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AN CHÚIRT UACHTARACH

THE SUPREME COURT

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O'Donnell C.J.

Charleton J.

O' Malley J.

Woulfe J.

Collins J.

BETWEEN

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

Applicants/Appellants

AND

CHIEF APPEALS OFFICER, SOCIAL WELFARE APPEALS OFFICER,

MINISTER FOR SOCIAL PROTECTION, IRELAND

AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr. Justice Maurice Collins delivered on 12 November 2024

INTRODUCTION AND SUMMARY

Constitutional Context

1. Decisions as to the design of the social welfare system, and as to the allocation of resources to it and within it, are complex and difficult. The financial resources of the State – indeed, the resources of any state – are finite and are inevitably subject to many competing claims and demands. According to publicly available information, the Budget 2025 allocation for the Department of Social Protection is €26.9 billion, the largest of all Government Departments.[1] Yet even that colossal sum is not sufficient to address every social need.

2. The Constitution gives the task of resolving such competing claims and demands, and deciding how resources should be raised and allocated, to the Government and the Oireachtas, rather than to the Courts: *O' Reilly v Limerick Corporation* [1989] ILRM 181 and *TD v Minister for Education* [2001] IESC 101, [2001] 4 IR 259. That demarcation of function is rooted in the fundamental architecture of the Constitution. As Hardiman J explained in *TD* (at 338), the legislative power – the Oireachtas – makes laws and elects the Government which is then responsible to it. Those branches of government, which are "*responsible for the formulation and implementation of policy on a vast range of issues of importance to the community as a whole*" and "*jointly responsible for the expenditure of public monies*", are directly or indirectly elected and

[1] *The Budget in Brief: Your Guide to Budget 2025* (Government of Ireland) (October 2024), at page 12.

therefore politically accountable for the policies they pursue. Necessarily, the judicial branch is not accountable in that way.

3. It follows from the allocation of responsibility made in our basic law that "*considerable latitude must be allowed to the legislature in the enormously complex task of organising and directing the financial affairs of the State*" (per O' Hanlon J in *Madigan v Attorney General* [1986] ILRM 136, at 151-152). That includes legislation in the area of social welfare: see, for example, this Court's decisions in *Lowth v Minister for Social Welfare* [1998] 4 IR 321 ("*Lowth*") (pages 339-341) and, more recently, *Donnelly v Ireland* [2022] IESC 31, [2022] 2 ILRM 185 ("*Donnelly*") (paras 162-165) and *O' Meara v Minister for Social Protection* [2024] IESC 1 ("*O' Meara*") (paras 22-25).

4. As O' Malley J explained in *Donnelly,* in a passage expressly approved by O' Donnell CJ in *O' Meara,* it is "*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*", adding 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 …*" (para 163). To similar effect are the observations made by O' Donnell CJ in *O' Meara*, emphasising that "*social welfare provisions are matters where the Court has afforded the State a broad margin of appreciation because any particular provisions under scrutiny are only part of a larger legislative patchwork, and which involve broader decisions on raising revenue and*

spending it, which are generally considered to be a matter for the Executive and subject to specific scrutiny by the Legislature" (para 22).

5. While *Lowth*, *Donnelly* and *O' Meara* all involved Article 40.1 challenges, the observations of the Court in those decisions are not, in my view, confined to such challenges but rather articulate the approach that courts should generally take to constitutional challenges to the validity of social welfare legislation, however based.

Carer's Allowance

6. The Social Welfare (Consolidation) Act 2005 ("*the 2005 Act*") provides for various benefits and allowances to be paid to eligible classes of persons and, together with the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (SI 142/2007) ("*the 2007 Regulations*"), sets out detailed rules governing eligibility for those benefits and allowances.

7. These proceedings are concerned with one such allowance, Carer's Allowance. Carer's Allowance was first introduced by the Social Welfare Act 1990. Its introduction was intended to give "*official recognition to the role of carer*" and to provide a "*secure and independent source of income*" for carers (per the Minister for Social Welfare speaking in the Dáil, quoted in Mel Cousins, *The Irish Social Welfare System, Law and Social Policy* (Dublin, 1995), at page 76). That language is echoed here in the Affidavit of Pamela Keegan sworn on behalf of the State.[2] Its coverage was significantly expanded

[2] Affidavit sworn on 3 October 2022, at para 13.

in 1999 (by the Social Welfare Act of that year). Provision for Carer's Allowance is now made in Part 3, Chapter 8 (sections 179-186A) of the 2005 Act ("*Chapter 8*").

8. For the purposes of Chapter 8, carers are defined as persons who provide "*full-time care and attention*" to a "*relevant person*", defined as a person who is so incapacitated as to require full-time care and attention and who has attained the age of 16 (or, if that person is in receipt of domiciliary care allowance ("*DCA*"), who is under the age of 16). Section 179(2) of the 2005 Act provides that the Minister may by regulation specify the circumstances and conditions under which a person is providing "*full-time care and attention*" to a relevant person and Article 136(1)(e) of the 2007 Regulations provides that a carer may be regarded as providing full time care and attention where the number of hours of providing care to the relevant person is not less than 35 hours in any period of 7 consecutive days and care is provided on any 5 days within such a 7 day period.

9. Carer's Allowance is payable regardless of the family relationship (if any) between the carer and the person requiring care. It is not limited to care provided by a mother (or father) to a child. It can – and frequently does – involve the care of a parent by a child. It may involve one spouse or partner caring for the other. Chapter 8 applies only to care provided in a residential setting. However, there is no requirement that care be provided in the home of the carer. Care may be provided in the home of the person requiring care and there is no absolute requirement that the carer reside with that person: section 179(1). It follows that the provision of care by a mother (or father) to a child within the family home is but a subset of the category of care coming within the scope of Chapter 8.

10. Section 180(1) of the 2005 Act provides that "*[s]ubject to this Act, an allowance ... shall, in the circumstances and subject to the conditions that may be prescribed, be payable to a carer*." Section 181(1) of the 2005 Act provides for the rate of allowance payable (referred to as "*the scheduled rate*") by reference to the rates set out in Schedule 4, Part 1 of the Act (a higher rate is payable where the carer is caring for more than one person), which rate is increased in certain circumstances, including where a "*qualified child*" (or more than one such child) normally resides with the beneficiary. A higher rate is also payable where the carer is 66 or older. The rates set out in Schedule 4 Part 1 are regularly increased by the Oireachtas. An increase of €12 per week in the full rate with effect from January 2025 is provided for in the Social Welfare Act 2024.[3]

11. Section 181(1) is significantly qualified by section 181(2). That sub-section provides for the reduction of the scheduled rate by reference to the "*weekly means*" of the applicant or beneficiary. Where such means exceed a certain level, no allowance is payable.

12. Detailed rules for the calculation of such "*weekly means*" are set out in Schedule 3 of the 2005 Act and in the 2007 Regulations. Schedule 3, Part 5, Rule 4(1) to the 2005 Act provides that, in the case of Carer's Allowance, when calculating the means of a person who is one of a couple living together, the means of the person "*shall be taken to be one-half of the total means of the couple*." For that purpose, "*couple*" means a married couple living together, civil partners (within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ("*the 2010 Act*")) who are

[3] Section 17 and Schedule 2 (substituting a new Part 1 in Schedule 4 to the 2005 Act).

living together or "*cohabitants*" within the meaning of section 172(1) of the 2010 Act. Schedule 3, Part 5 also contains detailed and complex rules providing for certain assets and/or income to be *disregarded* for the purposes of the means assessment. Rule 4(3) provides that the "*amount that may be prescribed shall be disregarded*". That amount is prescribed by the 2007 Regulations (as amended from time to time) and was increased to €900 per week in the case of a couple with effect from June 2024 by the Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No 6) (Carer's Benefit and Carer's Allowance – Earnings Disregard) Regulations 2024 (SI 275/2024). Therefore, in the case of a married or cohabiting couple, the first €900 of their combined weekly income (equivalent to an annual income of almost €47,000) is not taken into account for the purposes of the means assessment. A further increase – to €1,250 per week for couples with effect from July 2025 (equivalent to an annual income of €65,000)– was announced in the recent Budget.

13. Section 186 of the 2005 Act is central to these proceedings. Section 186(1) provides that the Minister for Social Protection ("*the Minister*") "*shall make regulations for the purpose of giving effect to*" Chapter 8. Section 186(2) then provides that "*Regulations under this section may, in particular and without prejudice to the generality of subsection (1) ... (b) provide for*

> *(i) entitling to carer's allowance the class or classes of person that may be prescribed who would be entitled to that allowance but for the fact that the conditions as to means as calculated in accordance with the Rules contained in Part 5 of Schedule 3 are not satisfied, or*

(ii) entitling to carer's allowance at a rate higher than that calculated in accordance with section 181(2) the class or classes of person that may be prescribed, and the rate of allowance so payable may vary in accordance with the claimant's means" (my emphasis).

Regulations made under section 186(2)(b) are subject to the sanction of the Minister for Public Expenditure and Reform: section 4(4) of the 2005 Act.

14. The use of a means test – or, as it is referred to in the affidavits filed by the State, a "*means assessment*" – for the purpose of determining eligibility for non-contributory social welfare assistance has long since been a feature of the Irish social welfare system. Almost all forms of social assistance provided for in Part 3 of the 2005 Act – DCA is a notable exception – are subject to means testing and the 2005 Act generally provides that the means of a spouse, partner or cohabitee are to be taken into account for that purpose.[4] The application of the means test varies from allowance to allowance and different regard/disregard rules apply for the purpose of the various allowances but the principle of means testing and, for that purpose, the principle of aggregating the means of a couple, are well-established and widely-applied features of the Irish social welfare system.

[4] Child Benefit is another universal benefit (a non-contributory benefit that is not subject to a means test) but it is provided for in Part 4, rather than Part 3, of the 2005 Act.

15. In *PC v Minister for Social Protection* [2017] IESC 63, [2017] 2 ILRM 369, this Court considered the correct legal characterisation of another form of benefit payable under the 2005 Act: the State Pension Contributory (SPC). As its name suggests, SPC is a *contributory* benefit (the State Pension Non-Contributory (SPNC) is its non-contributory – and means tested – equivalent). The issue in *PC* was the validity of section 249 of the 2005 Act, which disqualified a person serving a sentence of imprisonment from receiving SPC (or any other benefit under Part 2 of the 2005 Act). MacMenamin J (Denham CJ, McKechnie, Clarke and O' Malley JJ agreeing) characterised the right to SPC as "*a qualified entitlement derived from statute*" (para 31). He accepted that the benefit and the eligibility conditions attaching to it could be varied from time to time (for example, by way of budget decision) and that such a variation could not properly be characterised as an infringement of the property rights of those entitled to SPC (para 28). Ultimately, MacMenamin J did not consider it necessary to determine whether such entitlement was a property right, properly so called. It was, in his view, undoubtedly "*a legal entitlement, on foot of which, subject to compliance with the statutory conditions, an eligible person might sue if denied the pension. Of course, eligibility hinges on compliance with conditions. But, the statutory provisions, at least, give rise to a justiciable, if conditional, legal entitlement*" (para 45).

16. Although *PC* was concerned with a contributory benefit under Part 2 of the 2005 Act, rather than a non-contributory means tested Part 3 allowance such as that at issue here, "*a qualified entitlement derived from statute*" appears to me to be an apt characterisation of Carer's Allowance. As with social welfare benefits and allowances generally,

eligibility for Carer's Allowance "*hinges on compliance with conditions*" and, as is the case generally in respect of allowances under Part 3 of the 2005 Act, those conditions include conditions as to means.

17. The form of care supported by Chapter 8 – typically provided by a family member or a person with some other pre-existing relationship with the person requiring care, such as a friend or neighbour - is commonly referred to as "*informal care.*" Informal care is typically provided in a residential setting and on an unpaid basis. Care provided on a contractual basis by a professional carer is commonly referred to as "*formal care.*" Formal care may be provided in the home (by professional carers) or in the community (such as in a daycare or respite facility) or may take the form of residential care provided in an institutional setting (such as a nursing home). The terminology of "*informal care*" and "*informal carer*" has been criticised as tending to diminish the significant value of the care provided by such carers.[5] Insofar as such terminology is used in this judgment, it simply reflects established usage. There is no question but that the provision of informal care is an invaluable social good and a significant public benefit. In this jurisdiction, as elsewhere in the EU, informal care is a "*cornerstone*" of long-term care.[6]

The Applicants' Case

18. BM is JM's mother and carer. BM has been in receipt of Carer's Allowance since 2007. Because BM and JM's father now reside together as a couple, her weekly means are assessed not just by reference to her own means but also by reference to his means. That

[5] See for example Care Alliance Ireland, Discussion Paper 11 *Defining Carers* (Update June 2022).

[6] European Commission, *Informal Care in Europe* (April 2018).

BM and JM's father are "*a couple*" for the purposes of Chapter 8 is not in dispute. So assessed, BM's weekly means are such as to reduce the rate of Carer's Allowance payable to her. Thus, BM is entitled only to a reduced rate of allowance. While there were issues as to the proper calculation of BM's means for the purposes of Chapter 8, such issues have been resolved within the social welfare appeal system and there now appears to be no extant dispute that her means have been calculated in accordance with the rules set out in the 2005 Act and the 2007 Regulations. Thus – and significantly – for the purposes of these proceedings, the position is that BM is receiving Carer's Allowance in accordance with the 2005 Act, at the rate prescribed by the Act, based on an assessment of her means carried out in the manner prescribed by the Act and the 2007 Regulations.[7]

19. In these judicial review proceedings, BM and JM ("*the Applicants*") challenge the payment of Carer's Allowance to BM at a reduced rate and assert an entitlement to its payment at the full scheduled rate. They make two arguments. First, they say that the Minister has acted unlawfully in failing to make regulations under section 186(2) of the 2005 Act, which regulations would (or might) provide for payment of Carer's Allowance at the scheduled rate (or, in any event, a rate closer to the scheduled rate) to BM and other similarly situated persons. Second, they argue that payment of a reduced rate of Carer's Allowance to BM is inconsistent with the State's obligations under Article 41.2 of the Constitution.

[7] That is not to say that BM is necessarily still in receipt of Carer's Allowance at the same rate as was the case when these proceedings were initiated: the increase in the statutory disregard having effect from June 2024 presumably has resulted in an increase in the rate of allowance being paid to her.

20. For the reasons set out in her careful and comprehensive judgment ([2023] IEHC 359), Hyland J dismissed the Applicants' application. She concluded that the provisions of section 186(2) were truly permissive and therefore conferred a *power* on the Minister rather than imposing any *duty* on her. As regards Article 41.2, Hyland J considered that, even if it was accepted that the provision of Carer's Allowance vindicated the life of the woman in the home, Article 41.2 did not dictate the level at which the State had to provide such allowance and, in her view, it would trespass on the executive function of the State for the court to hold that the Minister was bound to make regulations increasing the level of allowance payable.

Grant of Leave

21. This Court granted leave for a direct appeal in respect of the following two issues identified in the Court's Determination of 31 October 2023 ([2023] IESCDET 131):

> *(1) Whether the Minister is under any obligation under the terms of section 186(1) and/or section 186(2) of the 2005 Act to make regulations of the kind which would dispense with the means-tested calculation of carer's payment, whether in whole or in part?*
>
> *2) The extent (if any) to which Article 41.2 of the Constitution has any bearing on the proceedings and whether Hyland J was correct to state (at paragraph 71 of her Judgment) that Article 41.2 cannot be regarded as dictating the level at*

which the State must provide a carer's allowance or otherwise mandating the making of regulations by the Minister under section 186(1) of the 2005 Act.

Disposition of the Appeal

22. The 2005 Act provides for a scheme of Carer's Allowance, in which the scheduled rate of allowance payable to eligible persons is the same (subject only to the possible application of one or more of the uplifts provided for in section 181(1)) and where the entitlement to the allowance is subject to reduction (or exclusion) on the basis of a uniformly applicable statutorily prescribed means test. In that statutory context, the Applicants' contention that section 186(2) of the 2005 Act *requires* the Minister to make regulations the effect of which would be to provide for two classes of carer for the purposes of Chapter 8 – and that is the clear end-point of the Applicants' argument on section 186(2) – is unpersuasive.

23. Significant issues would appear to arise as to the proper scope of the Minister's rule-making power under section 186(2). On its face, that sub-section purports to give the Minister a broad and largely unbounded power to dispense with and/or modify the application of the statutory rules relating to the means test for Carer's Allowance, for the benefit of an unspecified class or classes of carer (potentially including *all* carers). In the circumstances, it is unsurprising that at the hearing of this appeal there was discussion as to whether the conferral of a power in such terms was consistent with Article 15.2 of the Constitution.

24. However, assuming the validity of section 186(2), and assuming that the power thus conferred on the Minister extends to making regulations disapplying the means test, in whole or in part, for carers such as BM, the essential question here is whether section 186(2) *requires* such regulations to be made. The answer to that question is, in my view, clear. Text and context point unequivocally to the same conclusion: that the Minister has the *power*, but is not under any *duty*, to make regulations providing for the matters in section 186(2)(b)(i) and/or (ii). There have, of course, been cases where apparently permissive statutory language has been read as being mandatory in effect. However, the statutory regime here differs significantly from the regimes at issue in those cases. The Oireachtas has, in Chapter 8, prescribed a detailed – and mandatory – scheme for the means testing of Carer's Allowance. The contention that, having done so, the Oireachtas at the same time legislated (in ostensibly *permissive* terms) so as to *require* the Minister to *depart* from that scheme, in a unspecified manner, in favour of an unidentified class or classes of carers, is, in my view, wholly implausible and derives no support from authorities such as *Dolan v Neligan* [1967] IR 247 and *Application of Dunne* [1968] IR 105. In short, in this case "*may*" in section 186(2) means "*may*", not "*shall*" or "*must*".

25. As for the Applicants' Article 41.2 argument, even supposing that there may be circumstances in which that provision is capable of imposing an enforceable obligation on the State to provide financial support to carers in the home, significant financial support is in fact being provided to BM (and to JM) here. As a matter of fact, BM has not been obliged by "*economic necessity*" to engage in labour outside the home. The

fact that a reduced rate of Carer's Allowance is payable to BM, by reference to the means available to her (as assessed in accordance with Chapter 8), does not engage Article 41.2. Nothing in Article 41.2 precludes the application of a generally applicable means test (including the provisions for aggregation) to carers such as BM, i.e. mothers providing full-time, long-term care to a profoundly dependent child in the home, or requires that that sub-set of carers be treated preferentially or to be subject to more favourable rules than other carers (as would be the case if the general means testing regime did not apply, or apply in the same way, to them).

26. Though never framed quite in such terms, the underlying complaint being made by the Applicants here appears to be that there are (or ought to be) two classes of carer and that different rules should apply to those different classes, involving the more generous financial treatment of carers such as BM, who are required to provide care much in excess of the statutory minimum (35 hours over a 7 day period) and who, as a result, are effectively excluded from seeking employment.

27. Article 41.2 does not compel any such classification of carers. It is not concerned, or concerned solely, with the provision of care, in the special sense in which that term is used in Chapter 8. Rather it applies to a much broader range of care in the home, encompassing all the usual incidents of raising a family. Where care (in the Chapter 8 sense) is provided by a mother to a child within the home, it is not, on that account, inherently more likely to be more burdensome than care provided in other settings or relationships. The nature and extent of the care required is not logically related to where the care is provided or the relationship between carer and the person being cared for.

28. An argument for the recognition of two classes of carers might have been advanced by reference to Article 40.1, on the basis of a contention that the provisions relating to Carer's Allowance breach the principle of equality by failing to distinguish between different classes of carers and instead treating them all in the same way. However, even allowing that the principle of equality may be breached by the "*like treatment of unlike situations*" – Hogan et al, *Kelly: The Irish Constitution* (5th ed; 2018), para 7.2.105 – such an argument would face insurmountable hurdles, for all the reasons identified by O' Malley J in *Donnelly* and by O' Donnell CJ in *O' Meara*. Judgments made by the Oireachtas in the area of social welfare are not, of course, beyond review on equality grounds. That is demonstrated by *O' Meara* itself. But *O' Meara* was a very particular case, involving exclusion from benefit (Widowers' (Contributory) Pension) on the basis of a distinction – between spouses with dependent children and surviving partners of a non-marital relationship – that this Court characterised as "*arbitrary and capricious*" (per O' Donnell CJ, with whose judgment Dunne, O' Malley, Murray and Collins JJ agreed, para 35). A significant factor in the Court's assessment was the inconsistent way in which the impugned provision – section 124 of the 2005 Act – treated marriage and cohabitation: while it drew a sharp distinction between them for the purposes of *eligibility* for benefit, it then treated them as essentially similar for the purpose of the *removal* of benefit in payment (para 34).

29. Here, BM has not been excluded from benefit. She is in receipt of Carer's Allowance, calculated in accordance with the provisions of Chapter 8 and the 2007 Regulations. As noted, her real complaint appears to be that the Oireachtas should have legislated for different classes of carer, with a higher allowance payable to carers such as her whose

commitment greatly exceeds the statutory threshold and who cannot, as a result, seek employment. While it would certainly appear to be within the legislature's power to create different classes of carer, it is quite another matter to suggest that Article 40.1 *requires* such an approach, such that this Court could make an order effectively obliging the Oireachtas to legislate to create a new tier of allowance. Nothing in the Article 40.1 jurisprudence suggests that it confers such a quasi-legislative jurisdiction on the Court and even if the Court might exceptionally have such a jurisdiction, there is not any basis for its exercise here. When deciding on social welfare benefits, including the level of benefits payable, the thresholds for eligibility and whether to make the particular benefits subject to means assessment, the State must necessarily paint with a broad brush. Lines must be drawn. It cannot plausibly be suggested that the provisions of Chapter 8 are "*arbitrary and capricious*" by reason only of providing for a single class of eligible carer. In any event, no argument was actually advanced in those terms.[8] Instead, the Applicants' case has been shoe-horned – unconvincingly – into an argument about the application of the means test under the 2005 Act.

30. I share the High Court Judge's obvious sympathy for BM's position and her admiration for BM's commitment to the care and welfare of her son. It would be impossible not to, in light of the all-consuming nature of her responsibilities as carer for JM. It is apparent from the evidence that BM is required to provide care much in excess of the statutory

[8] A different Article 40.1 argument was advanced in the High Court, to the effect that BM was being treated less favourably than full-time carers without means who did not live with a spouse or partner with means. Hyland J rightly rejected that argument on the basis that the comparator was inappropriate, since such a person would not "*enjoy the benefits of a partner with means*" (para 71). The Applicants did not repeat that argument on appeal.

threshold. She effectively cares for JM 24 hours a day, 7 days a week. That commitment is unlikely to change in the foreseeable future. While BM is, in principle, free to engage in employment (subject to a maximum of 18.5 hours per week), her commitments as JM's carer exclude any possibility of employment. BM is effectively locked into providing near-constant care to JM for the foreseeable future.

31. There may well be cogent arguments for treating carers such as BM differently to carers whose caring commitments are less onerous and who are thus able to take up some limited employment while acting as a carer. That may intuitively appear fairer to carers such as BM. But there are, no doubt, countervailing considerations also. The creation of a two-tier system of Carer's Allowance would bring the allowance closer to a form of income replacement, which the State says it was never intended to be. Creating a two-tier system for Carer's Allowance would have implications for other benefits and allowances under the 2005 Act, including Carer's Benefit and DCA. It would add administrative complexity. It would also have financial implications, of uncertain but potentially significant dimensions. The different classes would have to be defined and demarcated, which might not be straightforward. Any new line of demarcation would inevitably produce different winners and losers. These issues would have to be considered against a backdrop of significant public debate as to the responsibilities of the State in the area of social care, whether it is appropriate for the State to rely to the extent that it does on informal carers for the provision of long-term care and how the State should support such care. These issues were the subject of animated public discussion in the lead up to the referendum on the Fortieth Amendment of the Constitution (Care) Bill 2023. Such issues, and the judgments that they involve, are not

matters for the courts. Courts have neither the constitutional nor institutional competence to make decisions as to the design of particular social welfare benefits or allowances; such decisions are quintessentially matters for the Government and the Oireachtas.

32. In the circumstances, I would answer the issues set out in this Court's Determination as follows:

1) *Section 186 of the 2005 Act does not oblige the Minister to make regulations of the kind which would dispense with the means tested calculation of carer's payment, whether in whole or in part.*

2) *Article 41.2 has no bearing on these proceedings. Article 41.2 does not dictate the payment of Carer's Allowance by the State, less still its payment at any particular level and it does not have the effect of requiring the Minister to make regulations of the kind contemplated by section 186(2) of the 2005 Act.*

33. It follows that this appeal must be dismissed and the High Court's Order dismissing the Applicants' application for judicial review affirmed.

THE FACTS IN MORE DETAIL

34. JM is a young man, not yet 18 years of age. Since birth, he has suffered from profound disability and development issues. He has Down syndrome and suffers from epilepsy, autism spectrum disorder (borderline), hypothyroidism and hyperactivity. He has to take multiple prescription medicines every day. Even so, he exhibits a range of significant behavioural issues, including repetitive banging of his head against the floor and wall, as a result of which he must wear a head brace to protect himself from injury. He requires 24 hours a day care, including at night-time because he is unable to sleep through the night and, when he wakes, needs care and comforting.

35. Other than when JM is at day care, BM is responsible for her son's care. In her words:

> *"[JM] requires my 24-hour care and … this will not change. [He] suffers from a myriad of neurological and physiological issues that will not change and that can only be managed, not cured. My entire life is centred and structured around caring for [JM's] needs in the home and this will not and cannot change."*[9]

36. Since his birth, JM has been so incapacitated as to require full-time care and attention, which BM has provided and which she continues to provide. As already noted, BM has been in receipt of Carer's Allowance since 2007. At that stage, she was also in receipt of One-Parent Family Payment and, as a result, she was entitled only to half-rate Carer's Allowance. BM ceased to be eligible for One-Parent Family Payment in 2020 when

[9] Affidavit of BM sworn on 14 March 2022, para 12.

she, JM and JM's father began residing together as a family. When payment of the One Parent Family Payment ceased, BM expected to receive Carer's Allowance at the full rate and she says that this was confirmed to her by the Department of Social Protection. However, it seems that she never actually received payment at the full rate and in January 2021 she was informed that her entitlement to Carer's Allowance had been re-examined on the basis of her means and, as a result, she was adjudged entitled to payment at a reduced rate only.

37. BM and JM's father were, at the time of the relevant assessment, a couple living together. As a result, the Department of Social Protection took account of his means in calculating BM's means for the purposes of assessing her eligibility for Carer's Allowance and in calculating the rate of allowance payable to her.

38. BM challenged the decision to pay Carer's Allowance at a reduced rate. She also challenged – with some degree of success – the actual calculation of her means. Ultimately, in May 2021, as a result of a decision of the Social Welfare Appeals Officer, BM was informed that she was entitled to a reduced weekly rate of Carer's Allowance of €134 (the then applicable *scheduled* rate was €219 per week – the current *scheduled* rate is €248 per week) plus a prescribed increase for a qualified child – JM – of €22.50 per week. She sought review of that decision by the Chief Appeals Officer under section 318 of the 2005 Act. Her grounds for seeking review largely related to the extent of JM's incapacity and the consequent burden on her as his full-time carer and the impact on her of any reduction in the rate of Carer's Allowance payable. However, by a decision of 21 January 2022, the Chief Appeals Officer refused to review the decision

of the Appeals Officer, finding that he had correctly applied the statutory provisions and had correctly calculated BM's means for the purposes of entitlement to Carer's Allowance. As to what she characterised as "*the substantive ground*" submitted on BM's behalf, the Chief Appeals Officer explained that, while it was a statutory requirement that the person being cared for must be so incapacitated as to require full-time care and attention, the 2005 Act made no provision for assessing the rate of the allowance by reference to the degree of incapacity of the care recipient.

39. While the Chief Appeals Officer's decision is challenged in these proceedings, BM has not suggested that the rate of Carer's Allowance currently payable to her has been incorrectly calculated and the position therefore is that she is currently receiving the allowance in accordance with the 2005 Act, at the (reduced) rate provided for by the Act, based on an assessment of her means carried out in the manner prescribed by the Act and the 2007 Regulations.

40. BM says that the failure to pay her Carer's Allowance at the full rate has a serious impact on her and her family. In her words:

> *"... the loss of the full rate of Carer's Allowance in respect of [JM] has had, and continues to have, a profound adverse effect and has caused, and continues to cause, very significant financial and personal strain to me as [JM's] full-time carer and to our family unit. I receive €100 by way of maintenance from my partner [ ] from his salary. I have no means of my own or in my own right. I cannot seek or obtain employment or earn an income either inside or outside*

the home by reason of my commitment as [JM's] full-time carer. I depend upon Carer[']s Allowance to enable me to care properly for [JM's] needs, to meet weekly outgoings and to look after our household and family unit. The reduction of my Carer[']s Allowance by €85 per week, which took effect from 31 December 2020 has had, and continues to have, a very significant and adverse effect on my ability to care properly for [JM's] needs, to meet my weekly outgoings and to look after and provide for our family unit."[10]

The scheduled rate of Carer's Allowance payable has increased since 2020, which presumably has resulted in a higher weekly payment to BM. Increases in the statutory disregard for the purposes of the means test would also have had the effect of increasing the level of payment to her. The financial position of the family may also have improved as a result of disability allowance becoming payable to JM as and from his 16th birthday. Disability allowance is payable at a significantly higher rate than DCA.

41. In any event, having regard to JM's profound dependence on her, and the corresponding commitment that being his full-time carer demands of her, BM clearly considers it highly unjust that she should receive anything less than the full rate of Carer's Allowance, particularly as the allowance payable to her has been reduced by reference not to her own individual means but to the means of her partner.

[10] Affidavit of BM sworn on 14 March 2022, para 43.

42. In these proceedings, the Applicants assert an entitlement to payment of Carer's Allowance at the full rate, without reduction by reference to means. As already explained, the principal argument made by them is to the effect that the Minister is obliged to make regulations that would provide for persons such as BM to receive Carer's Allowance at a rate higher than that calculated in accordance with section 181(2) of the Act. Such regulations, it is said, *could* – and, it seems, *should* – provide for persons such as BM to receive the full rate of Carer's Allowance, notwithstanding her means as assessed in accordance with the 2005 Act.[11] The Applicants' core contention is that the Minister is required to make such regulations and that her failure to do so is – and should in these proceedings be declared to be – unlawful. That is the essential issue in these proceedings and in this appeal. Article 41.2 is relied on by the Applicants in support of that argument but also as a stand-alone basis for contending that the State is under an obligation to pay Carer's Allowance to BM at the full scheduled rate, notwithstanding her assessed means.

[11] There was some discussion at the hearing as to whether regulations could be made pursuant to section 186(2)(b) providing for payment of Carers Allowance to a specified class/classes of persons at a rate higher than the rate prescribed in section 181(1) of the 2005 Act (referred to as "*the scheduled rate*"). In my view, it is clear that the Minister is not empowered to make regulations having such effect. Section 186(2)(b) does not empower the Minister to alter the scheduled rate; rather it allows the Minister to alter the effect of applying the means test provided for in section 181(2). Thus, by way of illustration, while section 186(2)(b) contemplates that regulations might be made providing that a specified class(es) of persons whose means were such that they would otherwise receive Carer's Allowance at 50% of the scheduled rate, should instead receive 75% or 100% of the scheduled rate, it does not permit regulations providing for payment of the allowance at a rate higher than the scheduled rate. That scheduled rate (which is set out in Schedule 4, Part 1 of the 2005 Act and has been regularly revised subsequently) provides a hard ceiling for the level of allowance payable.

PROCEEDINGS IN THE HIGH COURT

43. In March 2022, the High Court granted the Applicants leave to seek judicial review. The Statement of Grounds sought *certiorari* of the Chief Appeals Officer's decision of 21 January 2022 as well as a wide variety of declaratory relief and damages.

44. By the time that the proceedings came on for hearing, the Applicants' case had narrowed significantly. As Hyland J explains in her judgment, the essence of the case made at trial was that the Minister was obliged to make regulations under section 186(2)(b) of the 2005 Act so as to provide "*for an unspecified class of persons to be entitled to carer's allowance at a rate higher than that calculated in accordance with the existing rules under the 2005 Act and regulations made thereunder*" (Judgment, para 41).

45. The imposition of a duty to make such regulations was said by the Applicants to be consistent with section 186(2)(b) which recognised that there might be circumstances where carers with the greatest need for carer's allowance should be able to receive the allowance at the full rate despite not satisfying the means test (Judgment, para 21). It was also said that there was a "*lacuna*" in the 2007 Regulations in that they did not give effect to the "*derogations*" in section 186(2)(b) (para 22). On that basis, it was said that the 2007 Regulations were "*under-inclusive*" – reliance being placed in that context on this Court's decision in *Reeves v Disabled Driver's Medical Appeal Board* [2020] IESC 31 – and *ultra vires* the 2005 Act because of what was said to be the arbitrary and unjust exclusion of the Applicants (para 23). The Applicants also argued that the impugned

provisions of the 2005 Act and the 2007 Regulations engaged a broad range of constitutional rights, including their right to equality (Article 40.1), BM's rights to have her work in the home recognised by the State (Article 41.2), BM's right to earn a livelihood, which could not be exercised as a result of both JM's level of dependency and her limited allowance as a carer (Article 40.3), BM's right and duty to provide an education to JM (Article 42.1), and JM's right to realise his full personality and dignity (Articles 42 and 42A) (Judgment, paras 24 – 30). On the Applicants' case, the "*core relevance*" of these provisions was that they necessitated a particular approach to the construction of section 186, one that treated it as "*creating a mandatory obligation on the Minister to legislate for the outcome identified in s.186(2)(b)(ii)*" (Judgment, para 24). The Applicants also relied on Article 14 ECHR, read with Article 1 of the First Protocol but, again, that argument appears to have been advanced in support of the essential contention that the Minister was duty bound to make regulations under section 186(2)(b) (Judgment, para 31).

46. In its response, the State stressed the use of "*may*" in section 186(2) and argued that, in accordance with its normal usage, that conferred a discretion on the Minister. Citing *State (Sheehan) v Government of Ireland* [1987] IR 550, as well as *Reeves*, the State argued that the Minister could not be compelled to exercise such a discretionary power (Judgment, para 32). There was, the State said, no lacuna nor any under-inclusiveness such as had been found in *Reeves*. The 2007 Regulations did not purport to exclude or restrict BM's entitlement to Carer's Allowance in accordance with the 2005 Act (para 33). No constitutional rights of the Applicants were interfered with by the 2005 Act or the 2007 Regulations. According to the State, Article 41.2 did not give BM any right to

a pecuniary benefit (relying, by analogy, on *L v L* [1992] 2 IR 77) (Judgment, para 36). The State relied on *PC* as authority for the proposition that the Applicants could not invoke Article 40.3 or Article 43 as a basis for asserting an entitlement to a purely statutory entitlement (para 36). Furthermore, significant latitude was to be given to the Oireachtas in making complex assessments about social welfare entitlements (citing *Lowth*) (para 37). As regards the ECHR claim, the State argued that the Applicants had failed to demonstrate that the policy choices made by the Oireachtas, and specifically the means test for the carer's allowance, amounted to a manifestly unreasonable discrimination (para 40).

47. Hyland J dismissed the application and refused all relief. She began her analysis by considering the terms of section 186(2)(b). In her view, only section 186(2)(b)(ii) was relevant because section 186(2)(b)(i) referred to persons who did not qualify for Carer's Allowance at any level and BM was not such a person as she was in receipt of an allowance, albeit at a reduced level. The Applicants disputed the correctness of that approach on appeal but nothing turns on that issue. The Judge noted that subparagraph (ii) did not identify "*the people who may obtain the benefit of the enhanced regime nor the nature of the enhancement*", and the Minister had "*total discretion as to the class of persons that would be covered by any regulations made, and the extent to which they will benefit*" (Judgment, para 49). Hyland J could not, therefore, assess whether or not BM was a person who would benefit if any regulations were ultimately made. But given that she was a person who potentially might benefit from such regulations, the Judge was willing to accept that she was entitled to make the argument that section 186(2) was mandatory (para 51).

48. Having considered the discussion in *Heneghan v Minister for Housing* [2023] IESC 7, [2023] 2 ILRM 1 as to the proper approach to the use of "*may*" in statutes, the Judge was satisfied that the reference to "*may*" in section 186(2) was "*truly permissive*" and conferred a power on the Minister rather than imposing a duty. That conclusion was suggested by the ordinary meaning of the word "*may*" and none of the factors that might suggest a contrary intention were present (paras 54-56). While section 186(1) used the word "*shall*", that provision was qualified by section 186(2), rendering the making of the type of regulations identified in section 186(2) "*a matter entirely within the discretion of the Minister*" (para 57). Consideration of Chapter 8 supported that conclusion. It provided, in a "*highly prescriptive*" manner, for the conditions a person had to meet in order to claim carer's allowance. Absent section 186(2), "*the Minister would very likely not have been entitled to vary either the entitlement per se or the amounts payable*". Therefore, section 186(2) "*was necessary to ensure that the Minister could depart from the scheme if necessary, without having to enact primary legislation to do so*". That supported the view that the power to make regulations having such an effect was a matter for the Minister's discretion (paras 58-60).

49. As regards the alleged under-inclusivity of the 2007 Regulations, Hyland J noted that the argument was premised on the Minister being obliged to make regulations addressing the matters in section 186(2)(b) when in fact the Minster was under no obligation to do so (para 61). She considered *Reeves* in some detail. In her view, unlike the applicant in *Reeves,* BM could not point to regulations which excluded her from an

allowance to which she was entitled, and accordingly the decision did not assist the Applicants (para 69).

50. Turning to the substantive constitutional argument, Hyland J accepted that section 186(2) had to be interpreted in a constitutionally compliant manner. However, she was not persuaded that any of the constitutional provisions relied on by the Applicants required a departure from the interpretation of that subsection as permissive rather than mandatory. In particular, she did not accept that interpreting section 186(2) in that way would undermine the constitutional guarantee in Article 41. Even accepting for present purposes that the provision of carer's allowance vindicated the rights of the woman in the home, Article 41 could not "*be treated as dictating the level at which the State must provide a carer's allowance and cannot be used to mandate the adoption of regulations otherwise within the discretion of the Minister to ensure the increase (to an unspecified level and in respect of an unspecified group of persons) of the level of carer's allowance*". To do so would trespass on the executive functions of the State. She again emphasised that BM could not definitively show she would benefit from any regulations that may be made. As regards, Article 40.1, Hyland J stated that the Appellants' identified comparator (a full-time carer without means who did not live with a spouse or partner with means) was inappropriate since such a person would not "*enjoy the benefits of a partner with means*". She went on to emphasise that "*an obvious purpose of the existing means test is to put differently situated persons in a similar position*" in respect of carer's allowance (para 71).

51. No substantive submissions were made by the Applicants on Articles 40.3.1, 42, or 42A or on the claim for relief under the European Convention on Human Rights Act 2005.

52. By Order of the 28 June 2023 (perfected on 21 August 2023), the High Court dismissed the proceedings and adjourned generally the matter of costs.

53. As already noted, this Court gave leave for a direct appeal in respect of the two issues set out earlier.

SUBMISSIONS OF THE PARTIES

54. The parties filed detailed written submissions. Those submissions largely rehearse the arguments advanced before the High Court which I have set out in some detail above. Helpful oral submissions were also made by Mr Shortall SC for the Applicants and by Mr Durcan SC and Mr Ó hOisín SC for the State at the hearing of the appeal.

55. The case being made by the Applicants came into sharper focus in oral argument. Mr Shortall laid particular emphasis on the fact that BM was unable to seek employment because of the extent of her commitments as carer for JM. While the 2007 Regulations permit carers to engage in employment or self-employment (or to undertake training or courses of education), subject to a maximum of 18.5 hours per week, BM was as a matter of practicality excluded from the possibility of earning any income for herself.[12]

56. According to Mr Shortall, section 186(2)(b) of the 2005 Act (the substance of which dates back to the Social Welfare Acts of 1990 and 1991) clearly contemplates that there might be a category of recipients who ought to receive payment of Carer's Allowance at the full rate, irrespective of means, and provides the Minister with power to make regulations to that effect. Pressed to identify the "*class or classes of person*" who, on the Applicants' case, ought to be prescribed by the Minister in such regulations, Mr Shortall referenced carers whose caring commitment significantly exceeds 35 hours per

[12] Though the issue was not explored in argument, where a carer takes up employment and earns income from it, that income is presumably then brought into account in assessing the means of the carer for the purposes of Chapter 8, subject to the normal disregard rules.

week, who face a life-long care commitment and who, as a result, have no prospect of ever being in a position to take up employment. He suggested that there was no constitutional impediment to the making of such regulations, whether by reference to Article 15.2 or Article 40.1: there was, he said, a clear distinction between carers in that category and carers providing 35 hours of care per week and who are able to take up employment to supplement their allowance under the 2005 Act.

ANALYSIS

The Legislative Regime

57. Before engaging further with the specific issues in the appeal, something more must be said about the legislative regime governing Carer's Allowance.

58. As already noted, Carer's Allowance was introduced by the Social Welfare Act 1990 (which inserted a new Chapter 5B into the Social Welfare Consolidation Act 1981). Initially, the allowance was payable only in respect of care provided to pensioners but that was changed by the Social Welfare Act 1999.

59. Prior to the introduction of Carer's Allowance, the main social welfare support for informal care was the Prescribed Relatives Allowance (PRA). PRA was essentially an enhanced payment to pensioners who were incapacitated and receiving full-time care and attention from a "*prescribed relative*". PRA – which, in contrast to Carer's Allowance, was not means tested – was first introduced in 1968 (by sections 9 and 10 of the Social Welfare (Miscellaneous Provisions) Act 1968) on a very limited basis. Initially, only the daughter or stepdaughter of the pensioner concerned could qualify as a prescribed relative but the category of prescribed relatives was gradually expanded. PRA was paid to the pensioner, not to the carer. That was changed in 1989, in line with a recommendation of the Commission on Social Welfare (1986): see generally the account given by Cousins, *op cit.* at pages 73-75. Cousins explains that the numbers in

receipt of PRA were always quite low and, as of December 1989 (prior to the introduction of Carer's Allowance), only 1,850 persons were receiving it. Following the introduction of Carer's Allowance in November 1990, PRA ceased to be payable in respect of new claims but it continued to be payable to persons who were in receipt of it at that time and who did not qualify for Carer's Allowance. According to Cousins, as of 31 December 1993 the number of persons in receipt of PRA had dwindled to 420.

60. The new provisions inserted into the Social Welfare Consolidation Act 1981 by the Social Welfare Act 1990 included a provision – section 198L – mandating the Minister to make regulations for the purposes of the new Chapter 5B. Section 198L included a provision – section 198L(2)(c) – in materially the same terms as is now found in section 186(2)(b)(i) of the 2005 Act. The Social Welfare Act 1991 substituted a new provision for section 198L(2)(c), this one identical in its terms to the current section 186(2)(b). That provision was re-enacted as section 169(2)(b) of the Social Welfare Consolidation Act 1993 and re-enacted as section 186(2)(b) in the 2005 Act. Thus, section 186(2)(b) has effectively been part of the legislative regime governing Carer's Allowance since its introduction.

61. The research of the respective legal teams failed to identify any provision equivalent to section 186(2) elsewhere in the 2005 Act. Many other allowances under the 2005 Act are means tested. However, the Minister does not appear to have power to make regulations excluding or modifying the application of the relevant means testing rules with respect to any other allowance under the 2005 Act.

62. It may be that (as Mr Durcan SC suggested in argument) what is now section 186(2)(b) of the 2005 Act was enacted so as to enable the Minister to make regulations addressing any difficulties that might arise in the transition from PRA (which, as already noted, was not means tested) to Carer's Allowance (which is). In this context, it is notable that another provision inserted by the 1990 Act – section 198I(3) – provided that, notwithstanding the provisions as to means testing, Carer's Allowance would be payable at a rate corresponding to the rate of PRA previously paid (unless the rate of Carer's Allowance payable was higher). That provision was re-enacted in 1993 and again in 2005 (as section 181(3) of the 2005 Act) and was not repealed until 2018. It may well be that section 186(2)(b) was intended to allow the Minister to address any unanticipated difficulties that might arise in relation to carers making the transition from one allowance to the other. If so, that would explain why no provision equivalent to section 186(2)(b) is to be found elsewhere in the 2005 Act. However, whatever the reasons for its initial enactment, section 186(2)(b) is not in terms limited to persons previously in receipt of PRA. On the contrary, as already explained, a striking feature of section 186(2)(b) is that it gives an ostensibly unbounded power to the Minister to designate a class or classes of persons for special treatment in relation to means testing, without giving any guidance or setting out any criteria for identifying such class or classes.

The 2005 Act as a remedial statute

63. The Applicants' arguments on statutory interpretation – and in particular their central contention that "*may*" in section 182(2) of the 2005 Act is properly to be read as "*shall*"

– depend significantly on the proposition that the 2005 Act is a remedial statute.

64. The 2005 Act was characterised as a remedial statute by this Court in *McDonagh v Chief Appeals Officer* [2021] IESC 33, [2021] 1 ILRM 385, per Dunne J (Clarke CJ, MacMenamin, Charleton and Baker JJ agreeing), at para 52 and following. The immediate issue in *McDonagh* was whether a decision by a deciding officer *not* to revise a previous decision refusing an application for DCA was a "*decision given by a deciding officer*" for the purposes of section 311 of the 2005 Act. If it was such a decision, an appeal lay from it. Addressing the appellant's argument that the court should adopt a broad interpretation of "*decision*" because of the remedial nature of the 2005 Act, Dunne J observed that the legislation was "*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*" and "*[t]hus… , as Dodd put it, it is legislation which seeks to put right 'a social wrong and provide some means to achieve a particular social result'*" (para 61 – the reference is to Dodd, *Statutory Interpretation in Ireland* (2008), at para 6.51). The Oireachtas had, Dunne J noted, decided "*to apply public funds to provide for those who are caring for a child with a severe disability*" (para 62). In the circumstances, she considered that she should approach the interpretation of the legislation in the manner set out by Clarke CJ in *JGH v Residential Institutions Review Committee* [2017] IESC 69, [2018] 3 IR 68.

65. These observations have an obvious resonance here. The provisions of Chapter 8 are clearly intended to encourage and support the provision of essential care, in a residential

setting, to persons having such a disability as to require full-time care and attention. That is clearly an important social policy objective. There appears to be a broad consensus that, in general, it is preferable that care should be provided in a residential rather than institutional context. In addition, of course, institutional care is likely to involve significantly greater cost to the State.

66. Even so, recognition of the 2005 Act as a remedial statute does not alter the fundamental purpose and scope of the interpretative exercise that the Court must undertake. Statutory interpretation is a unitary exercise that, in every case, has a single objective, namely ascertaining the intention of the legislature from the text adopted by it (which is the starting point and primary focus), read in its proper context and having regard to its purpose: *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313 and *A, B & C v Minister for Foreign Affairs* [2023] IESC 10, [2023] 1 ILRM 335. Just as, in the area of criminal law, the strict construction rule does "*not alter the fundamental objective of the Court in construing legislation, which is to ascertain the will or intention of the legislature*" (*People (DPP) v TN* [2020] IESC 26, per McKechnie J (O' Donnell CJ and Dunne, Charleton and O' Malley JJ agreeing), at para 118), the remedial character of the 2005 Act does not alter the interpretative exercise that must be undertaken here or free the court from the established bounds of statutory interpretation.

67. So much is clear from the authorities. In *JGH v Residential Institutions Review Committee*, which involved the Residential Institutions Redress Act 2012, Clarke CJ (with whose judgment MacMenamin, Dunne and O' Malley JJ agreed) made it clear

that, while the Act should be construed as widely and liberally as could fairly be done, the court could only "*adopt an interpretation which can be said fairly to arise on the wording of the legislation itself*". To go beyond a meaning that could fairly be attributed would, he cautioned, be "*to impose a liability on the State which it could not properly be said that the Oireachtas intended to accept*" (at para 17). Later in his judgment, in a passage expressly adopted by Dunne J in *McDonagh*, Clarke CJ explained that the Oireachtas must be assumed not to have intended that qualifying applicants would be "*excluded on narrow or technical grounds, for that would be wholly inconsistent with the purpose of the legislation*" but continued:

> *"On the other hand the Oireachtas is entitled, when deciding to apply public funds in a particular way, to define, within constitutional bounds, the limits of any scheme which it is decided should be put in place. Where that scheme is remedial, courts should not be narrow or technical in interpreting those bounds but they should not be ignored either"* (para 20).

68. O' Donnell J (as he then was) also delivered a judgment in *JGH.* That he dissented as to the result does not seem to me to take away from the force of his observations as to the limits of the purposive interpretation of remedial legislation:

> *"... the statute must still be <u>interpreted</u>. The process of statutory construction cannot be treated as an exercise where the words of the statute are fed in to the magician's black box and words of incantation such as purposive, generous or literal or strict are spoken almost at random, before the desired result is extracted from the other side. As Hardiman J observed in Gooden v St Otteran's*

Hospital (2001), the limits of construction are reached when a court is asked to rewrite a statute or supplement it" (para 101; emphasis in the original)

69. Subsequent decisions of this Court emphasise that, while remedial legislation should be construed purposively, that "*cannot mean drawing a conclusion that is plainly contrary to the legislation*": *ELG v HSE* [2022] IESC 14, per Baker J (O' Donnell CJ, Charleton, Woulfe & Hogan JJ agreeing) at para 117, *JN v HSE* [2023] IESC 9, per Dunne J (O' Donnell CJ, Charleton, Woulfe & Hogan JJ agreeing), at para 41.

70. Thus, characterising the 2005 Act as a remedial statute does not transform the role of the court from interpreter to legislator or entitle it to rewrite the Act. That is particularly so where – as here – the interpretation of the 2005 Act that the court is asked to adopt is one that could potentially have significant – if unquantifiable – consequences for the Exchequer.

Is "may" to be read as "shall" here?

71. That an apparently permissive statutory provision can in some circumstances operate to create a mandatory obligation is not in dispute. As Murray J (with whose judgment O' Donnell CJ and Dunne, O' Malley, Baker and Hogan JJ agreed) explained in *Heneghan*:

"There is no sentence using the word 'may' that is – without further explanation or elaboration – unambiguously permissive. Undoubtedly, the law proceeds on the basis that normally the term has the effect of conferring a power, not of

imposing a duty of (see State (Sheehan) v Government of Ireland [1987] IR 550 and Kenny v Dental Council [2004] IEHC 105; [2009] 4 IR 321). But sometimes, 'may' when placed in context is in fact clearly intended to describe a mandatory obligation, and sometimes even when it is permissive, circumstances can arise in which in a particular situation a power becomes a duty" (para 130).

72. Thus in *Dolan v Neligan*, this Court (per Walsh J) held that section 25 of the Customs Consolidation Act 1876, by which the Revenue Commissioners were "*authorised*" to repay over-payments of customs duties where certain conditions were satisfied, *required* a repayment to be made when those conditions were satisfied. Walsh J accepted that the relevant statutory language ("*are hereby authorised*") *prima facie* imported a discretion. However the general context had to be examined to see if there was anything to indicate that the words were intended to be "*imperative*" (pages 274-275). That wider context made it clear, in Walsh J's view, that the legislature intended that, once a claim was made in accordance with the statute, and once the conditions for repayment were satisfied, the customs authorities were not lawfully authorised to do otherwise than to return the over-payments (page 275). Unsurprisingly, Walsh J found it "*difficult to conceive*" that the legislature intended that, where the statutory conditions were satisfied, Revenue might nonetheless decline to return the monies that had been wrongly exacted (*ibid*).

73. In *Application of Dunne*, Walsh J again gave the judgment of this Court. The issue in *Dunne* was whether the use of "*may*" in section 19 of the Intoxicating Liquor Act 1960

(which provided for the installation of a public bar in a hotel where the District Court had made an order extinguishing a 7-day licence on the application of the hotel owner) meant that the District Court (and on appeal the Circuit Court) had a discretion to grant or refuse the order or whether "*may*" should be construed as mandatory. Having analysed the statutory regime, and considered the well-known decision of the House of Lords in *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 as well as his own judgment in *Dolan v Neligan,* Walsh J concluded that, when one had regard to the context in which "*may*" appeared in the relevant statutory provision, the object of the section and the fact that the persons intended to benefit from the section were identified, the absence of any provision in the statute for notice to third parties or for third party objections, the correct construction of the section was that, on the giving of the required proofs, there was no discretion to decline to grant the order sought: page 118.

74. In these cases, the legislative purpose would clearly have been undermined if the relevant statutory provisions were read as being permissive only. That was also the position in *Doyle v Hearne* [1987] IR 601. Section 16 of the Courts of Justice 1947 Act gives the Circuit Court power to state a case to the Supreme Court (now the Court of Appeal) and provides that the court "*may adjourn the pronouncement of his judgment or order on such appeal pending the determination of such case stated.*" That "*may*" had to be construed as mandatory as any other construction would permit the Circuit Court judge to state a case but nonetheless proceed to make a final order while the case stated was pending. That would, per Finlay CJ, "*create a total absurdity*" (at 607).

75. Similarly, to interpret section 13(2) of the Housing Act 1988 (which provides that a housing authority "*may provide, improve, manage and control sites for caravans*") as giving the authority a discretion whether or not to provide a traveller family with a caravan would undermine the objectives of the Oireachtas in enacting the 1988 Act: see *University of Limerick v Ryan* (Unreported, High Court, Barron J, 21 February 1991 and *O' Donnell v South Dublin County Council* [2015] IESC 28. Reading the section to impose an obligation on local authorities "*was not judicial legislation. As a matter of natural construction, the meaning flowed from the context of the section itself*": per MacMenamin J In *O' Donnell* (Hardiman, O' Donnell, McKechnie and Dunne JJ agreeing) at para 51.

76. In contrast, in *State (Sheehan) v Government of Ireland*, this Court (McCarthy J dissenting) held that the section 60(7) of the Civil Liability Act 1961 (which provides that section 60 "*shall come into operation on such day, not earlier than the 1st day of April, 1967, as may be fixed therefor by order made by the Government*") was "*enabling*" and vested a true discretion in the Government as to whether and when to make such an order: per Henchy J (Finlay CJ, Griffin and Hederman JJ agreeing) at 561-562. One factor to which Henchy J clearly attached significant weight was the use of both "*may*" and "*shall*" in section 60(7) and in section 60 as a whole. Another was the "*necessary deployment of financial and other resources*" which the commencement of section 60 – which abolishes the so-called "*non-feasance*" rule – would require.

77. Similarly, in *Kenny v Dental Council* [2009] IEHC 105, [2009] 4 IR 321 the High Court (Gilligan J) rejected the contention that section 53 of the Dentists Act 1985 (which

provides that the Dental Council "*may, with the consent of the Minister, make a scheme for establishing classes of auxiliary dental workers who may undertake such class or classes of dental work as shall be specified by the Council …*") imposed a mandatory obligation on the Council to make such a scheme. Citing *Sheehan*, Gilligan J stated that "*the general rule is that where 'may' is used it is to be read as conferring a discretionary power*" (para 44). He then proceeded to distinguish *Julius v Lord Bishop of Oxford* and *Application of Dunne.* He noted, firstly, that there was no defined class of persons in whose favour the section 53 power was exercisable (para 48). Nor were there any conditions specified under which such persons would be entitled to call for the establishment of such a scheme, as envisaged in *Julius v Lord Bishop of Oxford:* there was not "*a clear set of criteria set out in the legislation which merely requires implementation*" (para 49). Gilligan J also attached significance in this context to the fact that any scheme proposed by the Council required the consent of the relevant Minister: in his view, it was clear that "*this complex two tier process*" was not comparable to the cases relied upon by the plaintiff (*ibid*).

78. Even where a statute defines the class of persons in whose favour a statutory power may be exercised, and sets out an elaborate set of threshold pre-conditions for its exercise, the use of the word "*may*" can nonetheless indicate that the power is truly discretionary rather than mandatory in character: *In the matter of McD (A Child): Child and Family Agency v McD* [2024] IESC 6, per Hogan J at paras 100-103 (speaking of section 23H of the Child Care Act 1991 (as amended) which confers on the High Court a power to make a special care order in respect of a child).

79. Turning to the provisions at issue here, the starting point is the language used in section 186(2)(b). It provides that Regulations made under that section 186 "*may*" provide for the matters that are then set out in sub-para (i) and (ii). The presumptively permissive character of that language is underscored by the use of "*shall*" in section 186(1).

80. The wider statutory context does not, in my view, provide any support for the Appellants' contention that section 186(2) should be read as imposing a mandatory obligation on the Minister.

81. The Oireachtas has in Chapter 8 set out a detailed scheme for the payment of Carer's Allowance. That scheme (i) prescribes the conditions of eligibility for the allowance (section 180); (ii) prescribes the rate at which the allowance is payable (the "*scheduled rate*") (section 181(1)); (iii) provides for means testing *and* prescribes how the scheduled rate is to be reduced by reference to the weekly means of the claimant or beneficiary (section 181(2)) and (iv) makes detailed provision for that purpose for calculating such means (section 179(3) and Schedule 3, Part 5). Having done so, it would not appear to make any sense for the Oireachtas simultaneously to legislate to impose a *duty* on the Minister to make regulations *departing* from that carefully delineated statutory scheme by dispensing with or relaxing the application of the rules relating to means. Such a statutory scheme would be entirely incoherent. When one considers the terms of section 186(2)(b), any such suggestion appears to be even more implausible. If section 186(2)(b) is to be interpreted as a legislative *command*, it is one notably lacking in specifics. section 186(2)(b) is silent as to the identification of the class or classes of person that may potentially benefit from regulations made by the

Minister pursuant to (i) and/or (ii) and equally silent as to the extent of the potential benefit that may be conferred upon such persons and the criteria by reference to which that judgment is to be made. Such matters are instead left entirely to the discretion of the Minister. The extent of that discretion is, in my view, impossible to reconcile with the suggestion that, despite its use of permissive language, the Oireachtas nonetheless intended to impose a *duty* to make regulations on the Minister.

82. The contrast with *Dolan v Neligan* and *Application of Dunne* is illuminating. In those cases, the statutory power was (in the words of Lord Cairns in *Julius v Lord Bishop of Oxford*) "*deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise*" (at 225). That was also the case in *O' Donnell*. It is not the case here. Rather, the Minister is here empowered to make regulations disapplying and/or varying the application of the means testing rules in the 2005 Act in an unspecified way, for the benefit of an unspecified class or classes of carers, without any indication whatever of the criteria to be applied by her in exercising that power.

83. Furthermore, the fact that the power to make regulations under section 186(2)(b) is subject to the sanction of the Minister for Public Expenditure is a weighty factor against the Appellants' contention that "*may*" is to be interpreted as imposing a mandatory duty on the Minister here: the Minister could not fulfil that duty in the event that the requisite sanction was withheld by the Minister for Public Expenditure.

84. Recourse to the "*principles and policies*" of Chapter 8 generally, and/or of section 186(2)(b) specifically, does not assist the Appellants either. Chapter 8 reflects and gives effect to a policy judgment – more correctly, perhaps, a series of policy judgments – made by the Oireachtas in relation to Carer's Allowance, namely that such an allowance should be payable to "*carers*" (as defined), the rate at which the allowance should be payable ("*the scheduled rate*") and – crucially – the fact that entitlement to such allowance should be subject to an assessment of means in the manner provided for in the Act and that, depending on that assessment, the entitlement may be lost or reduced in the manner prescribed. These are, it seems to me, the relevant "*principles and policies*" in Chapter 8.

85. As to Section 186(2)(b), it confers on the Minister a broad power to make regulations dispensing with and/or varying the application of the statutory rules relating to means. One can readily understand how it might be said that the conferral of such an apparently open-ended and unbounded power on the Minister, permitting the effective amendment of section 181(2) of the 2005 Act, amounts to an abdication by the Oireachtas of its Article 15 law-making function. Indeed, the State's submissions hinted as much, without ever going so far as to concede the invalidity of the sub-section. However, that is not an issue in these proceedings and so it is neither necessary nor appropriate to express a view on it. But, taking section 186(2)(b) at face value, it does not, in my view, reflect a policy that exceptions to the statutory means test rules are *required* so that persons who would not otherwise qualify for Carer's Allowance, or would otherwise qualify for it at a reduced rate, "*will receive Carer's Allowance at a level corresponding*

with their need" (Appellants' submissions at para 51(a)). The fundamental rationale for means testing Carer's Allowance in the first place is to target it at those most in need, i.e. carers with no or no significant means available to them. Any "*policy*" requiring departure from the general means testing rules, based on an unarticulated and undefined assessment of "*need*" to be undertaken by the Minister, would conflict with the principles and policies clearly animating Chapter 8, identified above. Rather, section 186(2)(b) – which does not, in fact, make any reference to "*need*" – appears to reflect a legislative judgment that the Minister should have the *power* – not the *duty* – to make regulations providing for exceptions to the statutory rules as to means for the benefit of such (unspecified) class or classes of person as may be prescribed by the Minister, subject to the sanction of the Minister for Public Expenditure. If the Oireachtas had intended that the Minister should be under a duty to make such regulations, it seems to me that it would necessarily have legislated in quite different terms: in the first place using the language of duty ("*shall*") but also setting out clearly the parameters of that duty and the criteria by which it was to be exercised.

86. Finally, it is very difficult to see what order a court could make here or how such an order would in fact benefit the Applicants if made. It was not suggested by the Applicants that the Court could direct the Minister to make regulations of a particular kind or in particular terms. Were the Minister to be directed to make regulations *simpliciter*, any regulations that she made in response (assuming that approval of the Minister for Public Expenditure was forthcoming) might not benefit BM or carers in a similar situation to her. Would it be sufficient compliance with the Court's order if the

Minister made regulations providing for a €1 adjustment to the means test as it applies to carers such as BM? These considerations simply serve to illustrate the difficulties in the Applicants' case on section 186(2).

Under-inclusiveness, Cooke v Walsh and Reeves

87. I have already identified the argument made by the Applicants in reliance on the decision of this Court in *Reeves v Disabled Driver's Medical Appeal Board*. The issue in *Reeves* – and in *Cooke v Walsh* [1984] IR 710 before it – was the making of Ministerial regulations the effect of which was to exclude from benefit persons who satisfied the applicable statutory criteria prescribed by the Oireachtas in primary legislation.

88. In *Cooke v Walsh*, the relevant regulation – Article 6(3) of the Health Services Regulations 1971, made pursuant to section 72 of the Health Act 1970 – purported to exclude the right of persons with full eligibility under the 1970 Act to free hospital care where such persons required treatment for injury suffered as a result of a road traffic accident, unless they established that they had not received and were not entitled to receive damages or compensation. The 1970 Act clearly provided that persons with full eligibility were entitled to both in-patient and out-patient services free of charge. This Court condemned Article 6(3) as an impermissible attempt to amend the relevant provisions of the 1970 Act, a power which, according to O' Higgins CJ, the "*National Parliament could not and did not intend to give … when it enacted s72…*" (at 729). Accordingly, the Court quashed Article 6(3) as *ultra vires* the Minister.

89. Similarly, in *Reeves*, the Minister for Finance had made regulations pursuant to section 92 of the Finance Act 1992 establishing a scheme for the repayment of excise, road tax and VAT in respect of vehicles used or driven by persons who are severely and permanently disabled. The regulations prescribed criteria for assessing disablement which had the effect of excluding the appellants, even though they were severely and permanently disabled and could only be transported in a vehicle specially constructed or adapted to take account of that disablement. O' Malley J (Clarke CJ and O' Donnell, McKechnie and Charleton JJ agreeing) held firstly that section 92 conferred a discretion on the Minister as to whether to make regulations providing for a concession scheme or not and that the Minister could not have been compelled to make such regulations (at para 51, citing *Sheehan*). That finding is obviously relevant here also. However, once the Minister decided to make such regulations, he was bound by the statutory provisions and could not, by specifying additional criteria for eligibility, effectively exclude persons who were within the scope of the statute (paras 51 – 68).

90. I can see no parallel between the circumstances here and those in *Cooke v Walsh* and *Reeves*. The complaint here is not that the Minister has made regulations excluding or restricting the entitlements of BM – or the entitlements of any other carer – under the 2005 Act. BM is in fact in receipt of Carer's Allowance in accordance with the Act, at the rate provided for in the Act and in the 2007 Regulations. Rather, the complaint is that the Minister has failed to make regulations the effect of which would be (or more correctly could be) to entitle BM to Carer's Allowance at an enhanced rate (that is to say, a rate higher than the rate payable to her under the 2005 Act). Assuming that the

Minister could validly make such regulations – and the decision in *Cooke v Walsh* serves to highlight the very real Article 15.2 issue potentially arising in this context – the fact that she has not done so does not have the effect of excluding persons who satisfy the statutorily prescribed conditions for receipt of Carer's Allowance (including the conditions relating to means) from receiving the Allowance, at the rate provided in the Act and the Regulations. The position here is not in any way comparable to *Cooke v Walsh* or *Reeves* and in my view no issue of so-called under-inclusiveness arises here. As for the argument that the Minister has failed to give effect to the "*derogations*" in section 186(2)(b), that argument assumes what it seeks to establish, namely that section 186(2)(b) imposes a duty, rather than simply conferring a power, to make regulations providing for the matters in that sub-section. That assumption is unfounded.

Conclusions on Issue (1)

91. As a matter of ordinary statutory construction, therefore, the position is clear. For the reasons set below, that construction is unaffected by the provisions of Article 41.2. It follows that I agree fully with the High Court's analysis of the statutory construction issue and with Hyland J's conclusion that the reference to "*may*" in section 186(2) is "*truly permissive and confers a power on the Minister rather than imposing a duty*" (Judgment, para 54).

The effect of Article 41.2 of the Constitution

92. It remains to be considered whether Article 41.2 compels a different construction of section 186(2)(b) (assuming that such a construction is open as a matter of law) and/or whether, as the Applicants argue in the alternative, the payment of a reduced rate of Carer's Allowance to BM by reference to her means (as calculated in accordance with the 2005 Act) is inconsistent with Article 41.2.

93. The 2005 Act is, of course, presumed to be constitutional. It follows that any alleged invalidity must be "*clearly established*": *In re Article 26 and the Judicial Appointments Commission Bill 2022* [2023] IESC 34, para 10. The burden on the Applicants is a particularly onerous one here, having regard to the nature of the 2005 Act: *Lowth, Donnelly* and *O' Meara.*

94. Article 41 ("*The Family*") provides in Article 41.1 for the recognition of "*the Family as the natural primary and fundamental unit group of Society*", the constitution and authority of which the State guarantees to protect "*as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.*" Article 41.2 then provides:

> *"2.1 In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.*

2.2 The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

95. Article 41.2 has long been the subject of controversy, dating back to the debates – both legislative and public – on the draft Constitution. Its origins and history, and the many proposals that have been made for its deletion or amendment, are helpfully discussed in Laura Cahillane, "Revisiting Article 41.2" (2017) 40(2) *DULJ* 107. The various proposals for the amendment of Article 41.2 had in common the use of gender-neutral language. Many – though not all – expressly referred to care within the home (and in some cases care outside the home/within the wider community). Most of the proposals would have committed the State "*to endeavour*" to support such care. More recently, however, the recommendations made by the Citizen's Assembly on Gender Equality and by the Joint Oireachtas Committee on Gender Equality would have committed the State to take "*reasonable measures*" to support care.

96. Ultimately, the People were presented with a proposal for the amendment of the Constitution in the Fortieth Amendment to the Constitution (Care) Bill 2023. The Bill proposed the repeal of Article 41.2 and the insertion of a new Article 42B in the following terms:

"The State recognises that the provision of care, by members of a family to one another by reason of the bonds that exist among them, gives to Society a

support without which the common good cannot be achieved, and shall strive to support such provision."

97. That referendum proposal was, of course, decisively rejected by the People and so what the authors of *Kelly: The Irish Constitution* describe as "*perhaps the single most dated provision of the Constitution*" remains as it was. It presents several difficulties of interpretation, which the limited jurisprudence involving it has done little to resolve, as is all too evident from the discussion in Cahillane, *op cit*, pages 116 – 122 and *Kelly: The Irish Constitution*, para 7.7.119 and following.

98. One issue that has not yet been definitively resolved is whether Article 41.2 is limited to marital families. The Family in Article 41.1 is the family based on marriage: *O' Meara*. Subsequent to the decision in *O' Meara*, the People were presented with a proposal contained in the Thirty-ninth Amendment to the Constitution (The Family) Bill 2023 to amend Article 41.1.1 by the insertion of the words "*whether founded on marriage or other durable relationships*" immediately after the reference to "*the Family*". That amendment, had it been adopted, would of course have materially altered the scope of the Article 41.1 family, as explained in *O' Meara* and the authorities considered in it, including *State (Nicolaou) v An Bord Uchtála* [1966] IR 567. However, the amendment was decisively rejected by the People and the Article 41.1 Family therefore remains the marital family. It would seem to follow that Article 41.2 applies to the marital family only and that appears to be how Article 41.2 has generally (though not always) been understood in the pre-*O' Meara* authorities. That indeed is the view expressed by Woulfe J in his concurring judgment in this appeal. However, in his

judgment in *O' Meara*, O' Donnell CJ refrained from expressing a definitive view on that issue: para 94. In any event, the State did not take this point against the Applicants and so it was not necessary for the High Court to address it. Before this Court, the State's position was that the issue did not need to be decided and it elected instead to engage with the substance of the arguments made by the Applicants, while reserving its position on the scope of Article 41.2 to a case where that issue would be determinative.[13] Woulfe J regards that approach as unsatisfactory. I see the force of that position. Even so, in light of the State's position, and having regard to the fact that the issue was not argued either in the High Court or on appeal, the Court ought, in my view, to proceed, at least in the first instance, on the (assumed) premise that the Applicants are entitled to rely on Article 41.2, notwithstanding the fact that they are not part of an Article 41.1 Family. If, on that basis, the constitutional validity of any of the provisions of the 2005 Act appeared to be in serious doubt, then the position would have to be reconsidered. The constitutionality of the 2005 Act could not properly be determined on the basis of a tactical – and highly conditional – concession by the State as to the scope of Article 41.2. However, having regard to the conclusion I have reached on the substance of the Applicants' arguments on the Article 41.2 issue, no such difficulty actually arises here.

99. Not the least of the difficulties presented by Article 41.2 is that of identifying the nature and scope of the duty imposed on the State by Article 41.2.2. It has been said to place a "*duty of imperfect obligation*" on the State: per Barrington J in *Hyland v Minister for Social Welfare* [1989] IR 624 ("*Hyland*"), at 639. In a similar vein, the authors of *Kelly:*

[13] State's response of 10 April 2024 to the questions raised by the Court in advance of the hearing, para 20.

The Irish Constitution refer to the "*tentative nature of the language used to describe the duty imposed on the State by Article 41.2.2*" (para 7.7.130).

100. No court has ever held that such duty extends to a legally enforceable duty to provide financial support to mothers in respect of their work in the home. From the Applicants' point of view, the high point of the jurisprudence would appear to be the *obiter* statement of O' Flaherty J in *L v L* in which he suggested that the effect of Article 41.2 was "*to require the State to endeavour to ensure that mothers with children to rear or to be cared for are given economic aid by the State*", adding that if "*a mother in dire economic straits were to invoke this Article it would be no answer for the State to say that it did not have to make any effort in her regard at all, though it would be open for it to say that it was doing its best having regard to the State's overall budgetary situation*" (page 112). None of the other judges in *L v L* endorsed that suggestion or expressed any similar view of the State's duty under Article 41.2 and no similar statement has been made in any other case.

101. Article 41.2 was addressed by two members of this Court in *Sinnott v Minister for Education* [2001] 2 IR 545. *Sinnott* was concerned principally with Article 42.4 of the Constitution, the plaintiffs' essential complaint being that the State had failed in its duty to provide free education to the first plaintiff, who was the son of the second plaintiff and who suffered from significant disability. In her judgment, Denham J (as she then was) stressed that Article 41.2 did not assign women to a domestic role. It recognised the significant role played by wives and mothers in the home, but that recognition and acknowledgement did not exclude women from other roles and activities. Work

performed by women in the home was recognised "*because it has immense benefit for society*" (page 665). Denham J went on to uphold the High Court's conclusion that the State had acted in breach of the second plaintiff's rights under Article 41 (*inter alia*) but in that regard she was in a minority of one. The only other judge to address Article 41.2, Geoghegan J, found it "*impossible to understand*" how the complaints could give rise to a breach of constitutional duty to the second plaintiff under Article 41.2 as none of the State's conduct was tantamount to any attack on the family in its constitution or authority (page 717). While in his view there was "*no doubt that in an appropriate case the mother might be able to claim breaches of constitutional duties towards her under Articles 41.2.1° and 41.2.2° as these are constitutional provisions directly dealing with the family*", it did not seem to him that any of the behaviour of the State condemned by the High Court constituted "*an attack on the family*" (at page 725). Geoghegan J did not offer any further guidance as to the parameters of the constitutional duties arising under Article 41.2 or what might be "*an appropriate case*" in which to find a breach of those duties.

102. The language of Article 41.2.2 – particularly its use of the phrase "*endeavour to ensure*" – is in marked contrast to the language used elsewhere in the Fundamental Rights section of the Constitution. Many of the rights provisions use the language of "*guarantee*" (see Article 40.3.1, Article 40.6.1, Article 41.1.2, Article 42.1, Article 43.1.2, Article 44.2.1 and 44.2.2). Other provisions, while not using that term, nonetheless clearly commit the State to the vindication and protection of specific rights and/or expressly restrain it from adopting particular measures (see Article 40.1, Article 40.3.2, Article 40.4, Article 40.5, Article 42.3, Article 42.4, Article 42A.1 and Article

44.2.3 - 44.2.6). The only other Fundamental Rights provisions that use the language of "*endeavour*" are Article 40.6.1.i ("*... the State will endeavour to ensure that organs of public opinion ... shall not be used to undermine public order or morality or the authority of the State*") and Article 42.4 (which, after providing that "*the State shall provide for free primary education*", goes on to provide that it "*shall endeavour to supplement and give reasonable aid to private and corporate educational initiative*"). In contrast, many of the provisions of Article 45 (Directive Principles of Public Policy) use the language of "*endeavour*" (Article 45.3.2, Article 45.4.2) or similar language such as "*strive*" (Article 45.1).

103. That contrast in language is also found in the Irish text. "*Ráthaíonn*" is the verb used in Article 40.3.1, Article 40.6.1, Article 41.1.2, Article 42.1, Article 43.1.2 and Article 44.2.2, while a variant – "*ráthaítear*" – appears in Article 44.2.1. The literal English translation of "*ráthaíonn*" is "*guarantee*": in fact another variant - "*a ráthú*" - is used in Article 22.1.1 in reference to the guaranteeing of a loan: Ó Cearúil, *Bunreacht na hÉireann: A study of the Irish text* (1999), pages 543-545. The verb used in the Irish text of Article 41.2.2 (and Article 40.6.1.i) is "*féachfaidh*", which Ó Cearúil translates as "*endeavour*" (page 598) and which may also be translated as "*try to*", "*attempt*" or "*strive*" (page 577). Article 42.4 uses the phrase "*iarracht a dhéanamh*", which Ó Cearúil translates as "*make an effort*".

104. This contrast in language speaks powerfully to the proper construction of Article 41.2.2. Had the drafters of the Constitution intended that the State should *guarantee* that mothers would not be compelled by "*economic necessity*" (in the Irish text "*uireasa*",

which Ó Cearúil translates as "*want*") to engage in work outside the home "*to the neglect of their duties within the home*", they would no doubt have used that language, as they did elsewhere in the Constitution. In my view, the language used in Article 41.2.2 connotes an obligation of a quite different order, directing the State – and in particular the Government and the Oireachtas, whose constitutional function it is to set social policy and to make laws for the State – in those policies and laws to seek to support the right of mothers, as a class, not to be obliged to work outside the home, but without committing the State to the provision of any particular form or level of support or giving individual mothers any legally enforceable right to support from the State. The language of the constitutional mandate here – "*endeavour to ensure*" – simply does not provide a justiciable standard by reference to which any such right might be asserted or assessed. Indeed, it seems to me that that is well illustrated by the observations of O' Flaherty J in *L v L*: how might a court set about assessing whether, in any given case, the State had made a sufficient "*effort*" or was (or was not) "*doing its best*" to support mothers in the home, having regard to available resources? Indeed, how would a court assess whether in any given case working outside the home would or might involve a mother *neglecting* her *duties* within it? Many mothers (and fathers) work outside the home, while also effectively managing their duties within it. What would be the standard of "*neglect*" for that purpose?

105. These questions serve to emphasise the extent to which the Article 41.2.2 duty is not readily capable of legal assessment or application in the same way as other, differently expressed, constitutional rights. It expresses a broad standard that, while it constrains the State at the level of general policy, does not provide a basis for the exercise for

which it is prayed in aid by the Applicants here, namely judicial review of detailed and complex decisions taken by the Government and the Oireachtas as to the design of the social welfare system and the allocation of resources to it and within it. Were the State to abolish all forms of support for mothers in the position of BM and/or adopt policies the purpose and/or effect of which was to coerce a significant proportion of such mothers to seek employment outside the home, Article 41.2. might well be engaged. But that is not the position here.

106. Such a construction of Article 41.2.2 does not deprive it, or Article 41.2 generally, of value. The constitutional articulation of a policy of supporting mothers in the home and recognising the value of their work has significance in itself. Thus, in *Dennehy v Minister for Social Welfare* (Unreported, High Court, Barron J, 26 July 1984), the High Court rejected an Article 40.1 challenge to provisions of the Social Welfare (Consolidation) Act 1981 that provided for the payment of deserted *wives* benefit and allowance but which excluded deserted *husbands* from any such benefit or allowance. In Barron J's view, that could not be said to be an unreasonable legislative policy, having regard to the provisions of Article 41.2. A similar approach was taken by the High Court and by this Court in *Lowth*, which also concerned the exclusion of deserted husbands from deserted wives benefit (the Oireachtas had by then provided for Lone Parents Allowance which was payable to fathers, but at a lower rate. Deserted wives benefit/allowance is no longer payable and a gender-neutral allowance – One-Parent Family Payment – now applies). *T v T* [2002] 3 IR 334 illustrates the potential relevance of Article 41.2 in a different context, the division of assets following divorce: see particularly the comments of Denham J (as she then was) at 381-382 and of Murray J

(as he then was) at 406 – 407. *T v T* was, in a sense, a sequel to *L v L*. In *L v L*, this Court had held that Article 41.2 did not give the courts a right to direct a transfer of property in favour of a mother based on ascribing a value to her work in the home but *T v T* suggests that Article 41.2 (*inter alia*) justified the enactment by the Oireachtas of a legislative scheme that essentially enabled the same outcome to be achieved.

107. In any event, the State does provide a range of supports to mothers raising children in the home, through the payment of benefits such as Child Benefit, Maternity Benefit and One-Parent Family Payment (though that is not payable where the mother is living with a spouse or cohabiting). The Early Childhood Care and Education (ECCE) scheme is another form of such support, as is free primary and secondary education (because they provide mothers with an opportunity to work outside the home without compromising their childcare duties). Taxation policy also provides some support for married couples, albeit significantly less support than was the case prior to the shift to tax individualisation in the early 2000s.

108. Where – as here – a mother is caring for a child with a disability in the home, a broader range of State support is available. In addition to Carer's Allowance, Carer's Support Grant will be payable under Part 5 of the 2005 Act (currently €1,850 a year). Child Benefit remains payable until the child is 18 (section 219(1)(b)(ii) of the 2005 Act). Depending on the age of the child, DCA or Disability Allowance will also be payable. Here, JM receives Disability Allowance (currently fixed at €232 per week). While that is payable to JM rather than to BM, it is nonetheless available to meet family expenses. A specific tax credit – the Incapacitated Child Tax Credit – will be available to the other

parent or guardian. JM's father would appear to be entitled to such a credit. Other forms of State support – such as free health care and respite care – may also be available.

109. Even if the effect of Article 41.2 is to "*require the State to endeavour to ensure that mothers with children to rear or be cared for are given economic aid by the State*" – and for the reasons set out above, I do not believe it does - the State has clearly given, and continues to give, such aid to BM here. If Article 41.2.2 commits the State to the provision of financial support to mothers in the home in certain circumstances, the availability of the supports identified above fulfils that commitment. That is not to suggest that the level of support provided by the State to carers such as BM properly values the care that they provide. That is a different question entirely, one that is for debate and resolution in the political rather than legal forum. At its high-water mark, Article 42.2.2 requires, and requires only, that mothers should not be obliged to work outside the home to the neglect of their "*duties*". It is clear that BM has not been obliged to work outside the home. Instead, she has been and is being supported in staying at home to care for JM.

110. What is said by the Applicants is that payment of a reduced rate of Carer's Allowance to BM, as a result of the application of the statutory means test, is inconsistent with Article 41.2. Implicit in that complaint is an acceptance that payment of Carer's Allowance at the full scheduled rate would satisfy the State's constitutional obligations. Indeed, in the course of argument, Mr Shortall appeared to accept the principle of means testing: the focus of complaint was on the fact that the means of BM's partner had been brought into account for that purpose.

111. Carer's Allowance is not, of course, the only support that the State provides to BM and her family. The Applicants' focus on Carer's Allowance, and in particular on the reduction in the rate of allowance payable to BM arising from the application of the means test, should not obscure that important fact. As regards Carer's Allowance, if it is constitutionally *permissible* to reduce the allowance payable to BM by reference to her own means (if any), as the Applicants appear to accept, it is very difficult to identify any basis on which it might plausibly be contended that, as a matter of principle, it is constitutionally *impermissible* to reduce the rate of allowance payable to her by reference to the means of her partner. No such basis was ever identified by the Applicants.

112. Every person applying for or receiving Carer's Allowance is subject to the same rules as to means testing. The objective of those rules is to target the benefit of the allowance to those with the greatest financial need.[14] There are, no doubt, *policy* arguments against the means testing of social welfare benefits (including the complexity and expense of administering any means testing regime and the risk that means testing may deter take-up by eligible persons), but there are also obvious *policy* arguments in favour of means testing such benefits in terms of the effective allocation of public resources to those whose financial need is greatest. It may be that different considerations apply to contributory allowances or benefits but these proceedings are concerned only with a non-contributory allowance. As a matter of *law*, it appears to be squarely within the

[14] Affidavit of Ms Pamela Keegan, at para 16.

competence of the Oireachtas to make the entitlement to Carer's Allowance subject to a means test. Indeed, the Applicants did not contend otherwise.

113. As the High Court Judge explained, the application of a means test puts "*differently situated persons in a similar position*" by taking account of their differing means (Judgment, para 71). As a matter of principle, the financial needs of a carer without means are greater than the needs of a carer who has means. Payment of Carer's Allowance at the full scheduled rate to the former and at a reduced rate to the latter effectively seeks to put them in the same position.

114. In principle, providing for the aggregation of the means of a cohabiting couple for this purpose also appears to be a reasonable and permissible legislative choice. Such aggregation appears to be a feature of many other social welfare systems, reflecting the fact that mutual financial support and the sharing of available financial resources are normal incidents of such relationships. That is so whether the couple is married or not; that indeed was the fundamental rationale of this Court's decision in *O' Meara*: per O' Donnell CJ at paras 34-35. It is apparent from the evidence here that JM's father is in fact providing financial support to BM and to JM.

115. Again, there are no doubt *policy* arguments against the aggregation of the means of a couple in this context – particularly as to the impact on women – but as a matter of *law*, it certainly appears to be within the competence of the Oireachtas to provide for it. In fact, the Applicants did not challenge aggregation as such but rather asserted that its

application to BM violated Article 41.2. It would seem to follow that, on the Appellants' case, the application of aggregation for the purpose of assessing the means of carers who do not come within the scope of Article 41.2 is unobjectionable.

116. No basis on which Article 41.2 might require carers in the home to be treated more favourably than other carers – as would be the case if the rules relating to aggregation of means were disapplied for carers in the home – was never articulated by the Applicants and I can see none. Where care is provided by a mother to a child within the home, it is not, on that account, inherently more likely to be more burdensome than care provided in other settings or relationships falling outside the scope of Article 41.2.2. The nature and extent of the care required is not logically related to where the care is provided or the relationship between carer and the person being cared for. Therefore, the fact that care is being provided to a child within the home is not a basis for treating it more favourably in terms of financial support.

117. The payment of a reduced allowance to BM is intended to put her in precisely the same position as the payment of allowance at the scheduled rate to a carer without means. Payment of the allowance at the scheduled rate to BM would effectively give her preferential treatment *vis-à-vis* other carers, including other carers whose caring commitments may be as onerous as BM's. Nothing in Article 41.2 mandates such an approach in my view.

118. Even if it could be said that the care provided by a mother within the home to a disabled child is inherently more burdensome than care provided in other settings or

relationships, nothing in Article 41.2.2 is capable of imposing a duty on the State to recognise that position by either paying Carer's Allowance at a higher rate, or disapplying the means test. The duty imposed on the State by Article 41.2.2 simply does not operate at that level.

119. In conclusion, Article 41.2.2 does not preclude or affect the application of the general means testing regime provided for in Chapter 8 of the 2005 Act and the 2007 Regulations.

Conclusions on Issue (2)

120. In my view, the effect of Article 41.2.2 is simply to require the State – and in particular the Government and the Oireachtas, whose constitutional function it is to set social policy and to make laws for the State – in its policies and laws to seek to support the right of mothers, as a class, not to be obliged to work outside the home. It does not commit the State to the provision of any particular form or level of support or giving individual mothers any legally enforceable right to support from the State.

121. In any event, even supposing that there may be circumstances in which Article 41.2.2 is capable of imposing an enforceable obligation on the State to provide financial support to carers in the home, significant financial support is in fact being provided to BM (and to JM) here and, as a matter of fact, BM has not been obliged by "*economic necessity*" to engage in labour outside the home.

122. The fact that a reduced rate of Carer's Allowance is payable to BM, by reference to the means available to her (as assessed in accordance with Part 3, Chapter 8 of the 2005 Act), does not engage Article 41.2. Nothing in Article 41.2 precludes the application of a generally applicable means test (including the provisions for aggregation) to carers such as BM.

123. Accordingly, Article 41.2 has no bearing on these proceedings. It does not dictate the payment of Carer's Allowance by the State, less still its payment at any particular level and it does not have the effect of requiring the Minister to make regulations of the kind contemplated by section 186(2) the 2005 Act.

CONCLUSIONS AND ORDER

124. For the reasons set out above, I would dismiss the Applicants' appeal and affirm the order made by Hyland J in the High Court.

125. That order resolves this legal challenge to the Carer's Allowance regime. It does not of course foreclose public debate on whether that regime requires reform or preclude the Minister and the Oireachtas from taking whatever steps they consider appropriate from a policy perspective to address the issues raised by the proceedings.