ï»¿H421

High Court of Ireland Decisions

Judgment

Title:	Donnelly & anor -v- The Minister for Social Protection & ors
Neutral Citation:	[2018] IEHC 421
High Court Record Number:	2017 No. 464 JR
Date of Delivery:	01/06/2018
Court:	High Court
Judgmentby:	Binchy J.
Status:	Approved

[2018] IEHC 421

THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 464 J.R.]

IN THE MATTER OF THE CONSTITUTION OF IRELAND
IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003
BETWEEN
ROBERT DONNELLY AND HENRY DONNELLY (A MINOR SUING BY HIS FATHER AND NEXT FRIEND ROBERT DONNELLY)

APPLICANTS

AND
THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Binchy delivered on the 1st day of June, 2018

1. The second named applicant, whom I shall refer to hereafter as Henry, was born with Down Syndrome on 18th June, 2015 and he has, from birth, suffered from a number of medical conditions which required him to have instant and almost permanent hospitalisation, very often in an intensive care unit, from his birth until November 2017. In July, 2016, the first named applicant, Mr Donnelly, applied to the first named respondent (the "Minister") for payment of Domiciliary Care Allowance ("DCA"). This is a benefit which is payable to the parent of a child, with whom that child is resident, where the child concerned has a severe disability and requires continuous care and attention substantially in excess of that required by a child of the same age. Mr Donnelly's

application was refused by the Minister on 6th April, 2017 on the grounds that Henry was not resident at the time with Mr Donnelly. Through his solicitors, Mr Donnelly requested a review of that decision in light of the very significant time dedicated by Mr Donnelly to Henry's care. By decision issued on 23rd May, 2017, the Minister declined to reverse his decision of 6th April, 2017. On 29th May 2017, the applicants obtained leave to issue these proceedings, whereby they seek the following reliefs:-

> "(1) An order of*certiorari*quashing the decisions of the Minister of 6th April, 2017 and 23rd May, 2017.
>
> (2) A declaration that ss. 186D(1)(a) and 186E of the Social Welfare Consolidation Act 2005 (as amended) (the "Act of 2005") and such provisions of S.I. 142 of 2007 (*inter alia*Regulations 13 and 140C-E), (all of which together I shall hereafter refer to as the "impugned provisions") which prohibit the payment of DCA to Mr Donnelly are unconstitutional on the grounds that,*inter alia*, the said provisions unlawfully discriminate against the first and second named applicants by treating them unequally before the law, respectively, with the parents of other severely disabled children, other severely disabled children, in an unjustified manner and is disproportionate, arbitrary and contrary to reason and fairness, insofar as the provisions of the said Act of 2005 prohibits payment of a social welfare payment intended for their benefit.
>
> (3) A declaration, pursuant to s. 5 of the European Convention on Human Rights Act 2003 (the "Act of 2003") that the impugned provisions are incompatible with the said Act on the grounds that DCA is within,*inter alia*, the scope or ambit of Article 1 of Protocol 1 and Article 8 of the Act of 2003, and therefore must be administered without discrimination on any of the grounds identified in Article 14 of the Act of 2003, such as Henry's "other status" as a severely disabled child and; that s. 186E of the act of 2005 unlawfully discriminates against Henry by denying him and his family the benefit of DCA because he requires lengthy hospital inpatient treatment, while granting it to those severely disabled children who do not require hospitalisation.
>
> (4) Alternatively, a declaration that Henry is resident with Mr Donnelly for the purposes of the Act of 2005 and S.I. 142 of 2007 (*inter alia*Regulations 13, 140C-E) and/or the said provisions are unconstitutional, in the premises that there is an unconstitutional lacuna."

2. Leave to issue these proceedings was granted upon the following grounds:-

> "(1) The impugned provisions breach Henry's constitutional right to equal treatment before the law pursuant to Article 40.1 of the Constitution. The applicants also enjoy personal rights under Articles 40.3 and 42 of the Constitution. Statutory provisions affecting rights under all of the aforementioned articles must be proportionate and;
>
> (a) be rationally connected to the object and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible; and
>
> (c) be such that their effects on rights are proportionate to the objective.

While the State is entitled to restrict access to its social welfare system, it must not do so in the manner which has the effect of wholly denying an Irish citizen child the benefit of a social welfare payment intended to contribute to his care and for his wellbeing. The impugned provisions permit the exclusion of payment of DCA in respect of Henry in a manner which constitutes an unjust attack on his rights, being arbitrary and contrary to reason and fairness. Further, the denial of DCA is contrary to the best interests of Henry.

(2) DCA constitutes a possession for the purposes of Article 1 of Protocol 1 of the ECHR Act 2003. DCA is also, pursuant to Article 8 of the ECHR Act 2003, the means by which States demonstrate their respect for family life and rights of families. Contrary to those articles, the impugned provisions permit the exclusion of payment of DCA in respect of Henry to Mr Donnelly. Henry is entitled to equal treatment with other disabled children (other status) who are not in hospital. There are insufficient reasons justifying the difference of treatment as between the granting of DCA in Ireland to those who are in hospital and those who are not. The denial of DCA is contrary to Henry's best interests and an interference with the family life of both applicants and/or a denial of a possession/property right.

(3) The Regulations, and specifically regulations 13 and 140c-e thereof set out exceptions to the rule excluding payment of DCA to children in Institutions. The applicants are within these exceptions or, alternatively, the exceptions are not sufficiently wide and fail to take account of circumstances such as those of the applicants in a manner which constitutes an unconstitutional lacuna."

DCA and the Impugned Provisions

3. DCA is a social welfare benefit which is paid in respect of children who are considered to have needs substantially in excess of other children of the same age, in recognition of the extra care and attention that is required to be provided in the home by parents of those children. It was originally introduced by way of a Department of Health circular in 1973, and was payable pursuant to s. 61 of the Health Act 1970. The 1973 departmental circular was superseded by a circular of the Department of Health and Children of January, 2007. That circular stated,*inter alia*:-

"Since the allowance is intended as a recognition of the additional burden involved in caring for children with a severe disability in the child's home, it does not apply to children who are maintained full-time in residential homes, schools or other centres. Eligible children in part-time residential care who go home at weekends or holidays will receive a*pro-rata*payment, i.e. a per nightly rate based on the number of nights spent at home ….

HOWEVER, THE ALLOWANCE IS PAID IN FULL IN CASES WHERE ELIGIBLE CHILDREN WHO LIVE FULL-TIME AT HOME ARE ABSENT FOR A PERIOD/S OF NOT MORE THAN EIGHT WEEKS IN ANY TWELVE MONTH PERIOD, I.E. HOSPITAL ADMISSIONS OR RESPITE.

The Health Service Executive may consider continuing payment of the allowance in cases of extreme hardship where an eligible child spends more than eight weeks in hospital in any twelve month period, and where the parents/guardian have to regularly travel long distances to visit the child in hospital."

(The text appearing in upper case above is endorsed in that manner on the

circular).

4. Soon after the circular of January 2007, DCA was put on a statutory footing by way of amendment to the Act of 2005. The amendment was introduced through the insertion of Chapter 8A of the Act of 2005 by s. 15 of the Social Welfare and Pensions Act 2008. The impugned provisions are ss. 186D(1)(a) and 186E of the Act of 2005, as well as provisions of S.I. 142 of 2007 which prescribe certain rules for the payment of DCA.

5. Section 186 of the Act of 2005 makes provision for payment of DCA and s. 186C(1) provides:-

> "A person who has not attained the age of 16 years (in this section referred to as the 'child') is a qualified child for the purposes of the payment of domiciliary care allowance where –
>
> (a) the child has a severe disability requiring continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age,
>
> (b) the level of disability caused by that severe disability is such that the child is likely to require full-time care and attention for at least 12 consecutive months,
>
> (c) the child –
>
> (i) is ordinarily resident in the State, or
>
> (ii) satisfies the requirements of s. 219(2),
>
> and
>
> (d) the child is not detained in a children detention school."

6. It is common case that Henry has at all times been a qualified child for the purposes of s. 186C(1) of the Act of 2005. However, DCA is payable not to a qualified child, but to a "qualified person" in respect of a qualified child. Section 186D of the Act of 2005 provides:-

> "(1) A person is a qualified person for the purpose of receiving domiciliary care allowance in respect of a qualified child if -
>
> (a) the child normally resides with that person,
>
> (b) that person provides for the care of the child, and
>
> (c) the person -
>
> (i) is habitually resident in the State, or
>
> (ii) at the date of the making of the application for domiciliary care allowance, is a person to whom paragraph (a), (b) or (c) of section 219(2) applies.
>
> (2) For the purposes of subsection (1)(a) the Minister may by regulation make rules for determining with whom a qualified child is to be regarded

as normally residing."

7. While it can be seen that it is a requirement of s. 186D that, to be a qualified person for the purpose of receiving DCA, the child must normally reside with the person concerned, this section was not specifically referred to either in the decision of the Minister of 6th April, 2017 or the further decision of the Minister dated 23rd May, 2017, upon the review of the decision of 6th April, 2017. The decision of 6th April, 2017 states simply that "DCA legislation states that the child for which the allowance is payable must normally be resident with the carer". This is of course a reference, without mentioning the section, to the requirement set out in s. 186D(1)(a) of the Act of 2005. The decision of 6th April, 2017 then proceeds to quote from s. 186E(1) of the Act of 2005 which states:-

> "Subject to subsections (2) and (3), domiciliary care allowance is not payable for any period during which a child is resident in an institution."

8. "Institution" is defined in s. 186B of the Act of 2005 as follows:-

> "In this Chapter—
>
> 'institution', means a hospital, convalescent home or home for children suffering from physical or mental disability or ancillary accommodation and any other establishment providing residence, maintenance or care where the cost of the child's maintenance in that institution is being met in whole or in part by or on behalf of the Executive or the Department of Education and Science."

9. The letter of 6th April, 2017 concludes with a request to Mr Donnelly to notify the Minister as soon as Henry is discharged from hospital so that the decision can be reviewed. The letter of the Minister of 23rd May, 2017 goes a little further and states that DCA will become payable when Henry returns home. The Court was informed that Henry returned home in November, 2017 and since then, DCA has been paid to Mr Donnelly at the rate of €309.50 per month. Accordingly, these proceedings are concerned with the period for which DCA was denied to Mr Donnelly, i.e. from the date of Henry's birth on 18th June, 2015 until his arrival home in November, 2017.

10. The Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007), as amended by the Social Welfare (Consolidated Claims, Payments and Control) (Domiciliary Care Allowance) (Amendment) (No.3) Regulations 2009 (S.I. No. 162 of 2009) (all of which I shall hereafter refer to as the "Regulations"), provides a limited exception to the requirement that a child, who is resident in an institution, is not eligible for DCA. Article 140E of the Regulations provides:-

> "For the purpose of section 186E(3), domiciliary care allowance shall continue to be payable in respect of a qualified child who has been admitted to an institution on a full-time basis for the purpose of receiving medical or other treatment of a temporary nature for not more than 13 weeks in a 12 month period."

In Henry's case, because he was resident in an institution from the time of his birth up until November, 2017, Mr Donnelly did not receive the benefit of this exception.

11. There are also other provisions in the Regulations designed to deal with situations that could undermine entitlement to the benefit. So for example, while Article 140C(2) provides:-

> "Except as provided for in Article 140D a qualified child who is reside with a person for less than 5 days in any one week shall not be regarded as normally residing with that person for the purposes of domiciliary care allowance."

Article 140D then provides:-

> "(1) Notwithstanding Article 140C for the purposes of section 186E(1),

domiciliary care allowance shall be payable in respect of a qualified child who is temporarily resident with a qualified person for not less than two days and not more than four days in any one week in which the child would otherwise be regarded as residing in an institution.

(2) In the case of a qualified child to whom sub-article (1) applies, the monthly amount of domiciliary care allowance payable shall be 50 per cent of the amount set out in Part 5 of Schedule 4 to the Principal Act."

Background

12. Henry was born on 18th June, 2015, at Mullingar Hospital. He is the youngest of three children. His siblings are now ten and eight years of age. The family resides in Kilcormack, Co.Offaly.

13. It has at all times been accepted by the Minister that Henry is a qualified child within the meaning of s. 186C(1) of the Act of 2005. Henry's diagnosis as of 21st June, 2016 is described in a report of a Dr Vaish, a consultant paediatrician, and includes no less then thirteen different headings of diagnosis. These include trisomy 21 (Down Syndrome), recurrent aspiration, oral aversion, gastro-oesophageal reflux, hypotonia, hypothyroidism, intermittent stridor, severe tracheomalacia and a cardiorespiratory arrest on 5th November, 2015. Henry has required, from birth, ongoing hospitalisation and treatment for these various conditions. Following upon his birth in Mullingar Hospital, Henry was transferred to the Children's University Hospital, Temple Street. He was discharged to Mullingar Hospital on 18th February, 2016, but owing to a recurrence of his symptomology, he was transferred back to Temple Street again on 24th March, 2016 where, amongst other things, a feeding tube was inserted. He eventually had a tracheostomy which prolonged his stay in hospital. It was also necessary to train Henry's parents to care for him at home.

14. In his grounding affidavit, Mr Donnelly describes how it became necessary for him to leave his position of employment (that of a radio broadcaster) in order to care for Henry while in hospital and to complete all of the training requirements for Henry. It was necessary for Mr Donnelly to live in Dublin five days a week, and apparently he was able to reside at no additional cost in a house nearby the hospital, provided by a charitable service. Mr Donnelly deposes that he would normally spend eight to twelve hours per day assisting with the care of Henry, and describes how he would carry out bathing, feeding, medications, trachi care, physiotherapy exercises, physical and sensory activities, social development skills programs and motor skill developments and all other care tasks associated with a sick child. Mr Donnelly deposes that he has been trained in traciostomy care and changing, suctioning, awareness of care in a sick child, the safe application of appropriate medications etc. with a view to providing 24 hour management and care for Henry at home, but some of which care he provided to Henry while in hospital. He expressly deposes that the level of care which he is providing to Henry is considerable and is effectively a full-time job. During Henry's time in hospital, Henry's mother also visited and assisted with Henry's care, usually on a Thursday, a Saturday and a Sunday. During this difficult period Mrs Donnelly was caring for the other children in the family without the assistance of Mr Donnelly, because of his commitment to Henry.

15. In a second affidavit sworn in support of this application, Mr Donnelly exhibits a report from a Ms Kim Murray, medical social worker at Our Lady's Children's Hospital, Crumlin where Henry also received treatment and care. Ms Murray says that while Henry's medical care was provided by the medical team, his parents were expected to provide the following care for Henry:-

- Tractotomy education and care;

- Peg education and care;
- Care of Hickman line;
- Education in relation to Hickman line;
- Manage the side-effects of chemotherapy;
- Personal hygiene;
- Daily psychotherapy;
- Daily speech and language therapy;
- Daily stimulation and entertainment.

Ms Murray concludes this report with the following paragraph:-

> "During prolonged hospitalisation parents are required to provide consistent emotional warmth and to respond to the cognitive and emotional need (sic) of the child. Mr and Mrs Donnelly were advised by the multidisciplinary team that one parent was required to provide daily care for Henry for the duration of his admission, not to provide such care was considered neglect. Mr Donnelly provided daily care for his son Henry for the duration of his treatment".

16. While none of this was disputed by the respondents, it was submitted by the respondents that there was no evidence put forward by the applicants that the level of support and care that Henry required from his parents while in hospital was as much as or greater than the level of care that would be required if he was at home.

17. In a replying affidavit delivered on behalf of the respondents and dated 6th July, 2017, Mr Roy Baldrick, assistant principal of the first named respondent explains the background to the introduction of the DCA. He refers to the 1973 circular and to the placing of the benefit on a statutory footing by the enactment of Chapter 8A of the Act of 2005, as inserted by s. 15 of the Social Welfare and Pensions Act 2008. He avers that the payment was specifically designed to help parents or guardians of severely handicapped children between two and sixteen years of age who are being cared for at home. The lower age limit of two years was removed in 2001 (under the old scheme). He avers that the payment of DCA has always been premised on a requirement that the qualified child is resident at home with his or her parents and the payment is made to recognise the additional obligations and expense that are placed on parents for caring for children in their own home. For that reason, he says, DCA has never been payable in respect of qualified children who reside in an institutional setting or otherwise reside outside of the home. He avers that in 2001 the administrative scheme then in operation was amended to allow for the pro-rata payment of the allowance in respect of periods of time spent at home by qualified children who ordinarily resided in a special school or other institutional setting. The statutory scheme, when introduced, allowed for a similar flexibility. He draws attention to the provisions of the Regulations, in particular the provision that permits of payment of DCA to qualified persons in respect of a qualified child in circumstances where the child may be resident in a care setting or hospital for part of a week or for certain periods during a twelve month period.

18. He then deals with the situation of the applicants and explains that the application for DCA was disallowed because, while Henry met the medical criteria for DCA, he was not eligible for the payment by reason of the application of s. 186E(1) of the Act of 2005, because he was resident in hospital on a full-time basis. He expresses the opinion that

the application of the legislation to the facts of this case is consistent with the underlying policy behind DCA, which is paid in recognition of the additional obligations and expenses that are placed on parents for the caring of children in their own home. He points out that at the time of the swearing of his affidavit, Henry was currently admitted to hospital where his care needs were being met by public funds. He avers that when Henry was released from hospital and resident with his parents, it will be possible for DCA to paid. This of course is what ultimately transpired.

19. Mr Baldrick also draws attention "for completeness" to payment of illness benefit to Mr Donnelly at the rate of €193 per week, with effect from 19th November 2015. Mr Donnelly confirmed receipt of this payment up to 2nd November 2017. Mr Donnelly's counsel informed the Court that eligibility for this benefit arose directly out of the stress experienced by Mr Donnelly in the wake of Henry's birth and care needs. The Court was also informed that Mr Donnelly would soon qualify for payment of a carer support grant in the sum of €1,700 per annum, and that he has applied for payment of carer's allowance of up to €210 per week.

The Issues

20. In his submissions on behalf of the applicants, counsel for the applicants, Mr Shortall B.L. reduced the issues to two questions:-

> (i) Are ss. 186D(1)(a) and 186E of the Act of 2005 and such provisions of S.I. 142 of 2007 (*inter alia*Articles 13 and 140C-E) which prohibit the payment of domiciliary care allowance to Mr Donnelly, unconstitutional?
>
> (ii) Are ss. 186D(1)(a) and 186E of the Act of 2005 and such provisions of S.I. 142 of 2007 (*inter alia*Regulations 13, 140C-E), which prohibit the payment of domiciliary care allowance to Mr Donnelly, incompatible with the ECHR Act 2003?

21. It should be noted that no case was made impugning the manner in which the decisions of 6th April, 2017 and 23rd May, 2017 were made by the Minister. The applicants' case is advanced entirely upon the bases that the impugned provisions are unconstitutional and/or incompatible with the ECHR Act 2003.

Submissions of the Parties

Submissions of the Applicants

22. In his submissions to the court, counsel for the applicants, Mr Shortall, argues that the impugned provisions breach the guarantee of equal treatment before the law as provided for in Article 40.1 of the Constitution. He is, however, careful to say that the applicants do not assert that social welfare payments such as DCA are ,*per se*, protected by the Constitution. He acknowledges that the courts have consistently adopted the position that they cannot adjudicate upon such matters which are peculiarly matters within the field of national policy, to be decided by a combination of the executive and the legislature, and in the absence of extreme circumstances the court will not interfere with the discretion enjoyed by the Oireachtas in the discharge of functions that are within its remit.

23. It is submitted however that in making provision for DCA, the Oireachtas has identified a category of persons i.e. those with severe disabilities who require continual or continuous care and attention, substantially in excess of the care and attention required by a child of the same age, on a full-time basis, and for whom it is appropriate that the State should provide some measure of support. Having identified that that category of persons is in need of support, the Oireachtas has then provided a two limb test to qualify for the DCA: firstly, the qualified child must reside with the qualified

person and secondly, the qualified person must provide for the care of the child. The first limb of the test cannot be met by a person whose child is resident in a hospital, other than in the circumstances prescribed by the Regulations (i.e. eligible parties would be entitled to DCA for a period of thirteen weeks in which the eligible child is hospitalised in any twelve month period). It is submitted however that the second limb of the test can be met by a parent providing a significant level of care to a child in a hospital, such as in the case of Mr Donnelly who has been required to leave his job, and his family home for most of the week, to reside in a house beside the hospital and to provide care to Henry for eight to twelve hours per day, five days per week, while his spouse provides care on the remaining two days and each of them are required to be "on call" in the evenings and at night. In these circumstances, it is submitted that it can hardly be disputed that Mr Donnelly, and his wife, are providing full-time care to Henry. But they are not eligible to receive DCA because of the requirement that during the relevant period, Henry was residing in hospital. Mr Shortall submits that the provisions therefore have the effect of treating Henry unequally before the law (by comparison to those receiving the full-time care of a parent or guardian at home), on the basis, ironically, that because of the extreme nature of his medical condition he is required to be detained in a hospital. This differentiation of treatment is not, it is submitted, legitimised by reason of being founded on a difference of capacity, whether physical or moral, or a difference of social function. Mr Shortall has referred me to a number of authorities in which the issue of unequal treatment has been considered. Firstly, he refers to the decision of*M.D. (a minor) v. Ireland*[2012] 1 I.R. 697 in which Denham J. (as she then was) in a discussion about Article 40.1 stated:-

> "The central principle of the Article rests, firstly, on the common humanity which we all share and, secondly, on the general understanding that for the State to pass a law which treats people, who are objectively in the same situation*vis-Ã -vis*the law, unequally, is an affront to fundamental ideas of justice and even to rationality.
>
> Thus strict equality is the norm laid down by Article 40.1. However, the Article recognises that perfectly equal treatment is not always achievable, rather the Article recognises that applying the same treatment to all human persons is not always desirable because it could lead to indirect inequality because of the different circumstances in which people find themselves."

24. Mr Shortall places special reliance upon the decision of Laffoy J. in*S.M. v. Ireland (No. 2)*[2007] 4 IR 369 wherein, with reference to s. 62 of the Offences Against the Person Act 1861, which mandated substantially different penalties in respect of indecent assaults upon males and females, she stated:-

> "It is inconsistent with the Constitution unless the differentiation it creates is legitimated by reason of being founded on difference of capacity, whether physical or moral, or difference of social function of men and women in a manner which was not invidious, arbitrary or capricious."

25. Mr Shortall submits that the difference in treatment between children residing at home and children residing in a hospital because of their medical treatment requirements is arbitrary, not recognising as it does that in many cases and in particular in this case the parent or guardian will be required to give as much of him or herself, and to expend as much if not more as the same resources in the care of their child while in hospital, as a parent may be required to do at home.

26. As an alternative argument, Mr Shortall submits that there is a "constitutional omission" in the impugned provisions insofar as the Oireachtas has failed to make provision for persons such as Mr Donnelly who are providing full-time care for a child while in hospital. It is submitted that there is no objective or justifiable reason why the

Oireachtas could not provide for these circumstances.

27. Mr Shortall referred to a number of authorities in support of the argument that there has been a constitutional omission. In*Byrne (a minor) v. Director of Oberstown School*[2013] IEHC 562, Hogan J. directed the release from custody of the applicant in circumstances where he would have been released had he been detained in another institution i.e. St. Patrick's. Hogan J. considered that the difference in treatment between those in Oberstown and St. Patrick's was a legislative omission resulting in a violation of the constitutional rights of the applicant by failing to afford him the same remission entitlements available to similarly situated juvenile offenders.

28. In*Carmody v. Minister for Justice*[2010] 1 IR 635, the Supreme Court granted a declaration that the applicant had a constitutional right to apply, prior to being tried, for legal aid (to include counsel) in criminal proceedings and to have that application heard and determined on its merits. The Supreme Court made an order prohibiting the prosecution from proceeding in respect of the criminal charge referred to in the proceedings unless and until the applicant was afforded the right identified and affirmed by the Court. By treating with the matter in this way, the Supreme Court did not need to declare the impugned legislation unconstitutional and was instead able to afford a remedy that addressed the constitutional omission.

29. In*B.G. v. Judge Murphy*[2011] 3 IR 748, Hogan J. referred to a constitutional lacuna arising "… by reason of what would appear to be a mere accidental oversight in the course of statutory drafting, the Oireachtas had inadvertently failed to have proper regard to the rights and interests of those who are either mentally ill or whose mental capacity is in doubt". He held that:-

> "While it is, of course, true that the court cannot indicate to the Oireachtas how or in what manner a particular enactment might be repealed or altered, for reasons which I will now endeavour to set out, it is clear from the subsequent post*Somjee*case law that it can declare that the law in question fails to meet constitutional norms by reason of an unconstitutional omission, even if the court refrains from actually declaring that law to be unconstitutional…
>
> By granting this form of declaration in the unusual cases where this relief seems appropriate, the courts may be further said to advance the dialogue between the three branches of government which is a healthy feature of the separations of powers."

30. In a passage also relied upon by counsel for the applicants, Hogan J. said:-

> "Returning to the question of remedies, in some instances, therefore, the courts can cure the unconstitutionality caused by a legislative omission by (possibly) extending the scope of the legislation by ensuring that it operates equally or (certainly) by granting a declaration regarding its scope of application. The existence of such a jurisdiction in the former category of cases is perhaps uncertain and, insofar as it can be exercised at all, it is confined to admittedly rare and special cases."

Hogan J. then went on to discuss the case of*McKinley v. Minister for Defence*[1992] 2 I.R. 333 in which the Supreme Court found that the common law rule whereby a wife could not sue for the loss of consortium in respect of her husband was unconstitutional, but considered that this could be remedied by extending the rule so that plaintiffs in the position of Ms McKinley could sue in respect of injuries to their spouse. However, Hogan J. noted that this was a decision that was concerned with a common law rule only and whether or not the same principle upon which the relief was granted in that case could be applied to a legislative omission awaits resolution in an appropriate case.

31. It is further submitted on behalf of the applicants that the Oireachtas intended to ensure that DCA would be paid in respect of qualified children in the most varied of circumstances and that the limited exception provided for by the Regulations (i.e. that DCA would be paid in cases of hospitalisation of children for up to thirteen weeks in any twelve month period) is unfair and cannot be regarded as being within the intention of the Oireachtas. The Court was referred to a number of cases which it is submitted are authority for the proposition that where such Regulations are found to be contrary to the intentions of the Oireachtas, then they may be struck down as being ultra vires the legislation pursuant to which they were made. In particular, the Court was referred to the decision of the Supreme Court in*McHugh v. Minister for Social Welfare*[1994] 2 I.R. 139 in which the Court struck down the social welfare regulations which it found to be illogical. In the words of McCarthy J.:-

> "If a regulation is demonstrably lacking in logic and unfair it cannot be sustainable within the framework of the scheme; it cannot be a proper application of the statutory power to make regulations."

32. In the same case, O'Flaherty J. stated that:-

> "I believe the impugned article of the regulations is not only anomalous: it goes against the grain of what the legislation set out to achieve. The promulgation of such an article in the course of a regulation made under legislation that is meant to provide financial amelioration for disadvantaged members of the community cannot be regarded as being within the intentions of the Oireachtas in enacting the primary legislation. Therefore, it must be held to be*ultra vires*the legislation."

33. Mr Shortall submitted that the limited exceptions set out in Article 140E of the Regulations is lacking in logic, is unfair and cannot be regarded as being within the intentions of the Oireachtas.

ECHR Arguments

34. It is submitted that the DCA is a possession within the meaning of Article 1, Protocol 1 of the European Convention on Human Rights (the "Convention" or the "ECHR"). Counsel for the applicants acknowledges that there is no obligation under the ECHR to adopt any particular or particular kind of social welfare scheme, but once adopted, such schemes must comply with Article 14 of the Convention. So, for example, in*Carson and Others v. United Kingdom*(2010) 51 EHRR 13, the European Court of Human Rights ("ECtHR") held, at paras. 63-65 that Article 1, Protocol 1 did not require a contracting State to establish a retirement pension scheme, but if it did so, the scheme fell within the scope of Article 1, Protocol 1 and so had to be administered without discrimination on any of the grounds identified in Article 14. In*Niedzwiecki v. Germany*(2006) 42 EHRR 33, [2008] ECHR 928, the ECtHR held that child benefit was protected within Article 8, which then engaged Article 14 of the ECHR. Article 14 prohibits discrimination on:-

> "… any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

35. It is submitted that in this case there is discrimination on the grounds of the applicants' "other status" which, in Henry's case, is that of a severely disabled child requiring lengthy inpatient hospital treatment and that the applicants suffered discrimination by comparison to other eligible "qualified children" who are not in need of lengthy inpatient hospital treatment, and who are thereby eligible for DCA.

36. The applicants rely upon the following passage of the judgment of the ECtHR in*Niedzwiecki:-*

> "According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it "has no

> objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

37. In the case of*Stec and Ors v. United Kingdom*65731/01; 65900/01 [2006] ECHR 393 (12 April 2006), the ECtHR stated:-

> "On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy … and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation.'"

The applicants submit that in this case the policy choice of the legislature is manifestly without reasonable foundation.

38. Special reliance is placed upon the decision of the United Kingdom Supreme Court ("UKSC") in the case of*Mathieson v. Secretary of State for Work and Pensions*[2015] UKSC 47, and because of the significant similarities between the facts of that that case and the facts of this case, it is both desirable and necessary to give that case particular consideration. The claimant in that case was a young boy who had been diagnosed with a number of severe medical conditions soon after his birth in June, 2007. For a period after his birth, he lived at home with his parents and siblings, and because of his complex bodily needs and care requirements, the claimant was awarded payment of the equivalent social welfare benefit in the UK, to DCA in this jurisdiction, known as Disability Living Allowance ("DLA"). In its judgment, the court notes that it is of some importance that, notwithstanding that he was a child, it was the claimant himself, and not either or both of his parents, who was entitled to DLA, although the benefit had of course been payable to one of his parents, his father, on his behalf. The claimant was admitted to hospital for a period of thirteen months, in July, 2010, during which period one or other of his parents was at the hospital at all times and they remained his primary caregivers, administering twice daily physiotherapy, giving nebulised antibiotics, feeding him by nasogastric tube and changing his stoma bag up to eight times a day. The claimant's parents estimated that as a result of his hospitalisation, they incurred extra expenses of the order of Â£8,000.00. This was not disputed by the respondent. The relevant provisions in the DLA Regulations provided that where a child who is otherwise entitled to payment of DLA is maintained free of charge while undergoing medical or other treatment as an in-patient in a NHS hospital, he shall not be entitled to payment of the benefit for any period in excess of 84 days, and so payment of DLA was suspended once the claimant had been in hospital 84 days. However, other social welfare benefits referable to the claimant continued to be paid, but not so as to raise the family's standard of living beyond subsistence level. The claimant's father gave evidence that in order to meet the shortfall in his expenditure arising upon the termination of payment of DLA, he had to borrow Â£4,000.00 from friends. In the proceedings, it was claimed that the suspension of payment of DLA breached the claimant's right not to be discriminated against under Article 14 of the Convention when read together with the right to the peaceful enjoyment of his possessions in Article 1 of the first protocol to the Convention. In the proceedings, the respondent conceded that the provision of DLA fell within the scope of Article 1 of the first protocol of the Convention, but contended that the claimant did not have any "status" within Article 14 on which the decision to suspend his DLA was based and that, in any event, the 84 day rule was justified as a means of avoiding overlapping provision to meet disability related needs.

39. The Court had to consider whether or not the claimant had a "status" for the purposes of Article 14 of the Convention. It was contended on behalf of the claimant that for this purpose, his status was that of a severely disabled child who was in need of lengthy in-patient hospital treatment and care, and that, in comparison with a severely disabled child who was not in need of lengthy in-patient hospital treatment and care, the application to the claimant of the 84 day rule discriminated against him contrary to

Article 14 of the Convention.

40. In his judgment, Lord Wilson noted that at first sight this argument appeared contrived. He conducted an analysis of various decisions within the United Kingdom and in the ECtHR in which the issue of status had been considered. He concluded:-

> "Decisions both in our courts and in the ECtHR therefore combine to lead me to the confident conclusion that, as a severely disabled child in need of lengthy in-patient hospital treatment, Cameron had a status falling within the grounds of discrimination prohibited by article 14. Disability is a prohibited ground (*Burnip v Birmingham City Council*[2012] EWCA Civ 629, [2013] PTSR 117). Why should discrimination (if such it be) between disabled persons with different needs engage Article 14 any less than discrimination between a disabled person and an able-bodied person? Whether, as in Cameron's case, the person is born disabled or whether he becomes disabled, his disability is or becomes innate …"

Similarly, Lord Mance concluded:-

> "To my mind, a child hospitalised free of charge (essentially in a NHS, rather than private, hospital) for a period longer than 84 days can be regarded as having a different status to that of a child not so hospitalised."

Having thus concluded that the claimant in that case had a different status to other severely disabled children, because of the duration of his hospital treatment, the court then moved to consider whether or not the difference in treatment could be justified. The Court referred to the decision of the European Court of Human Rights in*Stec v. United Kingdom*in which it was held that:-

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

41. The Court noted that in that case the ECtHR held that States enjoy a margin of appreciation in relation to social security provisions which should be respected unless they are "manifestly without reasonable foundation". In his decision, Lord Mance stated that "courts should not be over-ready to criticise legislation in the area of social benefits which depends necessarily on lines drawn broadly between situations which can be distinguished relatively easily and objectively". The Court considered the application by the legislature of a "bright line rule" in order to determine eligibility for benefits, which would avoid case by case analysis and save very significantly on administrative costs. Lord Mance quoted from the decision of Lord Bingham in the case of*R. (Animal Defenders International) v. Secretary of State for Culture, Media and Sport*[2008] AC 1312 where he said, at para. 33:-

> "… legislation cannot be framed so as to address particular cases. It must lay down general rules … A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial."

42. The Court then went on to consider the evidence before it, comprising two publications produced by charities on the curtailment of entitlement to DLA as well as a report from the Citizens Advice Bureau attached to Great Ormond Street Hospital in the latter of which it was stated:-

> "It can be devastating for families when payments of Disability Living Allowance stop. The caring responsibilities of parents of child in-patients are enormous. It is often not realised that parents are required to attend hospital when their children are in-patients and to take an active part in their medical management. If they fail to attend, the hospital's social workers are informed. Many carers live either in make-shift beds on the wards or in nearby hospital-provided accommodation."

The Court noted that this report concluded:-

> "Our view is that the 84-day rule unfairly and unjustifiably restricts benefit entitlement. When the 84-day rule was introduced, it may have been the case that families were discouraged or not permitted to stay with their children in hospital. However, it ignores the modern reality of paediatric in-patient healthcare and it removes necessary support from under the feet of the country's most vulnerable people."

43. The Court accepted these conclusions and noted that the respondent did not adduce any evidence in response to its reports. The Court also accepted that there was evidence to suggest that the number of families incurring additional costs as a result of their child's admission to hospital was more than a small minority. The Court also accepted as evidence conclusions in a survey included in one of the reports before it that 99% of parents provide no lesser level of care when their child is in hospital and that 93% often suffer an increase in costs in such circumstances. From this Lord Wilson concluded that the case before it was not a hard case, unreflective of the position of most parents in their situation and that the personal and financial demands made on the substantial majority of parents who helped to care for their disabled children in hospital are, to put it at its lowest, no less than when they cared for them at home. Lord Mance considered that the justification offered by the respondent for the 84 day rule failed to reflect the modern emphasis on the importance of parents, in particular, continuing to provide assistance in connection with bodily functions while their child is undergoing long term hospitalisation. He went on to say, at para. 58:-

> "The grant of DLA is linked to the existence of disability-related needs. It is plainly legitimate to make its continuation or withdrawal conditional upon the continuation of the same needs. Here, however, the evidence indicates that the same needs, in terms of parental attention, existed and were met during Cameron's hospitalisation after, as before, the expiry of the 84-day period. But, in order to continue to provide this parental attention, the parents had, necessarily, to incur ancillary expenses and loss, such as extra travel and meal costs and loss of earnings."

He concluded that:-

> "The withdrawal of DLA after 84 days was not justified in Cameron's case by any matching reduction in his needs for disability-related attention by his parents."

44. In a nutshell therefore the Court concluded that there was no objective and reasonable justification for the difference in treatment between the claimant on the one hand and a child suffering from severe disabilities who was being cared for at home on the other and that,*on the evidence before it*the personal and financial demands made on the substantial majority of parents who help to care for their disabled children in hospital are, at least, no less than when they care for them at home, and there had therefore been a violation of the claimant's human rights under Article 14 of the Convention, when taken together with Article 1, Protocol 1.

Submissions of Respondents

45. At the outset, counsel for the respondents, Ms Carroll emphasised that all legislation benefits from a presumption of constitutionality, and this presumption applies with particular force when considering legislation such as that impugned in these proceedings. She referred to the decision of the Supreme Court in*Lowth v. Minister for Social Welfare*[1998] 4 IR 321 in which the Court said:-

> "The particular difficulty of establishing the unconstitutionality of legislation dealing with economic matters was recognised by Kenny J. in*Ryan v. The Attorney General*[1965] IR 294, at p. 312 in the following terms:-
>
> > "When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the

> reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen. Moreover, the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to this type of legislation."

In relation to taxing statutes (which are in one sense the converse of social welfare legislation in that the former are the means by which public revenues are exacted so that they may be dispersed in part at least pursuant to the welfare codes), O'Hanlon J. said in*Madigan v. Attorney General*[1986] I.L.R.M. 136, at p. 151:-

> "[I]t has been recognised, both in our own jurisdiction and in the United States, where the constitutional guarantees are closely analogous to those provided by the Irish Constitution, that tax laws are in a category of their own, and that very considerable latitude must be allowed to the legislature in the enormously complex task of organising and directing the financial affairs of the State.""

46. Ms Carroll, on behalf of the respondent, submits that while these proceedings have been framed as a challenge to sections of the Act of 2005 on the basis that they violate Article 40.1 of the Constitution, in truth they are a challenge to the underlying policy decision of the Oireachtas that those children with a disability who are resident in an institution are ineligible for the payment of DCA, on the basis of their disagreement with that policy. It is submitted that it is well established that the guarantee of equality before law contained in Article 40.1 does not require identical treatment for all persons without recognition of different circumstances. The Oireachtas is entitled to differentiate between the needs of different groups of persons, and provided that any distinctions drawn are drawn on a rational basis, there is no violation of Article 40.1

47. Ms Carroll also laid emphasis upon the decisions of the Supreme Court in*MacMathÃºna v. Attorney General*[1995] 1 I.R. 484 and the High Court in*O'Reilly v. Limerick Corporation*[1989] ILRM 181. In the latter case, Costello J. held that the manner in which the resources of the State are to be distributed is a matter for the Oireachtas and not the courts. In the former case, which involved a challenge to legislation which made provision for tax free allowances for single parents but not married parents, the Supreme Court held that there were "… abundant grounds for distinguishing between the needs and requirements of single parents and those of married parents living together and rearing a family together. Once such justification for disparity arises, the Court is satisfied it cannot interfere by seeking to assess what the extent of the disparity should be".

48. Similarly, in*Lowth*, the Court held:-

> "It is no function of this Court to adjudicate upon the merits or otherwise of the impugned legislation. It is only necessary to conclude, as this Court has done, that there were ample grounds for the Oireachtas to conclude that deserted wives were in general likely to have greater needs than deserted husbands so as to justify legislation providing for social welfare whether in the form of benefits or grants or a combination of both to meet such needs."

49. In this case, it is submitted firstly that the applicants are treated in the same manner as persons who fall within the same category i.e. children with a disability who meet the eligibility criteria contained in s. 186C(1) of the Act of 2005, and who are resident in an institution. Insofar as those children are treated differently to children who are living at home, the Oireachtas has determined that such difference in treatment is justified by reason of the difference in circumstances between children resident at home and children resident in an institution. Ms Carroll submits that, in particular, the payment of the DCA has been guided by a desire to recognise the additional expense and obligations that are placed on parents caring for children in their own home and by the fact that care

provided for children resident in an institution is provided out of public funds. Ms Carroll submits that this is a decision that the Oireachtas is entitled to take and it is not a function of this Court to review the merits of such a decision. Furthermore, she submits that insofar as it is argued that Mr Donnelly has been put to greater financial expense than a parent or guardian whose child is resident at home, no evidence has been placed before the Court to support that argument.

50. Finally, insofar as the applicants argue that the impugned provisions are disproportionate to their objective, Ms Carroll submits that the principle of proportionality applies to an infringement of a constitutional right and is a mechanism whereby the validity of legislative and other actions can be assessed. It does not apply in the circumstances identified by the applicants. It would only arise if the applicants had a constitutional right to payment of the DCA. There is no such constitutional right and nor do the applicants argue that such a right exists.

51. As regards the case advanced that there is a constitutional omission in the Regulations, firstly, it is submitted that this is not pleaded and the applicants do not have leave to apply for judicial review on this ground. Accordingly, the applicants must be confined to the grounds upon which leave was obtained.

52. Secondly, it is submitted that the concept of "constitutional omission" is one that has arisen primarily in the context of identifying the appropriate relief that may be granted*after*a finding of unconstitutionality. To the limit and extent that the concept has been identified, it has been in cases in the criminal law sphere and not cases involving expenditure of public money. Ms Carroll submits that the extension of this doctrine so as to extend the application of social or economic legislation to certain categories of persons, specifically excluded by the legislation, would be a radical and novel departure that runs expressly contrary to long established Supreme Court precedent. She submits that, in effect, there is no omission in this case; the Oireachtas has expressly chosen to exclude a category of persons from being eligible for the payment of a particular social welfare benefit. Insofar as the applicants have submitted that the Regulations do not reflect the intention of the Oireachtas, she submits that the contrary is the case; the Regulations are entirely consistent with the legislative framework established by the Oireachtas.

ECHR Arguments

53. It is submitted that in order to establish any violation of the ECHR, it is necessary for the applicants to establish that they have been discriminated against on the basis of sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth or other status (per Article 14). The applicants in this case rely on "*other status*". It is submitted that Henry is being treated in the same manner as all other children with a disability who are resident in an institution. Alternatively, insofar as Henry is treated differently to other persons with a disability that arises by reason of the different factual circumstances of residing in an institution. In the circumstances, no discrimination under Article 14 arises.

54. The respondents also place reliance (as do the applicants) on the decision of the Grand Chamber of the ECtHR in*Stec v. United Kingdom*, a decision of 12th April, 2006. In that case, in considering the manner in which Article 14 applies to social security benefits, the ECtHR held:-

> "Article 14 does not prohibit a Member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article … A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words if it does not pursue a

> legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situation justify a difference treatment."

55. The ECtHR went on to say that in areas of economic and social strategy, Contracting States have a*wide*margin of appreciation and concluded that in that case, the difference in pensionable ages between men and women was reasonably and objectively justified.

56. Finally, as regards the case of C*ameron Mathieson v. Secretary of State for Work and Pensions*, the respondents attempt to distinguish that case, firstly on the basis that it was concerned with the removal of a benefit from the applicant, and not his initial qualification for the same. And secondly, the UKSC made certain findings arising from specific evidence placed before the Court in that case in respect of which there is no similar evidence placed before this Court in these proceedings.

Discussion and Conclusion

57. I will deal first with issues of fact. While the central facts in this matter are not in dispute, the respondents contend that Mr Donnelly has not advanced any evidence to support the proposition that he has incurred the same or even more expense in attending to Henry's needs while in hospital, than a person who is caring for an eligible child at home. That may be so as regards specific figures, but the following was established by the evidence, or in any case was not disputed by the respondents:-

> (1) One of Henry's parents, Mr Donnelly, was required to attend and care for Henry for long hours on a daily basis;
>
> (2) That care was very much "hands on" and some of it required a degree of training. It was not simply a case of sitting at Henry's bedside;
>
> (3) In order to provide this care, one of Henry's parents had to be absent from work, and, in the event, Mr Donnelly was required to cease his employment in order to do so. However, for a two year period, Mr Donnelly was eligible to receive and did receive illness benefit from the first named respondent. Coincidentally, payment of DCA commenced almost contemporaneous with the cessation of payment of illness benefit to Mr Donnelly.
>
> (4) In order to be with Henry to the extent required, Mr Donnelly was required to absent himself from the family home for five days of the week, and at weekends Mrs Donnelly took over. This meant that the family was effectively "split" during this period.
>
> (5) Mr Donnelly was able to avail of accommodation provided by a charity adjacent to the hospital and so that expense was saved as indeed was the expense of the alternative possibility i.e. travel to and from home to the hospital, at least to the extent that it was not required on a daily basis
>
> (6) Mr Donnelly did not contend that his other living expenses were increased by reason of his attendance in the hospital, for example by reason of having to eat out instead of preparing meals at home. It is not unreasonable to infer that if he had any significant increased living expenses, he would have identified the same.

58. Mr and Mrs Donnelly have devoted themselves heroically to Henry's care, while at the same time caring for their other two children. Undoubtedly, the manner in which they were required to care for Henry during his time in hospital must have been both stressful

and demanding in the extreme. However, unlike in*Mathieson*, no evidence was put before the Court to demonstrate the actual expenditure or losses incurred by Mr Donnelly in caring for Henry while in hospital. While I do not doubt his word that he was required to give up his employment for the period of Henry's hospitalisation, no indication was given to the Court at all as to his actual loss of earnings. The Court is simply invited to accept that he must have been at a loss, even though for much of this period he was in receipt of illness benefit. In those circumstances, I cannot infer that he was at a loss, never mind hazard a guess at the extent of that loss.

59. However, whatever about the specific loss of earnings involved, the central point being advanced on behalf of Mr Donnelly is that he was required, during the working week, to spend all of his waking hours caring for Henry, and Mrs Donnelly did so at weekends. It can therefore hardly be gainsaid that the time spent by Mr Donnelly and his wife in caring for Henry while he was in hospital was in any way materially different to that required to be spent in caring for a child in the home.

60. In addition, it cannot be doubted either that parents who are obliged to travel to and from a hospital will incur at least that expense which will not be incurred by a parent caring for a child at home. There will also be items of expenditure that are difficult to recall, and all of which added up may amount to a reasonably significant sum.

61. As against all of that, it cannot be gainsaid either that Mr and Mrs Donnelly were spared the expense of maintaining Henry during his time in hospital, and of course the State bore the expense of his actual medical care while Henry was in hospital. Disregarding the medical care, no evidence was advanced by the respondents as to the value of the savings in what I might describe as the "ordinary" maintenance of Henry, but such savings cannot be simply disregarded as being insignificant. Any parent of a new born child must surely notice an increase in domestic expenditure following upon the birth and new arrival to the household.

62. So what conclusions should I draw from all of this? While exact figures are not available, Mr Donnelly had increased expenditure, and possibly also some loss of earnings by reason of Henry's hospitalisation. He also had some savings (the cost of maintaining Henry at home) which have not been quantified either. If he were caring for Henry at home during the same period, he would a have had the same loss of earnings (but not the sundry other expenses, such as those associated with travelling to the hospital), together with the cost of maintaining Henry at home. In the latter case, these losses and costs would have been defrayed by payment of the DCA. If Mr Donnelly had received payment of DCA while Henry was in hospital, he would have benefitted both from the savings in the cost of maintaining Henry and the payment of DCA. While the exact figures are unknown, the fact of those savings is undeniable. And of course that is the very reason advanced by the respondent in this case to justify the impugned provisions. Without the benefit of exact figures in individual cases, or a general study of the financial impacts upon carers in these situations (such as the UKSC had in*Mathieson*), the State has chosen a blunt instrument to assist those parents who undoubtedly experience loss and increased levels of expenditure in caring for their child at home, but not those with a child resident in a hospital or other institution for more than thirteen weeks in a year.

63. That being the case, the first question to be addressed is whether or not the difference in treatment of parents caring for children in the home and parents caring for children in an institution amounts to a discrimination such as to be prohibited by Article 40.1 of the Constitution? The starting point, as Ms Carroll submits, is that the impugned provisions enjoy a presumption of constitutionality. It is also correct to say that it is well established that this presumption enjoys particular force in the case of financial or economic measures. It has long been accepted that decisions as regards the distribution of the resources of the State are within the exclusive preserve of the Oireachtas. It is

also the case that the Oireachtas is entitled, in deciding how to distribute those resources, to discriminate between persons or classes of persons on the basis of an assessment by the Oireachtas of the needs of those involved.

64. Mr Shortall has submitted that, in arriving at decisions of this type, the Oireachtas is bound to be proportionate in the manner in which it discriminates against any individual or class of individuals and that in this case the discrimination is disproportionate, not least because it affords the executive no discretion to assess the impact, and in particular the financial impact, on a parent of having to care for a child on a full-time basis, while the child is resident in an institution. Ms Carroll on the other hand submits that the principle of proportionality is not engaged because in order for it to be engaged, the right asserted must be a constitutional right, and there is no constitutional right to any particular social welfare benefit. Mr Shortall does not dispute the latter proposition, but he argues that he is asserting the constitutional right to equality guaranteed by Article 40.1 of the Constitution, and that any inference with that right must be proportionate.

65. In this regard I must agree with Mr Shortall. The Oireachtas has identified a category of children who are eligible for DCA and this includes Henry. However, it is then provided that DCA will not be payable in particular circumstances. Unless Article 40.1 is engaged, the Oireachtas will be free to discriminate between persons in the same category – a category of persons which it itself has identified – without reason or justification of any kind – in other words, indiscriminately. When treating differently with people within the same class or grouping, it behoves the Oireachtas to discriminate between such persons on an objective and rational basis, that is proportionate to an identified purpose.

66. Did the Oireachtas do so in this case? The purpose of the benefit is not in dispute and is evident from its title – DCA is intended to alleviate the financial burden in caring for an eligible child at home. That being the case, it is not difficult to see why the Oireachtas would exclude from those entitled to the benefit eligible children who are in the full-time care of an institution. The position is a little more complicated for children who are resident in a hospital for an extended period. The Oireachtas clearly envisaged such a possibility by including a hospital in the definition of "institution". More than that however, presumably in an effort to avoid the administrative complications that would be involved in short-term or relatively short-term hospital stays, the Oireachtas has provided by way of the Regulations that DCA will remain payable in respect of hospital stays of up to thirteen weeks in any twelve month period. This assumes that the child concerned has met all of the eligibility criteria in the first place, and that the benefit has been paid up to the time of admission to the hospital concerned. For that reason, Henry did not qualify for the benefit until he was eventually discharged home from hospital in November, 2017.

67. It can hardly be doubted but that the aim of avoiding what might amount to a duplication of expense is rational and objective, and in the case of institutions other than hospitals, where the child may be permanently resident, proportionate. Is it proportionate in the case of hospitals? The difficulty with this question is that the answer is likely to vary from case to case because the impact upon parents affected by the impugned provisions will itself vary from case to case. These difficulties arise because the Oireachtas has not given any discretion to the executive to decide whether or not the benefit might be payable in individual cases, having regard to the hardship experienced. It has used a blunt instrument, and it seems to have done so very deliberately, having regard to the fact that previously, entitlement to the benefit pursuant to the administrative circular of 1973 allowed for the exercise of such a discretion. Nonetheless, there is in my view a justification for the disparity in treatment i.e. that the State is entitled to take measures to avoid the potential duplication of maintenance of an eligible child, not least in circumstances where it is also fully funding the cost of the medical care of the child. Moreover, in providing for payment of the benefit for up to thirteen weeks of

hospitalisation in any one year, the Oireachtas has exercised its discretion proportionately. The Supreme Court has already decided in*MacMathÃºna*, in the passage referred to above, that once a justification for a disparity arises, the court cannot interfere by seeking to assess what the extent of the disparity should be. Having arrived at that conclusion, this Court has no further role in adjudicating upon the merits of the impugned provisions.

68. As to the arguments that are based upon the concept of constitutional omission, firstly, I must agree with Ms Carroll that since this was not a ground upon which leave was granted, the applicants are not entitled to advance it by way of submissions at the hearing of the matter. But even if I took a different view, I do not believe that this is an omission of the kind identified by Hogan J. in*B.G. v. Judge Murphy*. There is no "mere accidental oversight in the course of statutory drafting" involved here. The Oireachtas clearly considered whether or not children who would otherwise be eligible, but are resident in institutions, should be eligible for the benefit, and chose to exclude them from the same. Similarly, the Oireachtas clearly expressly considered the position of children detained in hospitals, and provided a limited exception (to the exclusion from benefit) for such children in the Regulations i.e. the benefit would continue to be paid for up to thirteen weeks in any one calendar year. The decision to exclude eligible children from the benefit in circumstances where they are detained for a longer period was clearly a deliberate decision and no accident. For this Court to determine otherwise would be to enter into the legislative domain.

69. In his submissions, Mr Shortall also submitted that the arguments made on behalf of the claimant in*Mathieson*, which were accepted by the UKSC, applied with equal force in the context of the Constitution arguments in this case. By this I understand him to mean that there is no justification for the impugned provisions and therefore the discrimination between qualified children who require lengthy in-hospital treatment and those who do not require lengthy in-hospital treatment cannot be either objective or rational, and must therefore be considered to be arbitrary, invidious or capricious. The difficulty with this argument, at least in the Constitutional context, is that in*Mathieson*, the UKSC had before it a considerable body of evidence upon which to base its conclusions. This evidence was both of a specific and general character. It was specific insofar as there was undisputed evidence as to the increased costs suffered by the claimant's parents in*Mathieson*. Then there was the general evidence, which was at least uncontradicted, if not accepted, as to the impact upon parents of attending to children who are in long-term hospital care. In this case there was no specific evidence as to the former. As to evidence in general, it was not contended that this Court should accept the evidence placed before the Court in the United Kingdom as being of equal application in this jurisdiction. While it might very well be the case that the situation in the two jurisdictions is very similar, it is not open to this Court to adjudicate a constitutional dispute based upon any such a supposition. "Evidence" gleaned from a court report in an another jurisdiction can hardly be treated as evidence in this jurisdiction, unless accepted by the respondent, which it was not.

70. Finally, I turn to the ECHR arguments. It is first necessary to consider, as the UKSC did in*Mathieson*whether or not Henry has a status falling within the grounds of discrimination prohibited by Article 14 of the Convention. First, it must be observed that it is not contended that Henry is being discriminated against on the grounds of disability*per se*. I think that it could hardly be doubted but that disability would, in general terms, constitute "other status" for the purposes of the Article 14 of the Convention but the argument in this case is that within that general classification it is possible to identify "other status" for the purposes of Article 14, in this case a child in need of lengthy in-hospital care and treatment.

71. In his judgement in*Mathieson*, Lord Wilson considered whether or not such an

approach is contrived. Following a review of authorities in the United Kingdom and the European Court of Human Rights he came to the "confident" conclusion that it was not a contrivance but that a severely disabled child in need of lengthy in-patient hospital treatment had a status falling within the grounds of discrimination prohibited by Article 14. As I mentioned above, he posed the question: "why should discrimination (if such it be) between disabled persons with different needs engage Article 14 any less than discrimination between a disabled and an able bodied person?". Lord Mance came to the same conclusion by a simpler route stating simply that "a child hospitalised free of charge … for a period longer than 84 days can be regarded as having a different status to that of a child not so hospitalised."

72. On balance I am inclined to favour the proposition accepted by the UKSC in*Mathieson.*I do so for this simple reason. While mindful of the fact that it is possible for almost any claimant, deprived of a benefit, to argue that he has a status for the purpose of Article 14 (simply by reference to the criteria of eligibility for the benefit, or by which he was excluded from the benefit), once the court concludes that an applicant has no relevant status, the claim is curtailed without any inquiry into the alleged discrimination. Establishing a status does not mean that a claimant succeeds; it simply gives a claimant*locus standi*within which to ground a claim. Unless therefore the status contended for is frivolous or lacks any reasonable basis, it is, it seems to me, preferable to accept a status for the purposes of Article 14 than to reject it; the claimant will, after all, still have to satisfy the Court that there has been a discrimination in treatment without objective and reasonable justification in order to succeed with his or her claim. I am therefore prepared to accept that Henry, from the time of his birth up to his discharge in hospital in November, 2017, had a status for the purposes of Article 14 being that of a severely disabled child in need of lengthy in-patient hospital care and treatment.

73. I turn then to consider whether or not the denial of DCA to Henry for the duration of his stay in hospital amounts to discrimination on the grounds of "other status". As noted above, in*Stec v. United Kingdom*, the ECtHR determined that in areas of economic and social strategy, Contracting States have a wide margin of appreciation. A difference of treatment will be considered discriminatory if it has no objective and reasonable justification or if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be realised.

74. In*Mathieson*, the UKSC determined that there was no objective and reasonable justification for the withdrawal of DLA because the claimant's needs during his hospitalisation, were, in terms of parental attention, just the same as his needs both before and after his hospitalisation. Furthermore, in order to continue to provide that parental attention, his parents had, necessarily, to incur ancillary expenses and loss such as travel and meal costs and loss of earnings. Lord Mance concluded that the withdrawal of DLA after 84 days was not justified in the claimant's case by any matching reduction in his needs for disability related attention by his parents.

75. The Court in*Mathieson*however was clearly very influenced by the evidence placed before it in particular by the reports of the charities that were made available to the Court, which included the results of an online survey relating to the impact of the curtailment of DLA in the United Kingdom. The Court did note that these reports were prepared for a particular purpose by the charities concerned, and that it was required therefore to look critically at the reports. However, the Court also noted that since the respondent had adduced no evidence in response to the same, the Court had nothing to set against the reports.

76. But in this case there is no evidence at all of the kind that was available to the Court

in*Mathieson*. There is of course the undisputed evidence of Mr Donnelly as to the extent of the care that he was required to provide to Henry. This is supported by the report of Ms Murray. But the exemplary behaviour of Mr Donnelly (and for that matter Mrs Donnelly) in their care for Henry does not mean that the reasons advanced by the respondent for the differentiation in treatment are not objective, reasonable or proportionate. Even taking the claimants' case at its height, there is no escaping the fact that the State is discharging the vast bulk of Henry's maintenance costs during his stay in hospital. The State is additionally paying for his medical care costs, but even leaving that to one side the value in financial terms of the expenditure being incurred by the State in maintaining Henry while he is in hospital may well be more than the DCA received by a parent looking after a child at home. This is obviously speculative, but even if it is not so, if DCA were to be paid while a child is resident in hospital then it must surely be the case that the parent of that child, in financial terms, is receiving more from the State than the parent who is looking after a child at home. There is no perfect answer to the problem and the achievement of absolute equality of treatment as between the parents and children in each set of circumstances is an almost impossible ideal. The best that the Oireachtas can do is to try and strike a balance and if it endeavours to do so in a reasonable, objective and proportionate manner then the measures that it takes will not amount to a contravention of the rights conferred by Convention. In my opinion the impugned provisions pass this test and the application for a declaration of incompatibility must also be dismissed.

77. I cannot conclude this judgment without expressing my considerable sympathy for the applicants. As I have said above, Mr and Mrs Donnelly have coped heroically and have put Henry's needs ahead of theirs, undoubtedly at significant personal cost (and by this I do not mean just financial cost). They embraced and discharged the challenges handed to them by the hospital authorities and demonstrated exemplary love and care for Henry. This is evidenced, if evidence were needed, by the report of Ms Murray to which I have referred above. Whatever about the comparison in financial burdens between Mr Donnelly and the parent of a child who has been at all times resident at home, and about the quantum of which there is a lack of clarity, there can hardly be any doubt but that the burdens generally shouldered by Mr and Mrs Donnelly in caring for Henry are likely to have been at least as great as those endured by parents caring for an eligible child at home.

78. While the care afforded to Henry by the State in the provision firstly of medical care and secondly of what I might describe as "ordinary maintenance" must be acknowledged, it is to me a great pity that the scheme of eligibility for DCA has proven to be so inflexible as to deprive the applicants entirely of the benefit during Henry's time in hospital. As I noted above, the Oireachtas has chosen to use a blunt instrument to achieve the aim of avoiding the double maintenance of an eligible child. A more sophisticated approach should be possible, and would be more likely to achieve a fairer result in a greater number of cases.