AN CHÚIRT UACHTARACH
THE SUPREME COURT

S: AP:IE: 2022:000139

[2024] IESC 1

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

Between/

JOHN O'MEARA, JACK O'MEARA (A MINOR SUING BY HIS FATHER AND NEXT FRIEND JOHN O'MEARA) THOMAS O'MEARA (A MINOR SUING BY HIS FATHER AND NEXT FRIEND JOHN O'MEARA) AND AOIFE O'MEARA (A MINOR SUING BY HIS FATHER AND NEXT FRIEND JOHN O'MEARA)

Applicants/Appellants

and

MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

Respondents/Respondents

JUDGMENT of Mr. Justice Gerard Hogan delivered the 22nd day of January 2024

Part I - Introduction

1. I agree with the judgment which Woulfe J. has just delivered and with the order which he proposes. I also gratefully adopt his summary of the facts, so that it is not necessary for me to recapitulate the details of the background facts of this appeal or the relevant legislative provisions. I also agree generally with the judgment of O'Donnell C.J. insofar as he deals with the Article 40.1 issue which arises in this case, but I respectfully disagree with the remainder of his judgment so far as the interpretation of Article 41 is concerned.

2. As Woulfe J. has explained, the first appellant, John O'Meara, was the long-term partner of the deceased, Michelle Batey. She tragically died at a young age in January 2021 as a result of a combination of cancer and COVID-19. They had been in a committed relationship together for some twenty years prior to her death. Ms. Batey was the mother of the second, third and fourth applicants, who were born in 2008, 2010 and 2012 respectively. Prior to her death, the couple lived with their children in their family home in Co. Tipperary. While the couple had originally decided not to get married, they had nonetheless hoped to do so once the serious nature of Ms. Batey's medical diagnosis manifested itself. As it happens, Ms. Batey passed away in January 2021 before this could prove possible.

3. Following Ms. Batey's death Mr. O'Meara applied for a particular contribution-based social welfare payment, namely, the widow's, widower's or surviving civil partner's contributory pension ("WCP"). This is provided for by Chapter 18 of Part II of the Social Welfare Act 2005 ("the 2005 Act"). The payment in question is contribution-based, and it is not a means-tested payment. For completeness one may add – although this is not relevant to Mr. O'Meara's claim – that WCP cannot be claimed if the claimant is in receipt of any other social welfare payment or if the person is a participating in a Community Employment scheme.

4. As it stands, however, the relevant provisions of the 2005 Act confine the payment of WCP to those who have been married or who have entered into civil partnerships. Since Mr. O'Meara had never married Ms. Batey or entered into a civil partnership with her, he is ineligible for that payment. This was confirmed by a decision dated 27th May 2021 of a Social Welfare Deciding Officer following a review of an earlier adverse decision in response to Mr. O'Meara's claim. It is accepted however that, having regard Mr. O'Meara's PRSI contributions at the time of Ms. Batey's death, Mr. O'Meara would otherwise have been entitled to the full rate of WCP. In 2023, Mr. O'Meara would have been entitled to a weekly sum of €225.50, plus a €50 weekly payment in respect of each child.

5. Following this refusal of WCP benefit, Mr. O'Meara and his three children then challenged the constitutionality of the relevant provisions of Chapter 18. That claim failed in the High Court before Heslin J. who rejected this contention in a thoughtful and careful judgment: see *O'Meara v. Minister for Social Protection* [2022] IEHC 552. This Court subsequently granted leave for a direct appeal to be carried to be this Court pursuant to Article 34.5.4° of the Constitution.

6. This appeal raises the question of whether an unmarried couple who have nonetheless lived together for an appreciable period – such as Mr. O'Meara and Ms. Batey did – constituted a "family" for the purposes of Article 41 of the Constitution. Previous decisions of this Court – commencing with *The State (Nicolaou) v. An Bord Uchtála* [1966] IR 567 – have ruled that the protection afforded by Article 41 is confined to married couples. In my opinion, however, although the *Nicolaou* doctrine has frequently been followed in later decisions, save for the important recent judgments of O'Donnell and McKechnie JJ. in *Gorry v. Minister for Justice* [2021] IESC 55 and that of McKechnie J. in *Re JJ* [2021] IESC 1, [2022] 3 IR 1, the relevant constitutional

provisions have not, I think, been the subject of a full analysis in any previous decision of this Court.

7. The fundamental *ratio* of *Nicolaou* is that a non-marital family does not – and can never – come within the guarantees attaching to the family in Article 41 of the Constitution. I consider, however, that this conclusion is simply not sustained by any close reading of the actual text of the Constitution itself. I say this for the following reasons.

Part II: The decision in *The State (Nicolaou) v. An Bord Uchtála*

8. In the first place the language of Article 41 – and, indeed, Article 41.3.1° upon which Walsh J. placed so much reliance in his judgment for this Court in *Nicolaou* – draws a distinction between the family and marriage. If the reference to "the Family" in Article 41 was to be read as being synonymous with marriage, one would have expected that this would have been reflected in the actual wording of this provision itself, so that instead of simply referring to "the Family" in Article 41.1.1°, the Constitution would have defined this phrase as referring only to married couples and their children. The drafters of the Constitution were, after all, perfectly capable of defining terms when they thought it necessary to do so: the definitions of "Money Bill" in Article 22.1.1° and Article 22.1.2° and the definition of "the Courts" in Article 34.2 are just among a number of illustrative examples of this scattered throughout the Constitution.

9. The absence of such a definition is, in any event, scarcely an oversight. As Kingsmill Moore J. observed in *Jordan v. O'Brien* [1960] IR 363 at 374 the word "family" has a variety of meanings. In that case the question was whether the sister of the deceased was a member of the "family" for the purposes of s. 38 of the Rent Restrictions Act 1946 so that she could inherit the statutory tenancy of a house in which she had been living with her now deceased brother for the previous fifty years. This Court agreed

that this provision of the 1946 Act should not necessarily bear the same construction as the meaning of the word "Family" in Article 41 of the Constitution as the context of these provisions was quite different and they were therefore not *in pari materia*. The Court also seemed to agree in passing that Article 41 was generally confined to parents and children, but even here the matter was not absolutely clear-cut. So Lavery J. could say ([1960] IR 363 at 370-371):

> "I will accept, without deciding, that the word as used in the Constitution does mean parents and children and does not include other relationships. Certainly, the Constitution has primarily in mind the natural unit of society – parents and children which it protects.
>
> I mention in passing – without any expressing any opinion thereon – that the word might well include – and the protection be afforded to – a family where the children were adopted either legally or informally, or even to a unit where both parents being dead an elder brother and sister undertake the care, maintenance and education of younger members of the 'family' – a situation not at all uncommon."

10. The point here, of course, is that some seven years before *Nicolaou* this Court recognised in the context of an important statute itself enacted within nine years of the Constitution and whose statutory predecessor (s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act 1923) contained very similar language to the 1946 Act and was actually in force in 1937 that the word "family" could have a wide range of different meanings. As it happens, in *Jordan* this Court held that two adult siblings living together constituted a family for the purposes of s. 38 of the 1946 Act. While acknowledging the different context of *Jordan,* one may also note the comments of Kingsmill Moore J. that if the drafters of the 1946 Act had intended to confine the term

"family" to "spouses, parents and children nothing was easier than to say so in clear terms": [1960] IR 363 at 375. Making all due allowances for the fact that a constitution must of necessity be drafted in more general terms than a statute, the same can just as readily be stated with regard to the meaning of the word "family" in Article 41.

11. Second, Article 41.3.1° simply states that the State pledges to guard with special care the "institution of Marriage, upon which the Family is founded, and to protect it against attack." As a matter of ordinary English, the statement that X is founded upon Y does not mean that X is synonymous with Y: it rather means that Y is the principal idea or belief system or basis for X. (The same, incidentally, is just as true of the Irish words of Article 41.3.1°: "Ós ar an bPósadh atá an Teaghlach bunaithe…") The statement that the family is founded upon marriage reflects the cherished belief of the drafters of the Constitution – and many others, both then and now – that the commitments and bonds of marriage provide the most secure social structure for the expression of human love and sexuality and the raising and education of children. But it does not follow that other forms of family life are thereby automatically excluded from the protection of Article 41 on some *ex-ante* basis.

12. Third, both Article 41.1.1° and Article 42.1 refer to "the Family." (The word is capitalised in both provisions). The understanding as to what constitutes "the Family" must therefore be the same in both provisions. If the reasoning in *Nicolaou* is correct, then it must necessarily follow for example, that the reference to "woman" in Article 41.2.1° and "mothers" in Article 41.2.2° must simply be to married women and married mothers respectively. As O'Donnell J. observed in *Gorry* (at paragraph 66): "it has not been suggested that the 'woman' and 'mother' contemplated in those provisions is limited to a married woman even if that was overwhelmingly the model in existence when the Constitution was drafted." It is true that in *McGee v. Attorney General* [1974]

IR 287 at 311 Walsh J. said in passing that the reference to "woman" in Article 41.2.1° was to a wife. Yet if that were so one must immediately ask why the drafters did not use the term "wife" rather than "woman."

13. Quite apart from the fact that neither the term "married" or "wife" is used in this context, such an interpretation seems in any event both anomalous and implausible. Both in 1937 and today, many women who worked within the home – and quite irrespective of their work outside of the home – were not married. Is to be said, for example, that the unmarried daughter who selflessly gives of herself to look after her aged parents does not fall within the protection of Article 41.2.1°?

14. In passing one might add that the other reference to "women" in the Constitution is contained in Article 45.2.i. This is one of Directive Principles of Social Policy, so it is not directly justiciable in a court of law. While the context of this provision is admittedly different, the statement in Article 45.2.i that the State shall direct its policy towards securing to ensuring that "men and women equally have the right to an adequate means of livelihood" is nonetheless plainly referable to all women and not just married women.

15. The same can equally be said of the reference to "mothers" in Article 41.2.2°. Is to be said that the reference to ensuring that mothers were not obliged "by economic necessity to engage in labour to the neglect of their duties in the home" was simply to mothers who happened to be married? Here the reference is to "mothers" simpliciter and this follows on from the reference to "the Family" in Article 41.1 The first reference to marriage is only to be found in the next following sub-Article, namely, Article 41.3, so that the references to "woman" and "mothers" are mentioned *before* there is any reference at all to marriage. If the reference to "woman" and "mothers" in Article 41.2 is to be read as meaning "married women" and "married mothers" respectively, then as

a matter of ordinary constitutional drafting it is somewhat curious that the first reference to marriage (Article 41.3) should come only *after* this particular constitutional provision and then in a context which does not expressly link these references to the married state.

16. After all, in 1937 the Oireachtas when enacting – and the People when approving – the Constitution would have been perfectly aware that it was often unmarried mothers who were the most economically vulnerable and that they were a particular category who might welcome and need State support to assist in defraying the cost of child rearing, even if, historically, that body showed itself reluctant to do very much about this. One might also say that, historically, at least, if there was any category of mothers who needed State support it was mothers who were not married.

17. It is true that there is impressive scholarly literature which suggests that the drafters may have subjectively understood that the references to "woman" and "mothers" were to married women and married mothers respectively: see Cahillane, "Revisiting Article 41.2" (2017) 40 *Dublin University Law Journal* 107. The courts are nevertheless generally confined to examining the *objective* meaning of the actual text of the Constitution and to use standard principles of constitutional interpretation for this purpose: see, for example, the various decisions of this Court attesting to this principle of interpretation such as the judgment of Henchy J. in *The People v. O'Shea* [1982] IR 384 at 426-427 and that of Murray J. in *Heneghan v. Minister for Housing* [2023] IESC 7, [2023] 2 ILRM 1 at 25-38.

18. The search for meaning, therefore, is not for the subjective understanding of the drafters. What counts is the *objective* meaning of the words, not least given that the People in 1937 must be taken to have adopted the Constitution by reference to that objective meaning when they were voting in a plebiscite on whether to adopt that document. This process involves "the application of the relevant canons of

interpretation, to ascertain what intention is evinced by the actual statutory words used.": *Director of Public Prosecutions v. Flanagan* [1979] IR 265 at 282 per Henchy J. While these comments were made in the context of statutory interpretation, they apply *a fortiori* in the context of the words of a constitutional text.

19. In the case of the interpretation of an ordinary word such as "woman", the canons of interpretation are perfectly clear. It is, after all "…the cardinal rule of…. interpretation that in the absence of some special reason, a word should be given its ordinary or natural meaning in its context": *Keane v. Irish Land Commission* [1979] IR 321 at 324, per Henchy J. The rationale for this was well explained by the same judge in another judgment delivered about this time, *Wilson v. Sheehan* [1979] IR 423 at 429, where Henchy J. observed:

> "The reason for that rule is that when statutes or other public or formal documents directed to the public at large…. are being interpreted, it is to be assumed, in the absence of a counter-indication, that the words used in such documents have been used in their popular rather than in any specialized or technical sense."

20. In our respective judgments in *Heneghan* both Murray J. and I separately stressed the necessity for an objective interpretation of the constitutional text. As Murray J. put it ([2023] 2 ILRM 1 at 35-36):

> "…a court can rarely be confident that pre-enactment drafts, parliamentary debates around the Constitution or indeed contemporaneous public discussion illuminate in any way the intent of those ratifying the [7th Amendment]: 'to rely on individual documents produced by a select number of individuals as part of an ongoing and evolving process of drafting as evidence of collective intention would risk engaging in the sort of errors identified by McGuinness J. in *Crilly*

> *v. Farrington Ltd*. [2001] IESC 60, [2001] 3 IR 251 at 302…To these concerns might be added, in the constitutional context, the democratic dubiousness of construing the popular will as expressed in documents of which the public were generally unaware' (Carolan, "Originalism enabled? The role of historical records in constitutional adjudication" (2013) 36 *Dublin University Law Journal* 311 at 320-311)."

21. And judged by that objective meaning of this ordinary word, it is plain that the unadorned reference to "woman" in Article 41.2 is not confined to a married woman. Save, perhaps, for a minority of lawyers and other specialists, what voter reading the text of the draft Constitution in advance of the plebiscite of 1 July 1937 could have supposed that the generic and ordinary word "woman" ("an bhean") would later be judicially interpreted as being confined to married women only in the absence of some unambiguous textual provision supporting this specialized interpretation of this word?

22. Fourth, continuing in this vein, if *Nicolaou* is correct then it also necessarily follows that the reference in Article 42.1 to the inalienable right and duty of parents to provide for the education of their children is simply to parents who are married only. On this interpretation, however, other equally anomalous results would follow. It would mean, for example, that only parents who happened to be married were free to provide education in their own homes for the purposes of Article 42.2 or to object on grounds of conscience and lawful preference to sending their children "to any particular type of school designated by the State" for the purposes of Article 42.3.1°.

23. The subject matter of Article 42.3.1° is, in any event, linked to Article 44.2.4°. This latter provision provides that legislation providing State aid for schools shall not "affect prejudicially the right of *any* child to attend a school receiving public money without attending religious instruction at that school." (Emphasis supplied). Both provisions

provide protections for parents in order to ensure that their own personal feelings of conscience and preferences in respect of the education of their children cannot be overridden by State compulsion. One could not realistically interpret these provisions as meaning that unmarried parents had no rights to object in this regard or that their children could be compelled to attend particular schools in violation of the personal conscience or personal preference of their parents just because they were not married.

24. The matter is, in any event, put beyond doubt by the actual wording of Article 44.2.4° which speaks of the right of "any" child to opt out of religious education at any school receiving public monies. It is perfectly obvious that these constitutional provisions apply alike to *all* parents and *all* children, irrespective of the marital status of the parents. This in turn must mean that the reference to "parents" in Article 42.3 is also a reference to *all* parents.

25. Fifth, returning next to Article 42, Article 42.3.2° obliges the State to ensure that "the children" – that is the children of "the parents" referred to in Article 42.3.1° – receive a certain minimum education. Here again the reference to "children" must be a reference to *all* children, irrespective of the marital status of their parents. It would be all but absurd to suggest the State had an interest simply in ensuring that the educational welfare of those children whose parents happened to be married was protected but that it was indifferent to the educational needs of the children of unmarried parents. As McKechnie J. said in *Re JJ "*it would seem an extraordinary dereliction of the State's ultimate responsibility if it could not insist upon the minimum requirements of education specified in Article 42.3 in respect of [all] children": see [2022] 3 IR 1 at 157.

26. Sixth, Article 42.4 imposes a duty on the State to provide for free primary education. Again, it would be fanciful to suggest that the State's duty in this regard should turn on

whether the parents of the children attending primary schools happened to be married. It is true that in *Nicolaou* Walsh J. stated ([1966] IR 567 at 642) that non-marital children could avail of the guarantees in Article 42.4. Yet there was no satisfactory explanation for this conclusion given that the logic of *Nicolaou* was that the protection of Article 41 and Article 42 only availed married couples and their children.

27. Seventh, the "old" Article 42.5 (which applied from the date of the coming into force of the Constitution in December 1937 until it was replaced in April 2015 by the new Article 42A) provided that the State could step in to vindicate the constitutional rights of children where "the parents for physical or moral reasons fail in their duty towards their children." Here again the suggestion that the former Article 42.5 could properly have been interpreted as meaning that the State had no obligations towards children simply because their parents were not married is perfectly unrealistic and absurd. It was rejected by Gavan Duffy P. in *Re M* [1946] IR 334 at 344 where he said that he thought that although the unmarried mother in that case could not avail of Article 41, he regarded her non-marital daughter as having the same "natural and imprescriptible" rights under Article 42 as if her parents had been married. A similar approach has been taken in the subsequent case-law (see, e.g., the comments of Henchy J. in *G. v. An Bord Uchtála* [1980] IR 32 at 87, but also in McKechnie J.'s authoritative treatment of this issue in *Re JJ* [2022] 3 IR 1 at 167-174), but no one has really been able to explain by reference to the actual text of the Constitution itself how Article 42 (or, specifically, the "old" Article 42.5) could apply to *all* children, *if* their parents (regardless of marital status) *did not also come within Article 42*. And if, as I have just pointed out, they were "parents" who were identified as part of the "Family" for the purposes of Article 42.1 (and the rest of Article 42), they must by definition also come within the scope of the Family referred to in Article 41. No one, incidentally, has ever suggested that "the

Family" referred to in Article 42.1 is not also the same "Family" which is referred to in Article 41,

28. Eight, it may also be noted that Article 45.2.v provides that the State shall "in particular direct its policy towards securing: "That there may be established on the land in economic security as many families as in the circumstances shall be practicable."

29. This is one of the Directive Principles of Social Policy and so, as I have already explained, it is not directly justiciable by a court of law. The context of this reference to "families" is also admittedly different and not directly *in pari materia* with Article 41 and Article 42. Yet there can be absolutely no doubt but that in this context the word as used in the plural was designed to apply to all those living on the family farm, including, for example, not atypical instances such as grandparents, adult siblings and close relatives, whether married or otherwise.

30. I mention Article 45.2.v in passing simply to illustrate once again by reference to text of the Constitution itself that the term "family" has a variety of meanings and, to repeat, if the drafters had wished to confine the term as it is used in both Article 41 and Article 42 simply to married couples and their children, then it would have been perfectly easy to do so.

Part IV: The implications of Article 42A in respect of the decision in *Nicolaou*

31. The new Article 42A (which took effect in April 2015) replaced the old Article 42.5. It addresses those exceptional cases where the parents "regardless of their marital status" have failed in their duty towards their children such as would entitle the State to intervene. As the "parents" in Article 42A must necessarily be the same as the "parents" referred to in Article 42, this shows by virtue of the linkage in wording between these constitutional provisions that they apply to married and non-marital families alike. Even if it be said that *Nicolaou* was correct when it was decided in July 1966 – and, for

various reason, I do not think that it was – it is also clear that it was overruled by the People when enacting the 31st Amendment of the Constitution (Children) Act 2015 which inserted the new Article 42A. The express language of the new Article 42A – particularly the words in Article 42A.2.1º, "regardless of marital status" of the parents – has implications for any interpretation of Article 42 and, by extension, Article 41.

32. As I have observed elsewhere in this judgment, the word "parents" clearly must have the same interpretation in Article 42 and Article 42A, as these provisions are clearly *in pari materia* and cover the same general ground of family, education and child-rearing. To take just one example of how these provisions interlock with each other, Article 42.1 speaks of the duty of the "parents" to provide for the "religious and moral, intellectual, physical and social education of their children." The State would therefore in principle be entitled in exceptional cases to step in by virtue of Article 42A when the failure in the "duty" of the "parents" to provide for the education of their children prejudicially affected their welfare such as, for example, where the children had received no education at all, whether at home or at school.

33. It follows therefore from the express words of Article 42A.2.1º that the reference to parents in Article 42.1 includes parents who are not married. If that is so, it follows in turn that such parents must form part of the "Family" for the purposes of Article 42.1. It further follows that the reference to the "Family" in Article 41 must have the same meaning as in Article 42.1 and, by reasons of the inter-locking nature of these provisions, include parents who are not married. If this is so, then the entire basis of the *Nicolaou* reasoning simply collapses.

Part V: Whether *Nicolaou* should be overruled

34. This brings us next to the question of whether *Nicolaou* should be overruled. The decision itself has been affirmed in at least three major decisions of this Court*: G v. An*

Bord Uchtála [1980] IR 32; *WOR v. EH* [1996] IESC 4, [1996] 2 IR 248 and *McD v. L* [2009] IESC 81, [2010] 2 IR 199. It is true that *Nicolaou* was affirmed in each of these cases but in none of them – with the partial exception of the dissenting judgment of Barrington J. in *WOR* – were the relevant constitutional provisions subjected to the close textual analysis which I have just taken the liberty of conducting. It is also clear that none of these decisions have quietened a profound sense of judicial unease regarding the quality of the reasoning in *Nicolaou*: examples, here include the dissent of McCarthy J. in *JK v. VW* [1990] 2 IR 437 at 449; Barrington J. in *WOR;* the comments of both O'Donnell and McKechnie JJ. in *Gorry* (and the extended critique of this decision found in the judgment of Humphreys J. in *IRM v. Minister for Justice and Equality* [2016] IEHC 478) and perhaps most especially the judgments of McKechnie J. in *GT v. KAO (Child Abduction)* [2007] IEHC 326, [2008] 3 IR 567 and *Re JJ*. It is also true that this Court is reluctant to overturn established precedent, but judicial fidelity to *stare decisis* cannot be allowed to trump this Court's obligation to uphold the Constitution or to perpetuate a judicial interpretation of the Constitution which is plainly wrong.

35. And there can be little doubt but that *Nicolaou* – and the other decisions which followed it – is plainly wrong. It was, to adopt the words of O'Donnell J. in *The People (Director of Public Prosecutions) v. JC* [2015] IESC 31, [2017 1 IR 417 at 623, "wrong by any standards", since, as we have seen, the Court in that case simply failed to conduct a thorough and complete analysis of the relevant constitutional provisions. The reasoning rests on a fallacy – or, perhaps, it would be more accurate to say, a combination of fallacies – which, in Holmes' memorable words, "no lapse of time or respectable array of opinion should make us hesitate to correct": *Black & White Taxi Co. v. Brown & Yellow Taxi Co.* 276 US 518 at 533 (1928).

36. The reasoning in *Nicolaou* was subjected to sustained, unsparing and searing criticism right from the start (see, in this respect, JM Kelly, *Fundamental Rights in the Irish Law and Constitution* (Dublin, 1967) and virtually every writer in the meantime from James Casey (*Constitutional Law in Ireland* (Dublin, 2000) at 463-463) to Michael Staines ("The Concept of 'The Family'' under the Irish Constitution" (1976) 11 *Irish Jurist* 223) to Oran Doyle (*Constitutional Equality Law* (Dublin, 2004) at 161-164) to Brice Dickson (*The Irish Supreme Court: Historical and Comparative Perspectives* (Oxford, 2019) at 220-222) has found this reasoning to be unconvincing and unsatisfactory. It is striking that outside of the pages of the law reports not a single writer has ever come forward to defend the reasoning in *Nicolaou*, even though it ranks among the most important decisions this Court has ever delivered. It is perhaps sufficient here to refer to Kelly's sustained criticism of almost every aspect of *Nicolaou* before he concluded (at 245) with withering understatement: "But the reasoning and the statements of principle which underlay the decision in *Nicolaou's* case are a disappointment."

37. In his judgment in *WOR* delivered some twenty years later Barrington J. was even more uncompromising, saying that the judgment in *Nicolaou* was "fundamentally flawed" and the reasoning "inadequate": see [1996] 2 IR 248 at 277, 279. In more recent times Humphreys J. has spoken of the fact that "previous decision on the lack of rights for the non-marital family are largely creatures of their time", noting that society "has transformed beyond all recognition since that chain of authority was put in motion": see *IRM v. Minister for Justice and Equality* [2016] IEHC 47. In *Re JJ*. McKechnie J. found himself in the impossible position where, by virtue of *Nicolaou*, an unmarried couple could not avail of either Article 41 or Article 42 in the context of a wardship case concerning the fate of their young son who had been totally incapacitated and left in acute pain by reason of a serious traffic accident. Beyond calling for a complete

reconsideration of *Nicolaou* and the subsequent decided cases, McKechnie J. observed that "unsatisfactory as it may be", he felt that he "was confined to approaching the issues from the perspective that Article 41 rights apply to the marital family only": see [2022] 3 IR 1 at 167.

38. As if this were not enough, the basic injustice of the decision still resonates through the decades. If anything can be gleaned from the account in *The Irish Reports* it would seem that Leontis Nicolaou cared deeply about his partner and their child, wished to marry her and supplied them with money. Yet even though An Bord Uchtála was fully aware at an early stage of his objection to the proposed adoption, the administrative and judicial agencies of this State still stood over the subsequent adoption of his child without any reference to him whatsoever. This decision was upheld by this Court because we held that he, qua unmarried father, had no rights in the matter at all. (The poignant – if unsuccessful – attempts by his birth daughter decades later to discover the whereabouts of her father are described by MacCormaic, *The Supreme Cour*t (Dublin, 2016) at 127-131). As Barrington J. pointed out in his dissent in *WOR*, this conclusion was itself based on stereotypical attitudes to unmarried fathers. All of this was compounded when this Court subsequently held in *G. v. An Bord Uchtála* in 1978 that whereas unmarried fathers had no constitutional rights in respect of their children, an unmarried mother had such an implied right which right was derived from Article 40.3.1° rather than Article 41. I cannot avoid thinking that so far from promoting basic gender equality in line with Article 40.1, a type of *ex ante* judicially created, gender-based discrimination was thereby given constitutional form.

39. I would therefore overrule *Nicolaou* (and the decisions which subsequently endorsed it, such as *G.*,*WOR* and *McD v. L*) insofar as it excluded cohabitants (and their children) on an *ex-ante* basis from the scope of Article 41 and Article 42. It is important to be

clear about this. Marriage is still the preferred constitutional status, and the State must not disadvantage married couples by treating them less favourably than cohabitants: see, *e.g.*, *Murphy v. Attorney General* [1982] IR 241; *Muckley v. Ireland* [1985] IR 472 and *Greene v. Minister for Agriculture* [1990] 2 IR 17. Not every form of cohabitation will come within the scope of Article 41 and Article 42: a young couple who, for example, had a fleeting holiday romance lasting a few weeks would probably be as a surprised as anyone else if they were told that they thereby constituted a family, even if they had lived briefly together and even if they had also engaged in sexual intimacy.

40. The Oireachtas would, accordingly, in principle, be entitled to prescribe conditions regarding the entitlements of cohabitants to a range of social benefits and tax treatment in a way which would not be permissible in the case of married couples. Examples here include, for instance, the provisions of the definition of "cohabitant" in s. 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ("the 2010 Act"), s. 172(5) of which provides for a two-year period of cohabitation in the case of dependent children and five years in all other cases.

Part VI: Article 40.1 and the provisions of Chapter 18, Part 2 of the 2005 Act

41. If we apply these principles to the facts of the present case, it will be seen that, on any view, Mr. O'Meara, Ms. Batey and the three children formed a family for the purposes of Article 41. The couple had lived together for a very long period, and they had jointly reared and educated three children. They plainly, for example, could have exercised all the rights of conscientious objection in respect of education and religious education provided for in Article 42 and Article 44.2.4.º in respect of their children. They were clearly cohabitants for the purposes of s. 172(5) of the 2010 Act. This is an example of what Finlay C.J. described in *JK v. VW* as an example of children "born as a result

of a stable and established relationship and nurtured at the commencement of [their lives] by [their] father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights of [the unmarried father] would be very extensive indeed" see [1990] 2 IR 437 at 447.

42. In these circumstances their entitlement to constitutional protection qua family for the purposes of Article 41 and Article 42 was considerable, approximating to – if nonetheless still somewhat short of – a couple who were married. It is true that in *JK* this Court, following *Nicolaou*, held that Article 41 did not apply to that particular family. But, as Doyle has observed, "although the conclusion in *Nicolaou* stood, some of the reasoning necessary to justify that conclusion no longer found favour with the courts": *Constitutional Equality Law* at 163-164. In any event, given the close similarity of the O'Mearas to the married state, they are entitled to say that any different treatment of them as compared with married couples must, in the words of Article 40.1, show "due regard" to any such differences so that they are proportionate and measured.

43. The Oireachtas is, of course, entitled – perhaps, in some instances, even obliged – to treat married couples differently. To repeat, marriage is different. It would, after all, make no sense in the light of the constitutional scheme of things to say that cohabitation was no different from marriage, when, for example, Article 41.3.2° expressly provides that a marriage can only be dissolved after two years and only when proper provision is made for the other spouse and any children of that marriage. Marriage and the protection of spouses is woven into the fabric of our law, and not just simply in the areas of tax and social welfare.

44. The Oireachtas is accordingly entitled to favour and protect the married state. What it cannot do, however, is to take such steps in a way which fails, in the words of Article 40.1, to have "due regard" to the position of other Article 41-protected families such as

the O'Mearas. The different treatment of marital and non-marital families must accordingly be measured, refined and proportionate. Given that the position of the O'Mearas approximated to that of a married couple, their family life was entitled to a considerable degree of protection by virtue of Article 41, even if, as I have already observed, it fell slightly short of that enjoyed by a married couple in similar circumstances. All of this meant that the case for the separate treatment of couple such as the O'Mearas is required to be capable of objective justification: see, e.g., the comments of O'Malley J. in *Donnelly v. Minister for Social Protection* [2022] IESC 31; [2022] 2 ILRM 185 at 239-241 While it is true that, as O'Malley J. noted in her judgment in that case, the courts must defer to the elected branches of government in terms of the raising of public monies, that in itself cannot prevent this Court from pronouncing on the constitutionality of unfair discrimination in either the tax or social welfare code: cases such as *Murphy, Muckley* and *Greene* are all testament to this.

45. Here it is necessary to address the implications of this Court's decision in *O'B v. S* [1984] IR 316. In this case this Court held that the (then operative) provisions of ss. 65 and 67 of the Succession Act 1965 applied only to marital children. While the Court held that there was no difference of capacity or social function as between marital and non-marital children for the purposes of Article 40.1, this did not matter because it found that ([1984] IR 316 at 334) a "law aimed at maintaining the primacy of the family as the fundamental unit group of society [did not] require to come within the words of the proviso [to Article 40.1] to be valid."

46. This seems to mean that a law which was designed to maintain the primacy of the married family was, in effect, immune from constitutional scrutiny on Article 40.1 equality grounds. The Court continued in this vein ([1984] IR 316 at 336):

> "Having regard to the constitutional guarantees relating to the family, the Court cannot find that the differences created by the Act of 1965 are necessarily unreasonable, unjust or arbitrary. Undoubtedly, a child born outside marriage may suffer sever disappointment if he does not succeed to some point to some part of his parents' property on intestacy, but he can suffer the same disappointment if the parent or parents die testate and leave that child no property – an event which could occur even if the Act of 1965 did enable intestate succession on the part of such child."

47. This passage calls for some comment. It is true that some children may be disappointed by the failure of one of their parents to make provision for them by will. But what is left unsaid here is that in those circumstances the disappointed child may apply to court under the terms of s. 117 of the 1965 Act. The real objection to the old version of the 1965 Act prior to its amendment by the Status of Children Act 1987 – and, by extension, to this Court's decision in *O'B v. S* – is that the Oireachtas, acting it would seem from some sense of moral disapproval in respect of the conduct of the parents, had sought to exclude the innocent, non-marital children from succession protection on some *ex ante* basis even though they were – as the Court acknowledged – *prima facie* entitled to be treated equally in the same fashion as marital children. The effect of the original version of the 1965 Act as it existed prior to the Status of Children Act 1987 was to send a message to such children that they were somehow less worthy of legal protection than children born within marriage. They suffered real and tangible discrimination as a result of the kind which Article 40.1 was designed to protect against. No attempt was made in *O'B v. S.* to explain how this form of discriminatory treatment would assort with the Preamble's objective of protecting the dignity of the individual.

48. This is the fundamental difficulty with *O'B v. S* and some other Article 40.1 equality cases from this era. I cannot help thinking that decisions such as *O'B v. S* emptied Article 40.1 of any real substance and drained it of any real meaning. A provision intended to operate as a meandering river which would gently fertilise the banks of constitutional law by ensuring that the fundamental principle of equality before the law in a democratic society was upheld was instead allowed virtually to run dry. Its vitality was drained away by decades of often uninspiring case-law from this era of the last quarter of the 20th century and it is only within the last decade or so that new life has been breathed into Article 40.1 with decisions such as that of O'Donnell J. in *Murphy v. Ireland* [2014] IESC 14, [2014] 1 IR 198 and that of O'Malley J. in *Donnelly*. This earlier jurisprudence nonetheless had somehow managed to culvert this river with artificially narrow reasoning, so that it was thus blocked by sandbags of legal formalism, casual stereotyping and timorous deference to hypothesised legislative judgments.

49. Turning now to the provisions of Chapter 18, Part 2 of the 2005 Act (i.e., ss. 123-129 of the 2005 Act), it will be seen that they do not apply to cohabitants, although they do apply to civil partners and divorcees who have not remarried or who are cohabiting. In his oral argument before this Court the Attorney General pointed to the evidence adduced by Ms. Eimear Murphy on behalf of the Minister in the High Court to the effect that WCP was intended to compensate the surviving spouse for the loss of a person who owed them certain rights and obligations in law. The payment is meant to assist with the economic aspects of his or her loss.

50. It is true, of course, that co-habiting couples do not enjoy the same legal rights and obligations in respect of maintenance enjoyed by spouses upon marriage. But

qualifying co-habitants can apply to court for maintenance where they are economically dependent on the other partner under s. 173 and 175 of the 2010 Act. They can also, for example, apply for property adjustment orders. These statutory provisions provide for a form of enforceable legal obligation to maintenance and (in some instances) capital transfer orders where the appropriate time periods of either two years (in the case of dependent children) or five years have elapsed.

51. Against the background, it will be seen that Mr. O'Meara would have had an enforceable right to maintenance against the late Ms. Batey had the circumstances ever arisen. One might add that the statutory disqualification of the appellant from eligibility is all the more striking given that both he and the late Ms. Batey have both paid the appropriate social insurance contributions over a long period of time. To this one must be added the fact that Mr. O'Meara is legally obliged to maintain his three children until (in practice) adulthood: see s. 3 of the Family Law (Maintenance of Spouses and Children) Act 1976 (as amended by s. 4 of the Status of Children Act 1987). So one might ask: where is the rationale for the separate treatment by the 2005 Act of cohabitants who qualify as qualifying cohabitants for the purposes of s. 172 of the 2010 Act as compared with a married couple? So stated, I believe that any justification for the vastly different legislative treatment of Mr. O'Meara and Ms. Batey as compared with married couples by the relevant provisions of the 2005 Act simply disappears. Cases of racial, religious or gender-based discrimination aside, I find a more direct and obvious infringement of Article 40.1 hard to imagine.

Part VII - Conclusions

52. In these circumstances, I believe that the conclusion that the provisions of Chapter 18, Part 2 of the 2005 Act effect an unconstitutional discrimination contrary to Article 40.1

is inescapable. The unconstitutional discrimination lies in the fact the 2005 Act effects an overbroad *ex ante*, automatic exclusion of a family with appreciable Article 41 family rights following a long period of cohabitation approximating to that of marriage from the scope of the WCP payment, even if these rights still fell short of the Article 41 rights enjoyed by married couples. The consequence of this finding of unconstitutionality is that the Oireachtas will have to provide for a nuanced and tailored solution which addresses these differences in a way which has "due regard" to the differences between a married couple on the one hand and a cohabitating couple of long standing in any future legislation.

53. All of this is for the future. For the moment, it is sufficient to say that I believe that *Nicolaou* and *O'B v. S* should both be overruled for the reasons which I have already given. I consider that both decisions were wrong – egregiously wrong – at the time they were delivered and the passage of time in the interval has only served to highlight the totally unsatisfactory nature of these decisions at almost every level. Both judgments are founded on an incorrect and incomplete interpretation of the text of the Constitution and the fundamental weaknesses contained in the reasoning in both cases have simply been augmented by time. The reasoning in *Nicolaou* has, in any event, been overtaken by the express words of Article 42A.2.1º (as inserted by the 31st Amendment), which in turn necessarily means that the reference to "parents" in Article 42 and Article 42A must be taken to include *all* parents, regardless of their marital status. This in turn has consequential implications for what constitutes "the Family" for the purposes of Article 42.1 and, by further extension, Article 41 itself.

54. It follows, equally that the provisions of Chapter 18, Part 2 of the 2005 Act should be held to be unconstitutional and contrary to Article 40.1 but only insofar as it effects an

ex-ante, automatic exclusion of co-habiting couples of long standing such as Mr. O'Meara and the late Ms. Batey. I would therefore allow the appeal and grant the appropriate declarations of unconstitutionality.