion that the child requires care substantially in excess of that required by another child of the same age.

The third issue

130. The respondents support the reasoning of the Court of Appeal in relation to the burden of proof. Noting that a statutory scheme will not necessarily be invalid merely because it results in unequal treatment of two individuals whose situations are similar, they say that there was no evidence before the court demonstrating that Mr. Donnelly was treated differently to like-positioned persons. There was evidence of the care he provided while Henry was in hospital, but not of care provided in the home. There was no evidence of the comparative position as regards the care generally provided in homes or the relative costs.

131. The respondents also support the finding of the Court of Appeal that the appellants could not succeed even if an altered standard of review were to be applied, since the differential arises from the definition in the statute itself. There is no support in the jurisprudence for the proposition that a burden should have been placed on the State to prove that the classifications adopted by the Oireachtas were rational, and the imposition of such a burden would run directly counter to the principle that legislation of this nature benefits from a strong presumption of constitutionality. While the appellants complain that the burden placed on them is almost insurmountable, it was described by this Court in *Lowth* as "*formidable*". The burden placed on the State is to demonstrate that there were grounds upon which the Oireachtas could decide to introduce different categories of beneficiary.

132. The submissions of the Commission in relation to the proposed shifting of the burden are not accepted. It is argued that the EU principles relied upon are concerned with claims of discrimination as between individuals, and not with the question of legislative classifications. Principles applicable to the former cannot be simply "read across" to the latter. Similarly, the Canadian case-law referred to does not address the validity of legislative classification. Section 42 of the Irish Human Rights and Equality Commission Act 2014 cannot be seen as altering the burden of proof in constitutional cases.

133. As far as the letter from the social worker is concerned, the respondents say that this was relied upon in the High Court only for the purpose of demonstrating the extent of care given by Mr. Donnelly in the hospital. They maintain that it was not argued at that stage that Mr. Donnelly was, or felt, obliged to be in the hospital. The

respondents state that there is "clearly" no such legal obligation, and argue that the letter does not suggest otherwise.

The fourth issue

134. Turning to the Convention argument, it is accepted by the respondents that, while States are not obliged to provide any particular social welfare payments, any scheme of payment actually adopted must be administered in a non-discriminatory fashion. However, it is noted that in *Stec v. United Kingdom* the ECtHR said that Article 14 did not prohibit a State from treating groups differently in order to correct "factual inequalities" between them.

135. In written submissions, it was argued that the conclusions of the UK Supreme Court in *Mathieson* were centrally linked to the significant body of evidence adduced by the claimants and the absence of any controverting evidence in the case. This view was said to be supported by the nature of the reliefs granted by the Court, which were limited to the individual claimant concerned rather than to the impugned measure. In the instant case, the reports relied upon in *Mathieson* were ruled inadmissible and there was no other evidence of the same nature. While the Commission submits that the appellants have adduced compelling evidence as to their own circumstances, the respondents say that this is not the point – the issue in *Mathieson* was whether or not the evidence demonstrated that the justification relied upon by the Secretary of State in respect of the legislative classification was sustainable. The finding was that the assumptions underlying the bright-line rule were in fact groundless. There is no evidence in the instant case upon which such a finding could be made.

136. The respondents also rely, however, on the more recent decision of the UKSC in *R(SC) v. Secretary of State for Work and Pensions* [2021] UKSC 26 (hereafter "*SC*") to argue that *Mathieson* was incorrectly decided and should not be followed by this Court.

The ECHR – *Mathieson* and *SC*

137. The Mathiesons' challenge was grounded on Article 14 of the ECHR, read in conjunction with Article 1 of the First Protocol. Article 14 provides that the enjoyment of rights and freedoms 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*". The UKSC accepted the argument that the claimant had a status within the scope of Article 14, being the status of a severely disabled child in need of lengthy hospital treatment.

138. The leading judgment is that of Lord Wilson, with whom Lady Hale, Lord Clarke and Lord Reed agreed. In the light of the subsequent debate in this Court, it is important to consider certain features of the analysis in the judgment of the relevant Article 14 jurisprudence. Lord Wilson noted, firstly, that in order to rely upon this Article the Mathiesons did not need to establish that there had been a violation of another Convention right, but only that the matter came within the scope or ambit of such a right. Secondly, it was accepted that the child in question had a "status" for the purpose of Article 14, being the status of a severely disabled child in need of lengthy in-patient hospital treatment. Thirdly, the analysis in *Stec v. United Kingdom* was adopted:-

> *"[A] difference of treatment is…discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."*

139. Next, Lord Wilson acknowledged that, while the ECtHR concept of the "margin of appreciation" was not apt to describe the approach of domestic courts to domestic legislation, the domestic courts should be slow to substitute their own views for that of the executive in relation to the provision of State benefits. In *Humphreys v. Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545, the UKSC had held that a challenge should be determined by reference to whether the rule in question was "manifestly without reasonable foundation", although it did not follow that the rule would escape careful scrutiny. The Court had also accepted, up to a point, the argument that a "bright-line" rule had intrinsic merits even if some hard cases fell on the wrong side of the line. In *R. (Carson) v. Secretary of State for Work*

and Pensions [2005] UKHL 37 Lord Hoffman had accepted that a line had to be drawn somewhere, and that all that was necessary was that the line should reflect a difference between the substantial majority of the people on either side of it.

140. The judgment then considers the justification put forward by the Secretary of State, who placed in evidence an extract from a 2003 parliamentary debate in which the government position was stated as being that all inpatients' disability-related needs were met by the health service, and the principle of double provision therefore applied. It was further stated that there was a therapeutic value to parents' "visits and treats".

141. Lord Wilson did not accept that all of the disability-related needs of children in hospital were in fact met by the health service, or that the reference to "visits and treats" bore any relation to the reality of the demands, personal and financial, which were made of parents of severely disabled children in hospital. The Children's Trust Tadworth/Contact a Family research was examined in this context. The campaigning purposes behind the research were borne in mind, and it was stated that the court must therefore look critically at it. However, it was noted that the Secretary of State had adduced no evidence in response to it. The appellants also produced a letter from the Citizen's Advice Bureau attached to the Great Ormond Street childrens' hospital, which stated *inter alia* that parents were required to attend hospital when their children were in-patients and that social workers would be informed if they did not. The CAB's view was that the 84-day rule was introduced at a time when families might have been discouraged or not permitted to be with their children in the hospital, and that it ignored modern-day realities. The Court therefore accepted that the Mathiesons' case was not unreflective of most parents in their situation. The personal and financial demands made on the substantial majority of parents helping to care for their disabled children in hospital were, "*to put it at its lowest*" no less than when they cared for them at home, and the respondent had an insufficient understanding of the role of parents in such situations. There was nothing to indicate that the Secretary of State had ever asked himself whether benefits at the relevant time overlapped to an extent that justified the suspension of the payment after 84 days.

142. The appellants had further submitted that the question of justification should be approached through the prism of certain international Conventions. Lord Wilson noted that such Conventions were not part of domestic law, and that the courts would not normally have regard to them. However, it could happen that the law which the domestic courts were required to apply might demand reference to them. He then went on to consider the UN Convention on the Rights of the Child, and the provision therein requiring that the best interests of the child be the primary consideration in all actions concerning children. To similar effect, the UN Convention on the Rights of Persons with Disabilities required the best interests of the child to be the primary consideration in all actions taken concerning children with disabilities. This was seen by Lord Wilson as conferring a substantive right on children, which required a decision-maker to evaluate the possible impact of the decision concerned on, where relevant, an identified group of children. No such evaluation had been carried out by the Secretary of State, and there was, therefore, a violation of international law.

143. Lord Wilson considered that this finding was relevant to the analysis of the ECHR rights of the child in the case under consideration. In brief, the finding of relevance was based on the fact that in *Neulinger v. Switzerland* (2010) 54 EHRR 1087 the ECtHR had said that the Convention could not be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. This approach had been referred to and not ruled out in previous decisions of the UKSC. The key concept here was "harmony." On this aspect, Lord Wilson concluded that a decision of a court, reached without any reference to international Conventions, to the effect that the Secretary of State had failed to establish justification for the difference in his treatment of severely disabled children who were required to remain in hospital for a lengthy period would "harmonise" with a finding that his different treatment of them violated their rights under the two Conventions referred to.

144. Lord Wilson then considered whether it would be appropriate to interfere with the findings of the specialist tribunal that had rejected the Mathiesons' claim. He concluded that the tribunal had erred in focussing, for the purpose of assessing justification for the different treatment, on the attention that the child had received in hospital in connection with bodily functions. Such needs had been the threshold for his entitlement, but since the money, once payable, did not necessarily have to be

deployed to meet those needs, there was no reason to focus so narrowly on them in considering whether or not the suspension of the payment was justified.

> *"The focus should be on whether the disability-related needs which Cameron exhibited at home continued to exist throughout his stay at Alder Hey and whether to a substantial extent Mr and Mrs Mathieson continued to attend to them there."*

145. The evidence suggested that the parents attended no less to their son's bodily functions in the hospital than when he had been at home. It also demonstrated (in the report by the charities) that the tribunal was wrong in finding that there would be only a small minority of parents whose families incurred an additional cost by reason of the fact that their child's needs could not be fully met by the health service.

146. The conclusion was that there had been a breach of the child's rights under Article 14 when taken with Article 1 of the First Protocol, in that the Secretary of State had acted unlawfully in making the decision to suspend the payment. However, the Court refused to make a formal declaration that there had been a violation. It also refused to accede to a submission by the appellants that the provisions should be read as if they did not exclude children. That was impossible, and, in any event, there could be other cases where suspension of the payment would not result in a violation of rights. The judgment thus related to the appellant only, in the light of the evidence in the case.

147. In a concurring judgment Lord Mance (with whom Lord Clarke and Lord Reed agreed) stated that he found the case to be more finely balanced. He considered that it was an important principle that courts "*should not be over-ready to criticise legislation in the area of social benefits which depends necessarily upon lines drawn broadly between situations which can be distinguished relatively easily and objectively*". He endorsed the dictum of Lord Bingham in *R. (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15:

> *"A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will*

arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial".

148. The line drawn in this case, excluding children who stayed in hospital for more than a set number of days, was a bright line that was capable of being criticised as arbitrary. The respondent had defended it on the basis that the patient's disability-related needs would be met by the hospital. However, that view failed to recognise the modern emphasis on the importance of the role of parents in continuing to provide assistance. On the evidence, a significant number of children with severe disability needs were adversely affected by the rule. The fact that other benefits remained payable to the parents, or that the child's meals were provided by the hospital, could not counterbalance the *prima facie* conclusion that the withdrawal of the payment was not matched by any reduction in the requirement for the parents to attend to the child's disability related needs.

149. Of note, these three members of the Court did not agree with Lord Wilson that the absence of any restriction on how the allowance was spent was relevant – it was seen by them as linked to the existence of disability-related needs, and it was accordingly legitimate to make its continuation or withdrawal conditional on the continuation of those needs. It may also be noted that they considered that a child hospitalised free of charge for a period longer than 84 days could be regarded as having a different status to that of a child not so hospitalised. On that basis, the focus would then shift to the issue of justification. The difference in treatment was not justified, because the child continued to have disability-related needs to which his parents were expected to continue to attend, and to meet which substantial expenditure was necessarily incurred.

150. Lord Mance agreed that the remedy to be granted should be tailor-made and limited to the particular case, by simply deciding that in the circumstances of the case the decision to suspend the payment could not stand.

151. *Mathieson* was given some further consideration by the UKSC in *S.C.* The issues in this complex case arose from the introduction of a rule limiting a particular element of child tax credit to the amount payable in respect of two children. The arguments concerned *inter alia* Article 8 and Article 1 of the First Protocol taken in conjunction

with Article 14 of the Convention. It was accepted that the ECtHR had, in a number of cases, found that a welfare benefit that was designed to facilitate or to contribute to family life by supporting families with children fell within the ambit of Article 8, for the purpose of a complaint of a breach of that Article when taken together with Article 14.

152. The sole judgment in the UKSC was delivered by Lord Reed (who had been one of the members of the Court in *Mathieson*). I will not attempt to summarise the full discussion here, but will for present purposes focus, firstly, on the reference to *Mathieson* and secondly, on the analysis of the appropriate standard of review in Article 14 claims.

153. *Mathieson* is considered in the judgment because the appellants argued (as had the Mathiesons) that the measure resulted in a breach of the UK's obligations under the UN Convention on the Rights of the Child (UNCRC). That Convention had not been incorporated into UK law, but it had been cited in some recent UK cases because a view had been taken (as demonstrated in Lord Wilson's judgment in *Mathieson*) that national courts were (in cases involving the rights of children) obliged to have regard to it when interpreting the ECHR. This view was held in *SC* to have been based on a misunderstanding of the ECtHR approach to its own obligations when interpreting the Convention. It was a fundamental principle of UK constitutional law that an unincorporated treaty did not form part of domestic law, cognisable by domestic courts. The ECtHR, on the other hand, was obliged by international law (in particular, Article 31(3)(c) of the Vienna Convention on the Law of Treaties) to take into account any relevant rules of international law when interpreting the ECHR in order to avoid, so far as it could, any conflict between the Convention and other treaties. However, the ECtHR did not regard such treaties as if they were directly incorporated into the ECHR and imposed specific obligations on the contracting States. Nor did it claim jurisdiction to determine whether contracting States had complied with obligations under them.

154. The judgment in *Mathieson* is one of a number of decisions examined in this context, because of Lord Wilson's references to the UNCRC. Lord Reed concluded that Lord Wilson had ultimately determined that the differential treatment was unjustified

without reliance on the international Conventions. The further determination in *Mathieson* that this finding "harmonised" with the finding that there had been a violation of the two unincorporated treaties should therefore not be considered to be part of the *ratio* of the decision. These remarks should, in fact, be regarded as having been made *per incuriam*, in that the Court had not been referred to the relevant authorities on the constitutional aspect. Lord Reed continued:

> *"One might add that what Lord Wilson took from the unincorporated international treaties was that the Secretary of State had been under a duty to treat the best interests of children as a primary consideration before making the legislation. There could have been no objection if he had instead treated the best interests of children as a relevant factor in the court's assessment of whether the differential treatment resulting from the legislation was justified under article 14 of the Convention: an approach which could have been taken directly from article 14 taken together with article 8 as interpreted in X v Austria and other cases."*

155. One of the arguments made by the appellants in *SC* was that the measure in question discriminated unlawfully against children living in households with more than two children as compared with children living in households with one or two children. Lord Reed considered that "status" for the purposes of Article 14 could not be defined solely by the fact that there was difference in treatment – it was necessary to identify some ground for the difference in treatment in terms of a characteristic which was not merely a description of that difference in treatment. (To put this another way, a claimant cannot simply assert that he or she has the "status" of being excluded from a particular benefit, and then mount an equality claim based on that status.)

156. However, it was not considered necessary that the characteristic identified should have any legal or social existence or importance in any other context. The legislation under consideration drew a simple distinction between households with one or two children and households with more than two children. The Court therefore accepted that being a child member of a household containing more than two children could be regarded as an individual characteristic or status for the purposes of Article 14. It may also be noted that Lord Reed observed that, since "status" simply referred to the ground for the difference in treatment, the ECtHR often did not concern itself with

consideration of the status of the claimant but moved directly to consider whether the different persons in question were in relevantly similar situations, and whether the difference in treatment was justified.

157. The judgment considers the significant question whether the UK courts had been correct in taking the approach, set out in *Humphreys*, to the effect that the court should respect the policy choice of the executive or legislature in relation to general measures of economic or social strategy in the context of welfare benefits unless it was "manifestly without reasonable foundation". For this purpose, there is a lengthy, and illuminating, analysis of the ECtHR jurisprudence on the approach to Article 14 claims. It begins by noting the settled case law (exemplified in *Carson v. UK* (2010) 51 EHRR 13) that the question whether there is an "objective and reasonable" justification for a difference in treatment is to be judged by whether it pursues a "legitimate aim" and whether there is a "reasonable relationship of proportionality" between the aim and the means employed to achieve it. There was no judgment in which the ECtHR set out a systematic analysis of the relevant factors and their interaction, but it was possible to discern patterns and draw inferences.

158. Lord Reed's own analysis (which repeatedly refers to the need to have regard to nuance and complexity) of the application of the general principles to claims concerning welfare benefits, insofar as is relevant to this appeal, is here tentatively summarised.

(1) The ECtHR distinguishes between differences of treatment on certain grounds which are regarded as especially serious ("suspect" grounds) and which call, in principle, for a strict test of justification, and differences of treatment on other grounds ("non-suspect" grounds), which are in principle the subject of less intense review.

(2) A wide margin of appreciation is usually allowed to the State in respect of general measures of economic or social strategy (including welfare benefits). In some of the cases illustrating this principle, the width of the margin is reflected in a statement that the court will generally respect the legislature's choice unless it is "manifestly without reasonable foundation". Importantly, Lord Reed considered that the phrase

"manifestly without reasonable foundation" does not express a test, in the sense of setting a requirement whose satisfaction or non-satisfaction will determine the outcome – rather, it describes the width of the margin, and hence the intensity of review. Other things being equal, a low intensity of review is appropriate in respect of measures falling into this category. However, the necessary level of scrutiny can be affected by a wide range of factors, depending on the circumstances of the case. In particular, if a differentiation is based on a suspect ground, then, even in the context of measures of social and economic policy, very weighty reasons may have to be shown.

(3) A wide margin is, in principle, available, even where there is differential treatment based on a suspect ground, where that treatment is brought about as part of the steps being taken by a State to eliminate a historical inequality over a transitional period. The same is true in areas of evolving rights where there is no established consensus.

(4) The width of the margin can be affected to a considerable extent by the existence, or absence of common standards among the contracting States.

159. Lord Reed concluded, on this aspect, that in a domestic case it was more fruitful to focus on the question whether a wide margin was appropriate in the light of the circumstances of the case than to attempt to define the ambit of the "manifestly without reasonable foundation" formulation. In this context it was necessary to bear in mind that it was possible to challenge any legislation on the basis of the principles of equality and non-discrimination, and that the courts must not interfere with the political process.

Discussion

160. At this point, I think it helpful to summarise the constitutional issues as I see them. It is clear at this stage of the case that there is no real dispute as to the appropriate comparator and in this regard I would agree with the analysis of the Court of Appeal. The first matter to consider, then, is the identification of the appropriate general principles to be applied in determining a challenge to the constitutionality of

legislation where that challenge is based purely on Article 40.1º. The context for the debate may need to be emphasised – the Court is not concerned in this appeal with, for example, a claim that a valid law has been unequally applied, or that legislation is invalid because it imposes a particular burden upon the group of which a plaintiff is a member, but with a claim that legislation conferring a benefit on one class of persons is constitutionally invalid because it excludes other persons who are said to be in a similar position to those who gain that benefit.

161. All of the parties accept that in any constitutional challenge to legislation the Court must apply the presumption of constitutionality. However, the approach of the appellants would, in its effect, require that presumption to be at least tempered in a case where the plaintiff can make a legitimate claim to be in a similar (although not identical) position to those who benefit under the particular legislative criteria. The arguments here are that the Court should either apply a *Heaney* proportionality test directly to the impugned exclusion, or should (adopting the approach of the Canadian courts, or the Court of Justice of the European Union in the context of certain areas of law) reverse the burden once a *prima facie* case has been presented and require the State to justify the differentiation.

162. Before discussing those arguments, it should I think be pointed out that the position of the presumption of constitutionality in the jurisprudence of this State has been firmly entrenched since, at least, the decision of Hanna J. in *Pigs Marketing Board v. Donnelly* [1939] I.R. 413 (a case which was concerned with the interpretation of the relevant provisions of both the Constitution of Saorstát Éireann and Bunreacht na hÉireann). Hanna J. held that the courts must accept as an axiom that a law passed by the elected representatives of the people was presumed to be constitutional unless and until the contrary was clearly shown. That principle has never been seriously questioned since.

163. It is also clear from the authorities that it is particularly necessary for the courts to respect the role of the legislature in enacting laws concerned with social and revenue matters, because the raising and spending of public money involves policy decisions that are more appropriate to the elected members of the legislature than to the courts. The point is that the allocation of different roles by the Constitution means that the

courts must be particularly aware of the danger of usurping the task of the legislature and imposing their own choices in the areas under consideration. This danger is, I think, more likely to arise in a case such as the instant appeal, where the claim is based purely on a claim to equality and the appellants do not suggest that any other right has been interfered with. I would not see the distinction between different types of legislation as giving rise to a *separate* test with *different* criteria, but it is one of the significant factors that determines the level of intensity of the court's scrutiny.

164. The distinction between a challenge based on infringement of a substantive constitutional right and a pure equality claim arises in this way. Where a claim is made that legislation breaches a substantive constitutional right, then, whether or not there is also a claim that the breach involves a violation of the right to equal treatment, a court will first consider (even if only for the purpose of determining that the claimant has standing to make the case) whether the claimant has established that he or she has such a right and whether the legislation in question interferes with it. If there is such an interference, the *Heaney* test is an appropriate tool in the analysis of the lawfulness of the interference.

165. However, where the only claim made is that the plaintiff has been wrongfully excluded from the category of persons who stand to benefit as a result of legislation, the position must necessarily be different. The plaintiff does not say that the legislation offends the Constitution because it impairs his or her substantive rights and has adverse consequences for him or her, but simply that it is unfair to the point of constitutional invalidity to confer a benefit on others while excluding him or her.

166. It seems to me to be clear, to begin with, that the test as formulated in *Heaney*, and accepted and applied in this jurisdiction in the years since, is not formulated in a manner capable of direct application to such a scenario. The test manifestly proceeds on an assumption that the measure under challenge has already been shown to interfere with a constitutional right. If it were to be reformulated, so as to apply directly to an assessment of legislation that creates disparities between persons said to be similarly situated, the logic of the test would require the court to commence its consideration on the basis that the drawing of such distinctions by the legislature is in itself at least a *prima facie* breach of the right to equal treatment, and to then go on to

apply the other criteria. There are a number of objections, that seem to me to be insuperable, to such a course.

167. Firstly, the drawing of distinctions is an intrinsic part of the process of legislating. The Oireachtas is obliged to define the categories of persons affected by its legislation, whether for the purpose of imposing liabilities or to confer benefits, and it does so on the basis of policy decisions that are reserved to it by the Constitution. Both the separation of powers and the presumption of constitutionality preclude an approach by the courts that can only be posited, in effect, on an assumption that *any* resulting disparities between individuals are to be perceived as, at least, a potential breach of rights requiring justification by the State.

168. Secondly, I find it impossible to see how the test could be carried out in a manner that would not result in the process of litigation becoming an established part of the process of legislating. It would be at least theoretically possible to frame many challenges to legislation in terms of an equality claim, on the basis that the plaintiff has been subjected to a liability or refused a benefit in circumstances where he or she can claim to be similarly positioned to other individuals who have been treated differently. Direct resort to a proportionality test would seem to put the courts in the position of another House of the Oireachtas, with the power not only to overturn the choices made by the elected members (as already happens where legislation is found to contravene the Constitution) but in effect to alter such choices and create new legislation based on the judges' view of what the more proper choices would have been.

169. In this regard I agree entirely with the views expressed by Laffoy J. in *S.M.*, where the problem with such an approach is clearly illustrated. The issue there arose from the anomalous sentencing provisions applicable to the common law offence of indecent assault. For historical reasons, the maximum sentence available depended upon the gender of the victim – it was 10 years in the case of a male victim, but only two in the case of a female. Part of the argument made by the plaintiff (who had been charged with indecently assaulting a number of males) was that even if the relevant provision related to a legitimate purpose, it would not satisfy a proportionality test because there was a disproportionate difference between the two penalties. Laffoy J., while holding that the legislative differentiation was invalid for other reasons, declined to embark

upon that particular analysis. She pointed out that it would have to involve forming a view on what the appropriate maximum sentences were – how else, she asked, could the court determine that, for example, a sentence twice as severe passed the test, but five times as severe did not? This was not the function of the court.

170. Similarly, the application of a proportionality test in the instant case could not but involve the Court making choices as to who should benefit from DCA. The appellants' claim, if successful, would result in an extension of the scheme to another category of beneficiaries, rather than simply the annulment of an exclusion in their own case. If, in principle, the differentiation between a family whose child is cared for at home and a family whose child is receiving long-term hospital treatment were to be found to be disproportionate, it would seem to follow that all parents of severely disabled children who give their child care and attention substantially beyond that required by non-disabled children should be included. If the argument is that there is no relevant or sufficient distinction to be drawn between parents caring for children at home and those caring for children in hospital, and that therefore proportionality does not allow distinctions to be drawn based on extraneous considerations such as the fact that a child is receiving medical attention in a hospital, then there would not appear to be any reason to exclude parents of severely disabled children who live in a residential institution if in fact the parents provide a similar level of care and attention. Nor might it be justifiable to exclude the parents of children who are not disabled, but who suffer from serious illnesses or injuries that may require lengthy and perhaps frequent periods of inpatient treatment. There is no particular reason to suppose that parents in such cases do not experience difficulties of the same nature and to a similar extent as the Donnelly family. But, at this stage, it is clear beyond doubt that the court would in effect be legislating for a new, and different, benefit that in principle should be available to all persons who care for a family member and incur cost and expense in so doing. That would clearly be a breach of the separation of powers, which reserves that power and obligation to the Oireachtas.

171. There does not appear to be any example of a constitutional challenge to legislation, based on equality alone, being decided on the basis of proportionality. *Dokie* is not such a case, in that an interference with well-established rights was certainly in issue there. The reference to Article 40.1º in the judgment is not expanded upon at all, and

it is not clear what case law was thought relevant. Insofar as the judgment suggests, therefore, that any claim of unconstitutionality made solely in reliance upon Article 40.1º must be assessed by application of the *Heaney* test, I would hold that that suggestion was *obiter* and is wrong. However, I do not consider that proportionality has no role to play in an analysis of an equality challenge. I will return to this aspect in due course.

172. It has been argued that there are other reasons, apart from the *Heaney* analysis, to alter the established approach to a constitutional challenge in the case of equality claims. The appellant submits that the presumption of constitutionality would be respected by a requirement that a *prima facie* case be made out, with the burden then shifting to the State. The Commission, in particular, suggests that the Court should adopt the position taken by the CJEU in relation to discrimination cases, where there is a partial shifting of the burden of proof, or that taken by the Canadian courts.

173. I do not consider that the CJEU decisions referred to are of particular assistance in this context. Those cited are *Danfoss (C- 109/88), Enderby (C-127/92), CHEZ Razpredelenie Bulgaria (C-83/14), Egenberger (C-414/16)* and *Cresco Investigation (C-193/17)*, all of which are concerned with the proof of claims made within the context of a private law relationship such as employer/employee, or service provider/customer, rather than in relation to a public law question concerning the validity of a law. For example, in *Danfoss* and *Enderby* the Court of Justice held that where a national court found that a particular practice or measure adopted by an employer had, as a matter of fact, an adverse impact on substantially more female employees than men, it was legitimate to require the employer to prove that it was not discriminatory. The later cases cited are directly based on EU measures, such as the Equal Treatment Directive, which expressly incorporated that principle into the test to be applied by a court. However, it may be worth emphasising that for the burden to be shifted, it must first have been shown that the class of persons said to have been discriminated against has in fact suffered adverse consequences. The inference to be drawn thereafter will, in the absence of evidence from the defendant, be that those consequences are due to membership of that class and hence are the result of prohibited discrimination.

174. One essential difference between private law disputes and constitutional challenges to legislation is that private law disputes are, of their nature, grounded in a state of facts and their resolution necessarily requires findings of fact to be made. In disputes raising issues of discrimination in the context of employment or service provision, a defendant employer may, for example, claim that it made a reasonable decision in the circumstances or that to comply with a strict application of a non-discrimination rule would cause it undue hardship. Such a defence will depend on the assessment of facts that may be entirely within the defendant's knowledge, and therefore the courts and legislatures in many jurisdictions (including this one) will require it to adduce the factual evidence grounding its claim. In contrast, the enactment of legislation is not required to be grounded on a factual assessment, capable of later evaluation by a court. The elected representatives of the People are entitled to make choices based purely on their own view of the appropriate policy and are not constitutionally obliged to establish any matter of fact before turning that policy into law. In determining the constitutional validity of a law, the courts are not concerned with what facts the legislators did or did not take into account, but with the objective meaning and effect of what they have enacted.

175. Reliance has also been placed, in this context, on the Canadian case law relating to claims made under s.15 of the Charter of Rights and Freedoms, which reads as follows:

> *(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
> *(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

176. This section of the Charter came into effect in 1985. Reference must also be made to s.1, which guarantees the rights and freedoms set out in the Charter "*subject only to*

such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

177. As I understand the jurisprudence relating to the Charter, the position in very brief summary is this. The claimant must prove all the elements necessary to establish a breach of a Charter right. That will, where the right is expressly stated to be subject to a limitation described in terms of arbitrariness or unreasonableness, include a requirement to prove facts capable of establishing arbitrariness or unreasonableness. It is only when that has been done that the burden shifts, and the opposing party must seek to establish that the challenged law constitutes a reasonable limit that can be demonstrably justified in a free and democratic society. The Supreme Court is prepared to take a flexible approach to evidentiary requirements and will frequently rely upon common sense, logic and judicial notice of public matters. It may also be noted that Canadian law has broader rules than those applicable in this jurisdiction in relation to standing, and will permit claims to be put forward on a hypothetical basis. However, it should be noted that the shifting of the burden may not ease the position of claimants greatly – as Hogg (in *Constitutional Law of Canada*) points out, they have to anticipate that the defendant will adduce evidence in the justification stage, and will therefore normally have to adduce countering evidence as part of their own case. It appears that the success rate in equality claims is relatively low.

178. This Court has frequently found the jurisprudence of the Canadian Supreme Court to be of interest and indeed of assistance, and it must be acknowledged that the proportionality test adopted in *Heaney* is taken directly from a line of authority beginning with that Court's decision in *R. v. Oakes* [1986] I S.C.R. 103 ("*Oakes*"). However, as already discussed, that test as deployed in this jurisdiction is utilised in cases where an interference with a substantive constitutional right has been identified. It is always necessary to consider carefully the legal context of an authority from a different jurisdiction.

179. It is immediately apparent, in this instance, that the text of the relevant provisions of the Charter, and hence the conceptual approach taken to its interpretation, differs considerably from that of the Constitution. Having regard to the text of the Charter, the courts do not appear to apply any presumption equivalent to the Irish presumption

of constitutionality. Furthermore, every Court tasked with interpreting a constitutional instrument builds up its own body of case law, with an inevitable accrual of judgments engaging in further and perhaps more sophisticated analysis. The citation of extracts from a limited part of that case law may not give a complete picture of how the legal principles concerned may be applied in the practice of the courts. One of the cases cited in this appeal – *Law v. Canada* [1999] 1 R.C.S. 497 ("*Law*") – is a good example of the complications that can develop. *Law* was the culmination of a line of authority that began with the first s.15 equality claim dealt with by the Supreme Court, *Andrews v. Law Society of British Columbia* [1989] S.C.R. 143. The Court in *Law* analysed discrimination in terms of the impact of a measure on human dignity, having regard to four listed contextual factors. However, in *R. v. Kapp* [2008] 2 S.C.R. 485 the Court said that this analysis had given rise to several problems. It was confusing and difficult to apply, and had led to increased formalism and burdens on equality claimants.

180. *Oakes*, mentioned above, is also the starting point in relation to the burden of proof in Charter challenges. The challenge was to a statutory reverse onus imposed on the defence in drug trafficking cases, claimed to be an infringement of the presumption of innocence protected by the Charter. Having found that the section in question violated the presumption of innocence the Court observed that the onus of proving that a limit on a right guaranteed by the Charter was reasonably and demonstrably justified in a free and democratic society was on the party seeking to uphold that limit. This finding was firmly based on the text of s.1 – the presumption was that rights and freedoms were guaranteed unless a party could demonstrate that the exceptional criteria justifying the limit were met. The Court went on to find that they were not met in that case. It was accepted that Parliament's concern in relation to drug trafficking was substantial and pressing, and was sufficiently important to warrant overriding a constitutionally protected right in certain cases. (It may be noted that in making this finding the Court referred to a number of national reports and international instruments.) However, the reverse onus failed the rational connection test. It applied even to possession of very small or negligible quantities, which could not rationally give rise to an inference of intent to traffic.

181. It can be observed here that this conclusion was based, not on a failure by the state authorities to adduce relevant evidence, but on a reading of the statute and the application of logic. That is an exercise familiar in this jurisdiction – not every challenge to a statute will involve an extensive evidential foundation being laid by either party. As Costello J. said in *Molyneux v. Ireland* [1997] IEHC 206 (a case in which the challenge was to the statutory garda powers of arrest in Dublin, which at the time were more extensive than those available outside the capital):

> *"in order to ascertain the basis for the difference of treatment which has been identified it is not necessary for the court to search the parliamentary debates to ascertain the arguments used to justify the enactment of the measure - it will usually be possible for the court to make reasonable inferences from the provisions of the statute itself and the facts of the case."*

182. There may, accordingly, be many cases where it is possible to conduct the argument largely on the basis of the terms of the statute without the need for evidence going beyond the effect of the measure on the interests of the plaintiff. As it happens, the courts in this jurisdiction have dealt with the proper application of evidential presumptions and reverse onuses in cases very similar to *Oakes*. Although this has been considered in the context of appeals against criminal convictions (see, e.g., *DPP v. Smyth* [2010] 3 I.R. 688 and *DPP v Heffernan* [2017] 1 I.R. 82), the issues could also have been dealt with in a challenge to the constitutionality of the legislation. Had that path been taken, it is entirely conceivable that the litigation would have focussed on the terms of the provision and on legal argument, with, perhaps, very little evidence being required by either party. However, different considerations arise in a claim such as the instant case, where the argument is not that the substantive rights have been interfered with but that a group of persons to which the appellants belong have been unfairly excluded from a benefit.

183. Again, some of the Canadian case law cited to the Court in this appeal relates to private law claims and not all of the cases are concerned with Charter interpretation. For example, *Ontario Human Rights Commission and O'Malley v. Simpson-Sears* [1985] 2 S.C.R. 536, cited in relation to the burden of proof, was an employment case

that was decided, not under the Charter, but under the Ontario Human Rights Code. The Supreme Court held *inter alia* that the burden of proof in a case of "adverse effect discrimination" (i.e. indirect discrimination) should be the same as in cases of direct discrimination. The rule therefore was that the complainant must show a *prima facie* case of discrimination, meaning a case which covered the allegations made and which, if the allegations were believed, would be sufficient to justify a verdict in the complainant's favour in the absence of an answer from the employer. Since, in an adverse effect case, the employer had to show reasonable steps towards accommodation or alternatively undue hardship, and since the relevant information in this regard would be in the possession of the employer, it was fair that the onus of proof in relation to those matters was on the employer.

184. Similarly, *Quebec (Commission des droits de la personne et des droits de jeunesse) v. Bombardier* [2015] 2 S.C.R. 789 concerned the provision of services (in this case, access to a specialised training course), and the operation of the Quebec Charter of Rights, rather than a challenge to legislation under the Canadian Charter. It should be noted that the complainant in that case failed because he was unable to discharge the onus of proof in relation to a crucial aspect – that he had been discriminated against on the basis of a prohibited ground.

185. I turn now to the argument based on the Convention. On this aspect, I commence by agreeing with the views of Lord Reed in *SC* on the question of "status". For the purposes of Convention analysis, it cannot be asserted that mere exclusion from a benefit confers the requisite status on a claimant. However, the characteristic relied upon does not have to have any legal or social existence or significance in any other context. I would in this case be prepared to accept that a severely disabled child who requires hospital inpatient treatment for more than 13 weeks has a "status". I would also accept that in the jurisprudence of the ECtHR, the question whether a measure is "manifestly without reasonable foundation" is one that relates to the grounds upon which the measures differentiates between individuals and therefore to the intensity of the review required.

186. The decision of the UKSC in *Mathieson* is not wholly undermined by *SC* and retains a degree of persuasive authority. However, there are reasons to treat it with some

caution in the context of the instant appeal. Firstly, the analysis did at least in part rely upon an approach that was subsequently held to have been mistaken. Secondly, it is clear that the UKSC had before it detailed evidence of the financial impact on the Mathieson family of the decision to suspend the payment. With some reservations, it also accepted the research evidence put before it, in the absence of any sufficient countervailing evidence. Not surprisingly, it was unimpressed by the "visits and treats" analysis. Finally, it is clear that the decision in *Mathieson* did not go to the validity of the legislation or involve any alteration of the legislative scheme. No general declaratory relief was granted.

Conclusions

187. It seems to me that the review of the authorities above does not demonstrate any support for the proposition that in some cases the Court can adopt a different approach to the burden of proof in claims based on the constitutional equality guarantee. There may, I think, be some confusion here as to what, exactly, is meant by the burden of proof and a *prima facie* case. "The burden of proof" is simply a term conveying the general rule that he who asserts must prove. A *prima facie* case is not made out by simply establishing that a statute differentiates between persons, or categories of persons, and that the plaintiff has been adversely affected thereby – that amounts to no more than the establishment of standing to bring the challenge, and the proposition that the burden should be reversed at that point raises precisely the same problem as to the presumption of constitutionality already discussed. In the sense in which the term is normally used, a *prima facie* case is made out where the evidence and arguments put forward by a party are sufficient to justify a ruling in his or her favour, in the absence of rebutting evidence and argument from the opposing party.

188. The authorities do demonstrate support for the following propositions:

(i) Article 40.1º provides protection against discrimination that is based on arbitrary, capricious or irrational considerations.

(ii) The burden of proof rests upon the party challenging the constitutionality of a law by reference to Article 40.1º.

(iii) In assessing whether or not a plaintiff has discharged that burden, the court will have regard to the presumption of constitutionality.

(iv) The court will also have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy.

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

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

189. It is necessary, therefore, to look at the elements of a successful claim. In my view, the formulation adopted by Barrington J. in *Brennan* and approved a number of times in this Court is consistent with the analysis in *Dillane*. The statutory classification must be for a legitimate legislative purpose, and it will not be legitimate if it is arbitrary, capricious or irrational. Further, the classification must be relevant to the legislative purpose, and it will not be relevant if it is incapable of supporting that purpose.

190. The establishment of a *prima facie* case, therefore, means presenting a case on the basis of which a court could find that the legislation does not have a legitimate objective, or that the discrimination created by it is irrational, arbitrary, capricious or not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of. If the party mounting the challenge can do this, then naturally the onus will shift to the State. No novel principles are required. However, this does not appear to be what the appellant is contending for. What seems to be sought is an approach which would require the State to adduce evidence and justify the legislation despite the fact that the plaintiff has not, in fact, presented sufficient material to fully ground a finding in his or her favour. This would, indeed, be a new approach that, as the Court pointed out in

Fleming, is not supported by authority. In my view, it is incompatible with the presumption of constitutionality.

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

192. What might be termed a "pure" equality claim may arise where the legislature has decided to confer a benefit on a class of persons, and the plaintiff is aggrieved at being excluded because he or she has at least some relevant similarity with those who are included. But the legislature is entitled to make policy choices, and therefore must be entitled to distinguish between classes of persons. To refer again to the text of Article 40.1º, the equality guarantee is not to be interpreted as meaning that the State shall not, in its enactments, have "due regard" to differences of physical and moral capacity, and of social function. I consider, therefore, that the challenge can only succeed if the legislative exclusion is grounded upon some constitutionally illegitimate consideration, and thus draws an irrational distinction resulting in some people being treated as inferior for no justifiable reason. The Constitution does not permit the court to determine that the plaintiff should be included simply because a more inclusive policy, assimilating more people sharing some relevant characteristic into the class, would be "fairer".

193. In considering whether the legislation offends against the Constitution, the Court will engage in a greater degree of scrutiny where the differentiation involves what may be termed one or more "suspect" grounds. In using the word "suspect", I do not intend to import the jurisprudence concerning that classification in other jurisdictions, which may have the potential to result in overly rigid differentiations between the applicable standards of review. It should be borne in mind that context is relevant here, and also that some grounds of discrimination, even within the core category of characteristics

of human personality, are more likely to be offensive than others and thus require more intense scrutiny.

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

195. This analysis should in my view be applied even in the areas of tax and welfare, and to that extent I would disagree on this aspect with the Court of Appeal. It is true that there was no reference in either *Lowth* or *MhicMhathúna* to such a concept, but it would appear from the reports that in neither case was it argued as an issue. (However, it could not be suggested that the courts dealing with those cases did not in fact scrutinise the evidence and arguments to the requisite standard.) I do not see a higher level of scrutiny in such cases, where warranted by the nature of the grounds for differentiation, as diluting the principle of deference to the Oireachtas in matters of taxation and welfare.

196. In this appeal it has been argued by the appellants that the exclusion from the allowance is based upon the severity of a child's disability. I cannot accept that this has been established. All severely disabled children are potentially included. The statutory exclusion does not relate to the degree or severity of a child's disability (once the threshold definition is met) but is, in fact, based primarily on the place in which the child is resident over a particular period of time. The Act distinguishes between children who are residing at home, children who reside in institutions other than hospitals and children who are being treated in hospital for a period in excess of 13 weeks. A requirement for inpatient medical treatment in the case of a child is not, in itself, something that is likely to be the subject of groundless prejudices or assumptions of inferiority resulting in a legislative decision to discriminate against such children or their families. I would not hold, therefore, that the distinction drawn

in the Act is based on a "suspect" ground. In those circumstances, it is undoubtedly more difficult to challenge the exclusion on equality grounds.

197. I consider that the Court of Appeal was correct in holding that the principal issue in the case is, as discussed by Henchy J. in *Dillane*, the rationality of the legislative differentiation. The first question is whether the legislation makes a discrimination in favour of, or against, a person or category of persons, on the express or implied ground of a difference in social function. If so, does the discrimination have a legitimate purpose, relevant to the objective of the legislation? Is it arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of? The answer to this latter question will of course entail considerations of proportionality, insofar as proportionality may be seen as an intrinsic aspect of rationality – the distinction drawn may, on its face, be rational, but it may be that in a particular case there is no rational relationship between that distinction and the measure enacted. There is no real conflict, in my view, between asking the question whether the discriminatory provision is "rational" and pursues a legitimate objective (the Irish test), and asking whether it has "no objective and reasonable relationship of proportionality between the means employed and the aim sought to be realised" (the ECtHR in *Stec v. United Kingdom*).

198. In identifying the objective of the legislation, I would not necessarily agree with the appellant's submission to the effect that one looks primarily at the exclusion provision, with the objective of the overall scheme being examined only insofar as it provides the context. It seems to me that the court must firstly consider the totality of the scheme, in order to assess the rationality of the exclusion within that scheme. Determining the objective of legislation may in some cases require evidence but in most it will be possible to "make reasonable inferences from the provisions of the statute itself and the facts of the case" (*per* Costello J. in *Molyneux v. Ireland* [1997] IEHC 206). However, it must be remembered that legislation may have more than one objective, and that the legislature cannot be obliged to craft a perfect fit in respect of each objective.

199. In the instant case, the Oireachtas has decided to give financial support to parents of severely disabled children who are looked after at home. The evidence before the Court is that the scheme was initially introduced on a non-statutory basis in the early 1970s. It is common knowledge that for many decades prior to that a very significant number of children in this State were maintained in residential institutions because, although they were not orphans, their parents were unable, or were perceived as being unable, to care for them properly at home. This would have included many children with disabilities. The State contributed to the financial maintenance of the institutions. The 1970s was the decade in which the view became ascendant that most children, including children with disabilities, were better off at home with their families. This was also seen as being of benefit to the family and the community.

200. I think, therefore, that it is reasonable to draw the inference that amongst the purposes of the allowance was that of encouraging parents in their decision to care for children with severe disabilities at home rather than leaving them in residential institutions, and to give assistance to those who might have felt financially unable to give the extra care and attention needed by the child. These were, and remain, legitimate policy objectives that benefit children, parents, families and the wider community. There is also the legitimate consideration that the State is no longer put to the expense of maintaining large-scale residential institutions. However, it does fund hospitals that specialise in the treatment of sick children. Seen in this light, the exclusion of children who are being maintained for some long-term reason in an institution, whether residential or medical, is not on its face irrational.

201. In those circumstances, this is not a case in which the Court could make a finding of invalidity on the basis of obvious irrationality, or illegitimate discrimination, merely by considering the terms of the statute. The question, then, is whether there is evidence in the case that could ground a finding that the exclusion is. As a matter of fact, irrational or illegitimate. In my view, there is not. It was necessary for the appellants to adduce some evidence of the impact of the exclusion on the group of which they are members, in order to demonstrate that Mr. Donnelly was not simply an unusual or "hard case" and that the group of parents who were eligible (i.e. those caring for children at home) was not likely to have greater needs than the group of parents caring for children in hospital. However, once the Children's Trust

Tadworth/Contact a Family report was ruled inadmissible (as it had to be, under the rules of evidence) there was no such evidence.

202. The appellants say that the analysis of the Court of Appeal presents an insurmountable hurdle, in that claimants will be unable to provide the professional, independent statistical evidence that appeared to be required. Firstly, the burden on a person seeking to strike down the legislative choices of the Oireachtas is intended to be heavy. However, it is not insurmountable. The strictures expressed in the judgment of the Court of Appeal apply to the admissibility of statistical evidence having regard to the normal rules of evidence. There may, however, be other ways to build a *prima facie* case. Thus, it would be open to a plaintiff to call evidence from suitably experienced medical, nursing or hospital social work personnel to say what, to their knowledge, is required of a parent when a severely disabled child requires long-term hospital care, and what the effect of a reluctance of a parent to engage with the care of the child would be. If there is a view prevalent in any official quarters that the role of parents is limited to "visits and treats", such evidence would be likely to be very effective. Supportive evidence of the financial impact might be forthcoming from the same sources, or from organisations such as the one that provided accommodation for Mr. Donnelly in Dublin. The appellants appear to believe that they could not have asked for such evidence from employees of the HSE, but I note that letters of support from hospital staff were provided when Mr. Donnelly applied for DCA.

203. I would observe here that proceedings of this nature will often be more appropriately dealt with in plenary form. I do not wish to be taken as criticising the choice of the judicial review option in this case – the appellants were entitled to take it, and judicial review is often understandably seen as the swifter and potentially less expensive route. However, there are undoubted advantages to plenary proceedings, which, with the availability of mechanisms such as discovery and interrogatories, the opportunity to recognise when further evidence will be necessary on a particular issue, and the ability to tease out oral evidence, are more likely to give the court a greater understanding of the factual context for a claim.

204. In my view the Convention claim must also fail. In principle, the measure in question is one that comes within the category of social and financial legislation, and the

ground for the exclusion is not a suspect ground. It does not, therefore, attract an intense level of review *per se* and the burden on a challenger is accordingly heavier.

205. Looking at the decision of the UK Supreme Court in *Mathieson*, it seems to me to be clear that the report relied upon, although not perhaps seen as fully independent, was sufficient to demonstrate (in the absence of any countervailing evidence) that the assumptions underlying the exclusion provision in that jurisdiction were not rationally based. It is also relevant that, despite the absence of adequate evidence on behalf of the State, the outcome of the case was designed solely for the benefit of the Mathieson family, with the Court accepting that the exclusion would not amount to a breach of rights in all cases. However, in the instant case, sufficiently probative evidence to this effect was not presented by the appellants. The Court does not know what the general situation of parents with severely disabled children in hospital may be. Although it might be speculated that many will indeed spend long hours caring for their children in the hospital setting, and may as a result experience financial difficulty, the Court cannot base a finding on such speculation. Similarly, the appellants have argued that the exclusion is irrational if based on cost grounds, because when a child with a severe disability is cared for at home the State will fund a care package as well as paying the allowance. However, this is simply asking the Court to guess at what the relative costs might be.

206. In the circumstances, I would conclude that the appellants have failed to discharge the burden of proving that the measure in question is either invalid having regard to the Constitution or incompatible with the Convention. I would therefore dismiss the appeal.