



Cúirt Uachtarach na hÉireann Supreme Court of Ireland

Donnelly v. The Minister for Social Protection & Ors.

On appeal from: [2021] IECA 155

Judgment delivered on 4th of July 2022

[2022] IESC 31

Headline

The Supreme Court today dismissed a challenge, brought under Article 40.1 of the Constitution and Article 14 of the European Convention on Human Rights, to a decision of the Minister of Social Protection and to certain provisions of the Social Welfare Consolidation Act 2005, as amended. The effect of these provisions excluded the first named appellant Robert Donnelly (RD) from eligibility for Domiciliary Care Allowance in respect of his severely disabled son Henry (HD), during a prolonged period when HD was in hospital. The Court held that the statutory classification, which distinguishes between parents who care for children with severe disabilities at home and parents caring for such children while they are in hospital, was not irrational and pursues a legitimate objective.

Composition of Court

O'Donnell C.J., MacMenamin, Dunne, O'Malley, Baker JJ.

Judgments

The sole judgment was delivered by O'Malley J., with whom O'Donnell CJ and MacMenamin, Dunne and Baker JJ agreed.

Background to the Appeal

The case centred on Domiciliary Care Allowance ("DCA"). This allowance may be paid in respect of a child who has a severe disability requiring continual care in excess of that normally needed by a child of the same age. The second named appellant is a child who comes within this description. DCA is payable to the person providing for the care of the child at home (a "qualified" person).

The complaint arose from the exclusion from eligibility of children who are resident in hospital for more than a specified period of time. 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". However, regulations made under the statute provide for some limited exceptions

to the exclusion. DCA may be paid for up to 13 weeks in a 12-month period while a child is in hospital. HD required inpatient hospital treatment for a considerably longer period than 13 weeks, during which time his father RD cared for him in the hospital for eight to twelve hours a day. It was contended that the exclusion created an unjustifiable discrimination against the appellants in comparison with parents caring for severely disabled children in the home.

Both the High Court and the Court of Appeal dismissed the challenge. Binchy J. in the High Court held that there was no evidence that the statutory differentiation in treatment was not objective, reasonable or proportionate. He also noted there had been no evidence at all of the kind that was available to the Court in the UK Supreme Court case of *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47, where a similar exclusion was found to have violated a child's rights under Article 14 of the Convention. In the Court of Appeal, Murray J. agreed that while there were similarities between the position of the applicants and the comparator, the reason they were treated differently in connection with the provision of DCA was not arbitrary or capricious and was reasonably capable of supporting that difference of treatment. Murray J. also noted the evidential deficit in the present case as compared to *Mathieson*.

The appellants contended that they had made out a *prima facie* case of unlawful discrimination, in that a statute differentiating between persons or categories of people who were similarly positioned had adversely affected them. They argued that the Court should apply a proportionality assessment to the legislative difference in treatment. Alternatively, they argued that the burden of proof should shift to the State to demonstrate the constitutionality of the legislation.

Reasons for the Judgment

Applying the formulation adopted by Barrington J. in *Brennan v. Attorney General* [1983] I.L.R.M. 449 and the analysis in *Dillane v. Attorney General* [1980] I.L.R.M. 167, O'Malley J. said that any statutory classification contained in legislation must be rational and must be for a legitimate and legislative purpose. It will not be legitimate if it is arbitrary, capricious, or irrational. The classification must also be relevant to the legislative purpose, and it will not be relevant if it is incapable of supporting that purpose. [189]

O'Malley J. rejected the approach relating to the burden of proof contended for by the appellants. This approach was not supported by authority and would be incompatible with the presumption of constitutionality. The legislature is entitled to make policy choices and therefore must be entitled to distinguish between classes of people, since all legislation involves differentiating between individuals or groups. A challenge to legislation on the basis of the equality guarantee can only succeed if the legislative exclusion is grounded upon some constitutionally illegitimate consideration, and thus draws an irrational distinction resulting in some people treated as inferior for no justifiable reason. [189-192]

In considering whether legislation offends against the constitutional guarantee, the Court will engage in a closer degree of scrutiny where the differentiation involves "suspect" grounds – that is, if the

distinction in question is drawn on the basis of intrinsic aspects of the human personality such as those referred to in the case of *Murphy v. Ireland* [2014] IESC 19, [2014] I.R. 198. O'Malley J. disagreed to some extent with the Court of Appeal judgment on this aspect, holding that this analysis should be applied even in cases concerning tax and welfare legislation. Such an analysis would not dilute the principle of deference to the Oireachtas in these matters. [193-195]

In this case, the distinction drawn was not based on a suspect ground and the purposes of the allowance were, and remain, legitimate policy objectives. The purposes included encouraging parents in their decision to care for children at home rather than leaving them in residential institutions, and to give financial assistance to those who would not be otherwise able to give the extra care and attention required by the child. There was also the legitimate consideration that the State is no longer put to the expense of maintaining large-scale residential institutions for disabled children. However, it does fund hospitals that specialise in the treatment of sick children. Therefore, the exclusion of children who are being maintained for a long-term reason in an institution, whether residential or medical, is not *prima facie* irrational. [196-200]

In circumstances where the Court could not make a finding of invalidity on the basis of obvious irrationality, or illegitimate discrimination, merely by considering the terms of the statute, evidence was necessary to ground any finding such irrationality or discrimination. However, adequate probative evidence had not been adduced. [201] Accordingly, the constitutional claim could not succeed.

The measure in question was one that came within the category of social and financial legislation, and the ground for the exclusion was not a suspect ground. In those circumstances, the level of scrutiny required by the Convention jurisprudence was less intense. Again, there was insufficient evidence to demonstrate that the differentiation in the legislative treatment of the two groups was irrational or that the adverse effects on the excluded group were disproportionate to the reason for the classification. Accordingly, O'Malley J. held that the claim under the Convention also failed. [204]

O'Malley J. concluded that in the circumstances, the appellants had failed to discharge the burden of proving that the measure in question was either invalid having regard to the Constitution or incompatible with the Convention and therefore dismissed the appeal. [206]

Note

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

Case history

18th January 2022

[\[2021\] IESCDT 89](#)

[\[2021\] IECA 155](#)

Oral submissions made before the Court

Supreme Court Determination granting leave

Judgment of the Court of Appeal