SUPREME COURT

RECORD NO. S:AP:IE:2025:000081

Between:

X

RESPONDENT/APPLICANT

-And-

THE MINISTER FOR FOREIGN AFFAIRS, THE ATTORNEY GENERAL AND IRELAND

APPELLANT/RESPONDENT

-And-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

RECORD NO: S:AP:IE:2025000083

V (SUING BY ███ MOTHER AND NEXT FRIEND X)

RESPONDENT/APPLICANT

-And-

THE MINISTER FOR FOREIGN AFFAIRS, THE ATTORNEY GENERAL AND IRELAND

APPELLANT/RESPONDENT

-And-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

RECORD NO: S:AP:IE:2025000084

W (SUING BY ███ MOTHER AND NEXT FRIEND X)

RESPONDENT/APPLICANT

-And-

THE MINISTER FOR FOREIGN AFFAIRS, THE ATTORNEY GENERAL

AND IRELAND

APPELLANT/RESPONDENT

-And-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

RECORD NO. S:AP:IE:2025:000082

Between:

Y

RESPONDENT/APPLICANT

-And-

THE MINISTER FOR FOREIGN AFFAIRS, THE ATTORNEY GENERAL AND IRELAND

APPELLANT/RESPONDENT

-And-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

RECORD NO: S:AP:IE:2025000085

Z (SUING BY ███ MOTHER AND NEXT FRIEND Y)

RESPONDENT/APPLICANT

-And-

THE MINISTER FOR FOREIGN AFFAIRS, THE ATTORNEY GENERAL AND IRELAND

APPELLANT/RESPONDENT

-And-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

Outline Legal Submission on behalf of the Irish Human Rights and Equality Commission

INTRODUCTION

1. The within submissions apply to both the X and Y families. Separate concise submissions addressing the interpretation of s.7 of the Irish Nationality and Citizenship Act 1956 ("**the 1956 Act**") in the context of the Y family have been prepared for the Court. Both sets of submissions should be read together.

2. These proceedings relate to two families:

   (a) Ms Y is the genetic parent of Z, who was born following a Lesbian Reciprocal IVF/Shared Motherhood (hereinafter included in "**DAHR**") procedure in [redacted]. Ms Y is an Irish citizen, she has a wife who is a British national, and they are domiciled in [redacted]. Z was conceived by way of anonymous sperm donation and an ovum from Ms Y. Ms Y's wife is the gestational mother of Z. Ms Y is the gestational mother to another child (who is not the subject of these proceedings), and who is entitled to Irish citizenship by descent pursuant to s.7 of the 1956 Act.

   (b) Ms X is an Irish citizen who lives in [redacted]. Ms X and her same sex partner had two children, V and W, who were born through donor-assisted human reproduction ("**DAHR**") procedures in [redacted]. Ms X is not the genetic nor gestational mother of V and W, but she is recognised as having been their parent from birth under [redacted] law.

   (c) Ms X and Ms Y applied for passports for their respective children, V, W and Z. The Minister refused to issue passports on the basis that they were not entitled to Irish citizenship by descent, as a result of Ms X and Ms Y not being their gestational mothers. These refusals gave rise to the within proceedings.

3. The *Amicus Curiae* ("**IHREC**") considers that the State, in legislating for citizenship by descent in a manner that disproportionately excludes the Respondent children, being the children of lesbian couples, fails to vindicate their right to equality under Article 40.1, their personal rights under Article 40.3, their family rights under Article 41, in particular Article 41.4, and the rights of the children under Article 42A.

4. IHREC agrees that the determination of who should be able to acquire citizenship is a core feature of the sovereignty of the State in accordance with Article 9 of the Constitution.[1] While the within cases do not concern a constitutional right to citizenship, they concern a statutory right to citizenship by descent in legislation that was enacted further to the provisions of Article 9.1.2°. In so enacting for the acquisition of citizenship by descent in the 1956 Act, the Legislature was obliged to do so in accordance with law.

5. Notwithstanding that the right to citizenship by descent is not in itself a constitutional right, the within proceedings engage a wide range of constitutional rights. Articles 40.1, 40.3, 41 and 42A encompass core personal and family rights and the standalone rights of the children at the centre of the proceedings.

6. IHREC considers that in legislating for the conferral of citizenship, the State is obliged to do so in a manner that vindicates the constitutional rights of those in the situation of the Respondents and that guarantees their right to equal treatment under Article 40.1. In failing to legislate for the Respondents' circumstances, the State has acted in breach of this guarantee.

7. With regard to s.7(1) of the 1956 Act, IHREC considers that the Appellants' (**"the State"**) interpretation of it, which does not recognise that the genetic and biological mother of a child is the child's parent, fails to vindicate the constitutional and ECHR rights of these children, their parents and their families.

8. IHREC considers that s.7 of the 1956 Act has been correctly interpreted by the Trial Judge to include a genetic and biological mother as a parent within the meaning of

[1] ***AP v Minister for Minister for Justice and Equality*** [2019] 3 IR 317; and ***A, B and C v The Minister for Foreign Affairs*** [2023] 1 ILRM 335, §4.

that section, thereby conferring citizenship on Z. The application of the double construction rule permits this interpretation and avoids invalidity. The issue is addressed in the submissions in Y and Z (the "**Y Submission**").

9. IHREC agrees with the Trial Judge's finding that s.7 is concerned with *jus sanguinis* and does not, having regard to this Court's decision in ***A, B and C v The Minister for Foreign Affairs***,[2] include the non-biological parent of a child for the purposes of acquiring citizenship by descent. In that regard, on the facts, the X family cannot acquire citizenship through s.7.

10. It is notable that the State has legislated for citizenship by descent for children who have a biological parent who is an Irish citizen at the time of birth, and separately (in the specific context of adoption) where the legal parentage of a child arises pursuant to a court order made subsequent to birth. Pursuant to s.226 of the Health (Assisted Human Reproduction) Act, 2024 ("**the 2024 Act**"), the 1956 Act has been amended to include a new s.11A which addresses citizenship of children born as a result of DAHR or surrogacy. While this section has not yet been commenced, it does not in any event address the circumstances of the Respondents.

11. On the other hand, the State has failed to legislate for a child born outside the State to an Irish parent, who is:-

    (a) not their biological parent, but as a matter of law in their country of domicile is recognised from birth as their parent, with or without a court order;

    (b) not their biological parent, but as a matter of law in their country of domicile is recognised subsequent to birth by way of a court order which has effect from the date of that order; nor

    (c) their biological mother, being the genetic but not gestational mother.

12. IHREC considers that when legislating for citizenship by descent only for biological children, adopted children, and for children born in the state through DAHR, the State

[2] [2023] 1 ILRM 335, §13.

has failed to vindicate the constitutional and ECHR rights of the children, parents and families through s.7 (i), (ii) and (iii), and the State is in breach of its Article 40.1 obligations to such persons.

13. Opposite sex couples who avail of DAHR for the purposes of forming their families are similarly disadvantaged where the State fails to recognise parentage of their children for the purposes of citizenship by descent.

14. By reason of the necessity for lesbian couples in the creation of their family to use DAHR, IHREC considers that the State, in legislating for citizenship by descent through *jus sanguinis* only, unlawfully discriminates in a disproportionate manner against same sex couples and their families. In circumstances where the X family cannot come within s.7, and/or if the State's interpretation of s.7 is correct, this would constitute an unlawful intrusion by the State into the private decision-making of these persons regarding the formulation of their family as follows:-

    (a) In the specific context of lesbian couples, as in this case, and notwithstanding the now divisible roles of genetic and gestational mothers, it requires that the Irish citizen partner/spouse gives birth in order that her child acquire Irish citizenship.

    (b) In the specific context of male homosexual couples, it requires that the Irish partner/spouse provides the genetic material.

15. IHREC believes that in effect, this constitutes an unlawful interference in matters of personal and marital privacy contrary to Article 40.3 of the Constitution, encroaching on decisions regarding both the constitution and authority of these families.

16. Where the same sex parties are married, this fails further to vindicate their rights under Article 41.4.

17. The State places weight on the fact that citizenship by descent under s.7 is not a constitutional right, including in their claim that the double construction rule is not engaged in its interpretation. They further challenge, in circumstances of the State's

sovereign right to determine the persons to whom citizenship might be conferred, the findings made by the Trial Judge with respect to the application of Articles 40.1, 40.3, 41 and 42A of the Constitution to the within cases.

18. IHREC believes that citizenship forms part of the essential identity and dignity of a person. Irish citizenship and the resultant entitlement to be part of the Irish nation under Article 2 is something that is of significant importance to Irish citizens who do not live in Ireland and whose children are born outside of Ireland. That importance is not less for same sex couples. It is not less where children are born through DAHR.

19. There does not appear to be a rational basis for this exclusion considering the enactment of the 2024 Act pertaining to children born through DAHR. Further, any purported policy basis for the exclusion is inconsistent with the fact that Z's sibling, born through DAHR in identical circumstances, acquired Irish citizenship. The only difference in █ circumstances of birth is the fact that █ Irish citizen mother gave birth.

20. In summary, IHREC considers that the failure to provide a legislative pathway for the acquisition of citizenship by the children of an Irish citizen who is domiciled or habitually resident abroad, and who may be recognised as a parent in accordance with the rules of private international law, results in unequal treatment being visited upon the child, the parent and the family unit without a rational basis. The result is a failure by the State to vindicate constitutional rights.

21. Further IHREC considers that the constitutional interpretation of s.7 of the 1956 Act, in respect of which the double construction rule is engaged, requires that s.7 be read as including Z as the biological child of an Irish citizen parent. This is addressed in the Y submission.

<u>ISSUES</u>

22. IHREC respectfully submits that three core issues arise in the within appeal:

    (a) whether the Respondent children are entitled to Irish citizenship by descent pursuant to s.7 of the 1956 Act;

(b) in the event that the Respondent children are found to not be entitled to Irish citizenship by descent pursuant to s.7 of the 1956 Act, whether the provision is constitutionally invalid and/or incompatible with the State's obligations under the provisions of the European Convention on Human Rights; and

(c) whether or, in the alternative, the State has failed to vindicate the Respondents' constitutional rights in not legislating for citizenship by descent in the context of their circumstances.

23. IHREC will address the following in these submissions:

(a) Citizenship;

(b) Same sex couples and their families;

(c) Personal, family and children's rights; and

(d) The Equality Guarantee.

A. CITIZENSHIP

24. Citizenship, and the entitlement that flows from citizenship to be part of the Irish Nation as provided for in Article 2 of the Constitution, forms an important part of a person's human identity and their dignity.[3] It is, as O'Donnell J. has described it, an "essential status",[4] and one which not only results in a person enjoying the entire range of rights provided for in the Constitution but also imposes duties on citizens and obligations on the State, both internally in relation to that citizen and externally in relations with other states.[5]

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[3] In addition to the benefits of Irish citizenship, IHREC notes that the children are deprived of the substantive benefits of citizenship of an EU member state. See ***Commission v Malta,*** C-181/23, ECLI:EU:C:2025:283, §§86-90.

[4] ***Odum v Minister for Justice and Equality*** [2023] IESC 26, §25. See also: ***Damache v Minister for Justice*** [2022] 1 IR 669, §§29-30; and ***AKS v The Minister for Justice*** [2023] IEHC 1, §87.

[5] ***A.P. v Minister for Justice and Equality*** [2019] 3 IR 317, p.345. See also: ***X.P. v The Minister for Justice and Equality*** [2018] IECA 112, *per* Gilligan J., §26.

25. Article 2 of the Constitution provides:

> *'It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.'*

26. In ***AO and DL v Minister for Justice***,[6] Fennelly J. (in a dissenting judgment) provided a persuasive interpretation of what the rights provided for in Article 2 of the Constitution encompass:

> *"These words represent a particularly strong and solemn declaration made very deliberately by the people in referendum. They are a qualitative statement of the nature of citizenship going beyond what formerly resulted from the exercise of the delegated legislative competence effected by s. 6 of the Act of 1956. The 'birthright of every person born in Ireland…to be part of the Irish nation' must have real content and should not be treated as a piece of empty sloganeering. The Irish born citizen's participation in the 'Irish nation' includes its 'cultural identity and heritage'. This emerges from the third sentence of Article 2 and is what 'people of Irish ancestry living abroad' share with Irish born citizens."*[7]

27. The failure to extend citizenship by descent to V, W and Z deprives them of those entitlements, rights and duties which form a core part of their human identity and dignity. Further, X and Y, as Irish citizens, are denied the right to avail their children born outside Ireland of Irish citizenship by descent, in contrast to Irish citizen parents who are heterosexual and whose children are born outside Ireland.

28. IHREC disagrees with the State's submissions that the Trial Judge was in error when she held that citizenship as an incident of parenthood is intrinsic to the human sense of self. In support of this submission the State contends that "*X's circumstances are*

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[6] [2003] 1 IR 1. This judgment preceded the twenty-seventh amendment of the Constitution.

[7] [2003] 1 IR 1, p. 181-182.

no more than a particular manifestation of a wider principle, which is that it is perfectly feasible for parents and children to maintain a proper function and fulfilling relationship even if they do not share the same citizenship."

29. There is a difference between family members who do not share the same citizenship and families where citizenship by descent has not been extended to the child of an Irish citizen by reason of the circumstances of their birth and/or the composition of their family within a same sex relationship or marriage.

30. While a range of fundamental rights can be enjoyed by non-citizens based on their human personality (particularly those in Articles 41, 42 and/or 42A),[8] these are not necessarily enjoyed in the same way as citizens.[9] Of course, citizens also enjoy rights that are not enjoyed by non-citizens,[10] such as the general right to live in Ireland without permission and to grow up, as Hogan J. has described it, as "fully-fledged" members "of the Irish Nation."[11] This was recognised by this Court in ***Damache v Minister for Justice***[12] and ***U.M. v The Minister for Foreign Affairs***[13] in cases concerning a loss of citizenship.

31. Notwithstanding that the right to citizenship by descent is not in itself a constitutional right, the within proceedings engage a wide range of constitutional rights. Articles 40.1, 40.3, 41 and 42A encompass core personal and family rights and the standalone rights of the children at the centre of the proceedings.

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[8] ***Nottinghamshire County Council v KB*** [2013] 4 IR 662, §226; and ***NHV v Minister for Justice and Equality*** [2018] 1 IR 246, §14. See also: ***State (McFaden) v Governor of Mountjoy Prison (No 1)*** [1981] ILRM 113, which provided that the guarantee of fairness of procedure in Article 40.3 was not confined to citizens; ***Finn v Attorney General*** [1983] IR 154, in which the duty placed on the State to protect the life of every citizen, was also a right enjoyed by non-citizens; ***In re The Illegal Immigrants (Trafficking) Bill, 1999*** [2000] 2 IR 381, in which it was held that non-citizens were to be understood to have a constitutionally protected right of access to the courts; and ***Omar v Governor of Cloverhill Prison*** [2013] 4 IR 186, in which the protection of inviolability of the dwelling provided for in Article 40.5 of the Constitution was said to apply irrespective of the nationality or status of the occupants of a dwelling.

[9] ***Odum v The Minister for Justice and Equality*** [2023] IESC 26, §27.

[10] For example: the right to be part of the political community that governs the State and to participate in the democratic process through a right to vote in Presidential elections or in referendums to amend the Constitution; the right to marry and to benefit from the constitutional protections afforded to any marriage they may enter into; the right to travel with the protection of the State: ***Gorry v Minister for Justice and Equality*** [2024] 1 IR 666, §22; and they would benefit from the facility to travel to third countries without an entry visa pursuant to visa waiver schemes entered into by the State: ***M v The Minister for Justice*** [2025] IECA 1.

[11] ***I v Minister for Justice*** [2011] IEHC 66, §8.

[12] [2022] 1 IR 669, §§29-30.

[13] [2024] 1 IR 316.

32. IHREC considers that in legislating for the conferral of citizenship, the State is obliged to do so in a manner that vindicates the constitutional rights of those in the situation of the Respondents and that guarantees their right to equal treatment under Article 40.1. In failing to legislate for the Respondents' circumstances, the State has acted in breach of this guarantee.

B. SAME SEX COUPLES AND THEIR FAMILIES

(i) The Constitution

33. IHREC considers that in legislating for citizenship by descent in a manner that only recognises traditional parentage, and not legislating for persons in the Respondents' circumstances, the State has failed to respect their right to equality having regard to Articles 40.1, 40.3, 41 and 41.4 of the Constitution.

34. As Hogan J observed in ***A, B and C v The Minister for Foreign Affairs***,[14] the amendment of the Constitution to include same sex couples within Article 41.4:

> "*…did rather more than simply authorise the Oireachtas to legislate for same-sex marriage. It has to be seen in practice as amounting to an emphatic rejection by the People of this Court's decision in Norris v. Attorney General [1984] IR 36 and, accordingly, read in conjunction with Article 40.1, it reflects a constitutional commitment to homosexual equality at all levels….*"

35. A couple, without regard to their sexual orientation, has the right to make decisions of the most intimate nature regarding family planning in the privacy of their own relationship without interference by the State. In making those decisions, they ought not be the subject of disadvantage or discrimination. The children born as a consequence of those private decisions similarly ought not be disadvantaged or discriminated against (to read Articles 40.1 and 42A consistently).

[14] [2023] 1 ILRM 335, §13.

36. Same sex couples who wish to have their own biological children will by necessity be obliged to have recourse to methods of DAHR (including Reciprocal Lesbian IVF, as in the case of Y), and surrogacy. While heterosexual people may also have recourse to reproduction methods such as DAHR and surrogacy, as Hogan J. observed of surrogacy in ***A, B and C v The Minister for Foreign Affairs***[15] at §14:

> *"in the very nature of things, this will be a route more frequently availed of by homosexual couples who seek to have children of their own with a genetic link to one member of that couple."*

37. These proceedings concern the private decisions made by two lesbian couples about how to create their respective marital and non-marital families. These included decisions about which woman in each couple would perform the roles of genetic and gestational mother, and which medical science made divisible. In the X case, the couple agreed that X's partner would perform both roles of gestational and genetic mother. In the Y family, the couple chose to divide the roles between them with Y being the genetic mother of Z and her wife, the gestational mother. Similar decisions are made by male same sex couples, notwithstanding that the role of the man is not divisible in the same way as that of a woman. Nonetheless, in making decisions as to the creation of their family within their relationships, they can decide which of them will provide the genetic material for the purposes of forming their family. These are private decisions made by marital and non-marital same sex couples regarding the formation of their families.

38. These private decisions, regarding the creation of their children, reflect what is encapsulated in the right to marital privacy as identified by Walsh J. in ***McGee v Attorney General***:[16]

> "*…the rights of a married couple to decide how many children, if any, they will have are matters outside the reach of positive law where the means employed to implement such decisions do not impinge upon the common good or destroy or endanger human life. It is undoubtedly true that among those*

[15] [2023] 1 ILRM 335, §14.
[16] [1974] IR 284.

persons who are subject to a particular moral code no one has a right to be in breach of that moral code. But when this is a code governing private morality and where the breach of it is not one which injures the common good then it is not the State's business to intervene. It is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire."

39. In protecting the right to privacy, under the personal rights provisions in Article 40.3, the Constitution recognises it as a facet of human personhood. If marital privacy as enunciated in ***McGee*** is to be interpreted harmoniously with the provisions of Article 41.4 of the Constitution, then the right to make intimate decisions about family planning and parenthood must equally apply to same sex marriages.

40. This protection of privacy is not limited merely to the marital family, however. As this Court recalled in ***Gorry v Minister for Justice and Equality & Ors***.[17]

"*…the 'right to procreate' is clearly not limited to married couples. It is clear that marital privacy, as recognised in McGee, is protected by Article 40.3*."[18]

41. The Court in ***Gorry*** went on to consider the extent to which decisions regarding procreation may be outside of the scope of state interference, whether considered as personal *or* marital rights:

"*61. Furthermore, without in any way devaluing the constitutional significance of what is involved, or suggesting any lower level of protection in fact for the values concerned, it may be better to conceive of these matters other than as rights, however characterised, giving rise to correlative duties. If, for example, there is a personal (or even marital) right to procreate, then questions arise as to the State's obligation to defend and, so far as practicable vindicate, that right… Is, for example, the State obliged to provide any fertility treatment without regard. perhaps, to the age of the person or the cost*

[17] [2024] 1 IR 666.
[18] At §60.

if a person cannot afford the treatment? It may be easier to conceive of these matters as decisions within a sphere of life, either marital or personal, with which the State cannot, or cannot readily, interfere, both because in the case of a married couple this is a matter peculiarly within the authority of their family unit and in the case of individual because it is a vital part of the human personality which the Constitution protects…

68. It follows that decisions of the State having an impact on such relationships engage the Constitution. The length and durability of a relationship formed by persons (whether married or not) is something that must be valued and respected by a state which guarantees to protect individuals as human persons. …"[19]

42. IHREC submits that where the State indirectly dictates that only one choice of family formation is open to these families in order to ensure the recognition of the citizenship of their children, the Respondent families are the subject of unwarranted State intrusion into their right to privacy. This clearly intrudes upon their capacity to make intimate private decisions within the context of their relationships, whether married or otherwise. It disproportionately impacts on same sex families and it disregards the reality that the role of mother is now, through medical science, divisible into genetic and gestational roles that can be shared by both women in a lesbian couple, if they so choose.

43. While s.7 does not directly require that a lesbian woman give birth before she is recognised as the parent of her child (including her genetic child), nonetheless, the provision has that effect. Neither does s.7 expressly dictate that an Irish citizen man in a same sex couple must provide the sperm in order for █ parentage to be recognised, but again, nonetheless, that is the effect of the section. In both scenarios, the couples, if they wish their children to avail of citizenship pursuant to s.7(1), must make these decisions in conformity with the model applied by the State. In so doing, the State is unlawfully interfering in the private decision-making of marital and non-marital couples. Failing to legislate for a model that reflects the reality of the decisions

[19] See also: ***O'Meara v The Minister for Social Protection*** [2024] 1 ILRM 437, §109.

and methods that same sex couples must use to form their families breaches their right to equality and their personal right to privacy.

(ii) The ECHR

44. IHREC acknowledges that these issues first fall to be determined in accordance with the Constitution, but makes the following submissions on the approach taken by the European Court of Human Rights ("**ECtHR**") in cases concerning similar issues, for the purposes of assisting and informing the necessary interpretation of constitutional provisions.[20]

45. Article 8 of the ECHR provides protection for a range of rights that constitute private and family life, and that extend to non-marital and *de facto* families – including same-sex couples.[21] The jurisprudence of the ECtHR supports *a social and functional* understanding of parenthood, rather than requiring particular biological or legal structures.[22] The applicable rights that flow from Article 8 are summarised clearly in ***Costa and Pavan v Italy***,[23] and include:

(a) the right to establish and develop relationships with other human beings;[24]

(b) factors such as sexual identity, orientation and life;[25]

(c) respect for the decision to become or not to become a parent;[26] and

(d) respect for the decision to become genetic parents.[27]

[20] For example, see: ***Fox v Minister for Justice and Equality and Ors*** [2022] 3 IR 221, §80
[21] The existence of "family life" in the ECHR jurisprudence is a question of fact, depending on the existence of close personal ties.
[22] Lima, "The Concept of Parenthood in the Case Law of the European Court of Human Rights" in Boele-Woelki & Martiny (eds.) *Plurality and Diversity of Family Relations in Europe* (2019) at p 109.
[23] Application no. 54270/10, 28 August 2012, §55.
[24] ***Niemietz v. Germany***, 16 December 1992, §29, Series A no. 251 B; the right to "personal development", see: ***Bensaïd v. the United Kingdom***, no. 44599/98, § 47, ECHR 2001-I.
[25] ***Dudgeon v. the United Kingdom***, 22 October 1981, § 41, Series A no. 45, and ***Laskey, Jaggard and Brown v. the United Kingdom***, 19 February 1997, §36, Reports of Judgments and Decisions 1997 I.
[26] see: ***Evans***, cited above, §71; ***A, B and C v. Ireland*** [GC], no. 25579/05, §212, ECHR 2010; and ***R.R. v. Poland***, no. 27617/04, §181, ECHR 2011 (extracts)).
[27] ***Dickson v. the United Kingdom*** [GC], no. 44362/04, § 66, ECHR 2007 V, concluded that Article 8 applies to heterologous insemination techniques for in vitro fertilisation. See also: ***S.H. and Others v. Austria*** [GC], no. 57813/00, § 82, ECHR 2011.

46. In ***SH v Austria,***[28] which concerned an Austrian law prohibiting gamete donation, the Grand Chamber held that Article 8 protects "*the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose*".[29]

47. Article 8 privacy rights are not limited to married couples, as is clear from ***Evans v United Kingdom***,[30] and ***Knecht v Romania.***[31]

48. The ECtHR has dealt with many cases raising similar issues to the instant case, and has considered non-recognition of legal parenthood for intended parents in surrogacy situations to be an interference with such persons' right to private life. However, in assessing the legitimacy and proportionality of such interference, the strong countervailing factor throughout this jurisprudence is the wide margin of appreciation given to States in this sensitive policy area. Frequently, the Court finds that States have not exceeded same, at least in relation to the (intending) parents. Observations made by the ECtHR about the sensitivity of the policy area have frequently been in the context of *surrogacy*, and the concerns of States about the risks of harm and abuse that such arrangements may entail.[32]

49. Given that the 2024 Act provides for DAHR in Ireland and also extends, through the amendment of the 1956 Act,[33] citizenship to some children born through DAHR, the argument for denying recognition of parentage in the context of the instant cases is arguably reduced when seeking to justify the interference with Article 8 rights. Similarly, questions about motherhood as between the gestational and genetic mother that are raised in the context of surrogacy or ova donation simply do not arise on the facts of the Respondents' cases – there is no dispute between the women. Further in the case of Z's sibling, born through DAHR in the same circumstances as Z (save that the roles of genetic and gestational mother were reversed between the spouses), █ has acquired Irish citizenship by descent pursuant to s.7 of the 1956 Act. It cannot be said

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[28] Application no. 57813/00, 3 November 2011.
[29] At §78.
[30] Application no. 6339/05, 10 April 2007.
[31] Application no. 10048/10, 11 February 2013.
[32] As outlined Judge O'Leary in the context of surrogacy in her concurring opinion in ***A.M. v Norway***, application no. 30254/18, 24 March 2022.
[33] S.226 of the 2024 Act inserts a new s.11A into the 1956 Act. S.226 has not yet been commenced.

that the State has concerns about citizenship by descent to a child born through DAHR in these circumstances where it has already issued a passport to Z's sibling.

50. Article 14 should be read in conjunction with Article 8 to ensure that there is no discrimination in respect of the protection of the private and family life rights.[34]

C. PERSONAL, FAMILY AND CHILDREN'S RIGHTS

(i) <u>The Constitution: Personhood, identity and dignity</u>

51. IHREC considers that a recognition of one's parents that results in citizenship forms part of the personhood, identity and dignity of a person. The Trial Judge correctly recognised that the constitutional rights engaged by the issues in these cases are:

> *"rooted in the right to personhood and dignity. As Clarke J. (dissenting) observed in his judgment in M.R. v. An tArd Chláraitheoir [2014] IESC 60, [2014] 3 IR 544, the principal constitutional entitlement arising in circumstances of surrogacy considered in that case was the entitlement which persons have, as part of their natural entitlement to human dignity, to have the State recognise their status by reference to such relationships as they may have, whether to parents, siblings, wider family members and within such family or families (however defined) as their status may place them. In my view, the same could properly be said in this case…"*[35]

52. In IHREC's view, nationality and citizenship, and sharing that nationality and citizenship with one's children, is fundamental to a person's identity and sense of self. Any arbitrary, irrational or otherwise unlawful interference with the ability to share that nationality and citizenship with one's children undermines that identity and sense of self. Those rights of Ms X and Ms Y, who are rights-holders independent of their children, would be undermined and arguably denied in the absence of there being a pathway to citizenship through descent for each of the three minor Respondents.

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[34] IHREC acknowledges the limited jurisprudence on the intersection between Articles 8 and 14 within this context, as outlined by Judge O'Leary in ***<u>A.M. v Norway</u>***.

[35] §101 and see also: §216.

53. Turning to the first category of rights-holders, Ms X and Ms Y – there could be no doubt but that, as Irish citizens, both individuals enjoy a right to personhood, identity and dignity pursuant to the Constitution. Collins J's concurring judgment in ***Doe v Commissioner of An Garda Síochána***[36] addresses the relationship between the interlocking rights to personhood and identity:

> *"8. As to the source of the right of an identity, there is no need to dive into the murky waters of unenumerated rights to locate such a right. Rather, it is an essential aspect of a number of interlocking fundamental rights explicitly enshrined in the Constitution, including the right to equality before the law in Article 40.1, the protection of the person in Article 40.3.2º (a right that is surely broader than a mere protection against defamation and which is arguably concerned with the protection of a person's place and reputation in civil society, which in turn necessarily implies a right to a social identity that the State must seek to protect). Recognition as a person – recognition of one's personal and civil/social identity – is essential if persons are to participate as equals in the free and democratic social and political community envisaged by the Constitution… Identity is key to all parental and family relationships and to civil status more broadly. The right to know who you are, and the right to establish that identity to third parties and to have it recognised by the State, are basic rights enjoyed by everyone."*[37]

54. A failure to recognise the parentage of Ms X and Ms Y to enable their children to acquire citizenship by descent undermines X and Y's interlinking rights of personhood and identity, as well as failing to vindicate their correlative rights with their children pursuant to Articles 41 and 42 of the Constitution.[38]

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[36] [2025] IESC 44.
[37] At §8 and see also: §9; and Hogan J.'s concurring judgment, §25, where he stated, "The right to one's identity is quite obviously a central feature of every human."
[38] IHREC acknowledges the position that continues to prevail as a matter of Irish law by virtue of the Court's judgment in ***The State (Nicolaou) v An Bord Uchtála*** [1966] I.R. 567, but also the positions adopted in the dissenting judgments of Hogan and Woulfe JJ. in ***O'Meara v The Minister for Social Protection and Ors.*** [2024] 1 ILRM 437, in respect of that case.

55. A right to respect for and recognition of the children's relationship with their parents is at issue.[39] A denial of citizenship by descent to any one of the minor Respondents would result in the familial and social identities of the children in X Family, and the familial, social and genetic identities in the case of the Y Family, not being properly recognised or protected.[40]

56. While addressing an entirely different aspect of a person's identity, in ***Foy v an T-Ard Chlaraitheoir and Ors. (No. 2)*** [2012] 2 IR 1, McKechnie J. highlighted the significant impact that a lack of recognition of the applicant's identity had on her dignity and privacy:

> *"For those persons affected with this condition, and in particular those who have undergone gender reassignment surgery, there seems to be a burning desire to have their new sexual identity recognised, not only socially but also legally…Everyone as a member of society has the right to human dignity, and with individual personalities, has the right to develop his being as he sees fit; subject only to the most minimal of State interference being essential for the convergence of the common good. Together with human freedom, a person, subject to the acquired rights of others, should be free to shape his personality in the way best suited to his person, and to his life."*[41]

57. While acknowledging that the factual underpinning of these proceedings is quite different, it remains the case that the effect of the State's position, such that there is no mechanism through which the minor Respondents may acquire Irish citizenship by descent, would result in a failure to recognise the familial, social and indeed cultural identity not only of the minor Respondents but also of Ms X and Ms Y, as their parents.

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[39] The respect for and recognition of children's relationships with their parents has been considered across a range of case law including in ***G v An Bord Uchtála*** [1980] IR 32, ***N v Health Service Executive*** [2006] IESC 60, ***SMcG and JC v Child and Family Agency*** [2017] 1 IR1, ***In the Matter of JJ*** [2020] IESC 1.

[40] On foot of ***NHV v Minister for Justice and Equality*** [2018] 1 IR 245, it is clear that the minor Respondents in these cases enjoy protections pursuant to the Constitution, which are engaged in respect of the matters at issue in these cases.

[41] See also: ***Adoption Authority v C, D & A*** [2024] 1 IR 415, §188, where Hogan J. addressed the right to know one's genetic identity as being an aspect of parenthood.

58. IHREC acknowledges that these issues first fall to be determined in accordance with the Constitution but makes the following submissions on the approach taken by the ECtHR in cases concerning similar issues, for the purposes of assisting and informing the necessary interpretation of constitutional provisions.[42]

59. This argument may also be informed by reliance upon the right to respect for private and family life as guaranteed by Article 8(1) of the European Convention on Human Rights, addressed above.[43]

60. In ***A.M. v Norway***,[44] the applicant and her partner, both Norwegian citizens, entered into a surrogacy agreement with a woman living in the United States. A court in the United States recognised the applicant as the legal parent to any child born under the gestational surrogacy agreement in that case. The child was subsequently conceived using sperm from the applicant's partner and an ovum from an unknown donor. After returning to Norway, the applicant's partner denied her access to the child, and she lodged proceedings in Norway seeking for her parental status under US law to be recognised or for a direction that her by-then former partner be mandated to allow her to see the child. The domestic courts held that there was no legal basis for her claims. The ECtHR found there had not been a violation of Article 8 of the Convention. In her concurring opinion, Judge O'Leary sought to highlight how, if issues in respect of a child's identity fell to be considered, it would result in the margin of appreciation being reduced:

> "*15…The Court's case-law in this field has sought from the outset to place the legal and social interests of children concerned centre stage and it is clear from the existing case-law that the 'living instrument' responds better and more progressively to cases in which the rights of children are involved rather than simply the rights of legally unrecognised parents, whether intended, non-biological parents or even genetic mothers (see D. v. France, cited above). The price the defeated parent pays is very heavy. Few would question,*

[42] For example, see: ***Fox v Minister for Justice and Equality and Ors*** [2022] 3 IR 221, §80

[43] IHREC notes and acknowledges the position consistently adopted by this Court in respect of the Constitution being the primary port of call in rights-based litigation and the manner in which the approach taken in respect of the European Convention on Human Rights might inform interpretation of constitutional provisions: see, for example ***Fox v Minister for Justice and Equality and Ors*** [2022] 3 IR 221, §80.

[44] Application no. 30254/18, 18 March 2022.

however, the need to maintain the rights of children centre stage; a need about which there is clear national, European and international consensus…That being said, as the child-parent relationship is a two-way street, refusal of recognition of the intended parent clearly has consequences for the rights, interests and social reality of the child…"

61. Similarly, in ***Mennesson v France,***[45] the ECtHR highlighted the fact that the French authorities, despite being aware that the children in question had been identified in the United States as the children of the first and second applicants, had refused them that status under French law. In focusing on issues that related to the children's identity, the Court found the contradiction at the centre of the case:

"96…undermines the children's identity within French society.

97. Whilst Article 8 of the Convention does not guarantee a right to acquire a particular nationality, the fact remains that nationality is a person's identity (see Genovese v. Malta, no. 53124/09, § 33, 11 October 2011). As the Court has already pointed out, although their biological father is French the third and fourth applicants face a worrying uncertainty as to the possibility of obtaining recognition of French nationality under Article 18 of the Civil Code…That uncertainty is liable to have negative repercussions on the definition of their personal identity."[46]

62. In a subsequent Advisory Opinion provided by the Court following an amendment of French law, the ECtHR extended its reasoning in ***Mennesson v France*** to intending mothers without a genetic link to a child:

"40. The lack of recognition of a legal relationship between a child born through a surrogacy arrangement carried out abroad and the intended mother thus has a negative impact on several aspects of the child's right to respect for its private life. In general terms, as observed by the Court in Mennesson and Labassee, cited above, the non-recognition in domestic law

[45] Application no. 65192/11, 26 June 2014.
[46] At §§96-97.

of the relationship between the child and the intended mother is disadvantageous to the child, as it places him or her in a position of legal uncertainty regarding his or her identity within society (§§96 and 75 respectively). In particular, there is a risk that such children will be denied access to their intended mother's nationality which the legal parent-child relationship guarantees; it may be more difficult for them to remain in their intended mother's country of residence (although this risk does not arise in the case before the Court of Cassation, as the intended father, who is also the biological father, has French nationality); their right to inherit under the intended mother's estate may be impaired; their continued relationship with her is placed at risk if the intended parents separate or the intended father dies; and they have no protection should their intended mother refuse to take care of them or cease doing so…

44…where a particularly important facet of an individual's identity was at stake, such as when the legal-parent child relationship was concerned, the margin allowed to the State was normally restricted."[47]

63. Ultimately, the Court held that Article 8 of the Convention did not impose a general obligation on States to recognise *ab initio* a parent-child relationship between a child and intended mother.[48] However, the Court did find that the child's rights pursuant to Article 8 require that domestic law provide a possibility of recognition of a legal parent-child relationship with an intended mother.

(ii) The Rights of V, W and Z as children

64. IHREC considers that the best interests of the children require the State not to exclude them from citizenship by descent by failing to recognise their relationship with their Irish citizen parents.

[47] ***Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation*** (Request No. P16-2018-001, 10 April 2019) §§40-44.
[48] At §52.

65. As Baker J put the matter in ***AO'D v O'Leary***:[49]

> "*…Article 42A … puts the welfare and interests of the child clearly within the sphere of constitutional, and not merely common law or statutory rights. That new Article must be seen as enhancing the rights of the child…*"[50]

66. Article 42A must also be read in a manner consistent with the equality guarantee, which recognises the "*essential equality of children*" is protected constitutionally. As the Chief Justice put the matter in ***O'Meara v Minister for Social Protection***[51]:

> *"…The Constitution as interpreted, recognises the rights of all children, and obligations of their parents, irrespective of the status of their parents. In this respect, there is no distinction, and certainly no relevant constitutional distinction, between children in a long-standing non-marital unit such as the O'Meara's, and those of a comparable family whose parents were married. Significantly, nor is there any difference in the duties and obligations the parents married or unmarried owe to their dependent children. In the light of the essential equality of children under the Constitution vis-à-vis their parents, and the rights which they all have to look to their parents for support, both emotional and financial, and the loss which they all suffer on the death of a parent, the stark differential treatment in the 2005 Act requires particular justification."*[52] [Emphasis added].

67. IHREC submits that similarly there should be no distinction between children in how they are born or created when it comes to decisions about their citizenship if the "*essential equality of children under the Constitution*" is to be respected.

68. In addition to the constitutional and Convention provisions, the UN Convention on the Rights of the Child ("**UNCRC**") recognises the right of children to acquire a nationality (Article 7(1)) and for their identity and nationality to be respected (Article 8.1). The right to non-discrimination also applies under Article 2.

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[49] [2016] IEHC 555.
[50] At §90.
[51] [2024] 1 ILRM 437.
[52] At §32.

69. The UNCRC lends support to the arguments outlined under Article 42A and may provide an interpretive aid.[53] As the UN Special Rapporteur has observed (in the context of surrogacy):[54]

> *"[18] The primary consideration of the best interests of the child born from a surrogacy arrangement should be the starting point of any analysis of the international legal framework…*
>
> *[19] … in addition to giving full effect to the main parameters outlined in general comment No. 14 (2013), the best interests of the child must be ensured, at a minimum, by providing certainty of identity; of status; and of parenthood…*
>
> *[23] This overarching principle of non-discrimination signifies that none of the rights of the child should be impacted by the method of his or her birth, including through a surrogacy arrangement."*

D. <u>THE EQUALITY GUARANTEE</u>

(i) The application of Article 40.1

70. The Trial Judge states at §207 of her Judgment, that:

> "*It is not…that s.7 of the 1956 Act is unconstitutional because it is underinclusive but rather that the failure of the State to legislate to fill the lacuna which it is common case exists (and has been established to exist as a matter of law) is a failure on the part of the State to hold citizens equal before*

[53] Finlay Geoghegan J referred to Article 12 of the Convention in her judgment in ***Nwole v Minister for Justice*** [2003] IEHC 72 (which pre-dated Article 42A Constitution). See also: the approach adopted by Theis J in ***A v P*** [2011] EWHC 1738 (Fam) in which the Court explicitly referred to the child's right to identity under Article 8 UNCRC in the context of an application for a parental order in respect of a child born following surrogacy, where the husband had died before the hearing of the application.

[54] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material (15 July 2019; A/74/162) Available at: https://www.ohchr.org/en/documents/thematic-reports/a74162-sale-and-sexual-exploitation-children-including-child.

the law by providing for entitlement to citizenship on a manner consistent with Article 40.1"

71. The Trial Judge goes on to conclude that the:

> "*… failure on the part of the State to legislate in respect of the conferral of citizenship on the children of an Irish citizen domiciled abroad who may be recognised as a parent in accordance with the rules of private international law results in the unequal treatment of the child and parent before the law without rational basis*."[55]

72. IHREC agrees with the Trial Judge and makes the following submissions, which apply to both the X and Y families, as follows:

(a) The failure to provide a legislative pathway for citizenship by descent to be conferred on V and W constitutes a breach of their rights, and those of their mother, X pursuant to Article 40.1.[56]

(b) Without prejudice to IHREC's Submission in Y in which it is contended that s.7(1) of the 1956 Act can be read as including Y and Z, and in the alternative, the failure to provide a legislative pathway for citizenship by descent to be conferred on Z constitutes a breach of █ rights, and those of █ mother Y, pursuant to Article 40.1.

73. The questions that require to be addressed in respect of Article 40.1 are:

(a) Whether s.7(1) of the 1956 Act should be examined subject to the close scrutiny standard (as described by O'Malley J in ***Donnelly v Minister for Social Protection***[57]).

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[55] At §213.
[56] The concept of equality has also been said to be found in Article 9.1.3° of the Constitution itself: ***Fleming v Ireland*** [2013] 2 IR 417, §128. The concept has also been interpreted as being implicit in Articles 41 and 42 of the Constitution: ***(State) DPP v Walsh*** [1981] IR 422, and ***W v W*** [1993] 2 IR 476.
[57] [2023] 2 IR 415.

(b) Whether the Respondents were the subject of discrimination based on arbitrary, capricious or irrational considerations, having regard to appropriate comparators.

(c) The rationale for the distinction in treatment.

(ii) Close scrutiny standard

74. IHREC submits that a difference in treatment in the conferral of citizenship by descent related to the circumstances of a child's birth to his or her parents constitutes discrimination that is based on matters that are intrinsic to the human sense of self, in the manner that O'Malley J envisaged in ***Donnelly***. Further, in light of the sexual orientation of Ms X and Ms Y, this particularly affects members of a group that is vulnerable to prejudice and stereotyping, those being members of the LGBTQI+ community. As a result, a closer level of scrutiny is required in considering the 1956 Act.

75. IHREC considers the questions of whether the Respondents have been discriminated against contrary to Article 40.1 in light of O'Malley J.'s judgment in ***Donnelly***, in particular the following:

> "*(i) Article 40.1º provides protection against discrimination that is based on arbitrary, capricious or irrational considerations.*
>
> *(ii) The burden of proof rests upon the party challenging the constitutionality of a law by reference to Article 40.1º.*
>
> *(iii) In assessing whether or not a plaintiff has discharged that burden, the court will have regard to the presumption of constitutionality.*
>
> *(iv) The court will also have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy.*

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

(vi) The objectives of a legislative measure, and its rationality (or irrationality) and justification (or lack of justification) may in some cases be apparent on its face. Conversely, in other cases it may be necessary to adduce evidence in support of a party's case."[58]

76. In IHREC's respectful submission, therefore, this is a matter that requires the Court's close scrutiny.

(iii) Discrimination based on arbitrary, capricious or irrational considerations having regard to appropriate comparators

77. This Court in ***A, B and C v The Minister for Foreign Affairs***[59] observed that detrimental treatment may occur at different levels. It is submitted that in the within cases, the Trial Judge was correct to identify a number of comparators as there are a number of distinctions in treatment at issue. Put simply, the identification of comparators within the particular *context* of these proceedings necessitates an approach such as that adopted by the Trial Judge. In identifying comparators, context is all important to ensure that the comparators are similar or similarly situated in respect of the matter at issue.[60] It is submitted that while a simple binary comparator may be appropriate in most instances, there are intersectional inequalities that may not be appropriately encapsulated in a binary comparator and therefore require a more nuanced approach.[61]

[58] These principles have been followed and re-affirmed in subsequent judgments of the Court, see for example: ***Heneghan v Minister for Housing, Planning and Local Government*** [2023] 3 IR 419, *per* Murray J, §124; ***O'Meara v Minister for Social Protection*** [2024] IESC 1, *per* O'Donnell CJ, §20; and ***BM and JM v Chief Appeals Officer and Ors.*** [2024] IESC 51, §§3, 4, and 28.

[59] [2023] 1 ILRM 335, §119.

[60] ***MR and DR v An tArd Chláraitheoir*** [2014] 3 IR 533, §36.

[61] The concept of *intersectionality* reflects the need for a recognition of compounded or multiple discriminations. First enunciated by Kimberly Crenshaw in "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" *University of Chicago Legal*

78. The distinction in treatment in the present proceedings and the context in which it occurs such that it engages the provisions of Article 40.1 arises in a number of ways:

(a) In respect of the parents in both cases, and in only recognising traditional parentage, with which a same sex couple cannot comply, unless they make their family planning decisions in a way that is in effect directed by the State, this results in a distinction in the treatment of their right as Irish citizen parents to pass citizenship to their children in a manner that is not applied to same sex couples. Specifically:

(i) A lesbian couple is obliged to tailor decision-making in matters relating to the composition of their family if they wish to satisfy the terms of s.7(1), such that their children can acquire Irish citizenship by descent in a manner equal to the children born to an opposite sex couple;

(ii) Both X and Y are required to give birth in order to satisfy the terms of s.7(1), such that V, W and Z can acquire Irish citizenship by descent in a manner equal to the children born to an opposite sex couple;

(iii) The choice as to which woman will give birth is a choice that should be available within a lesbian couple;

(iv) As a consequence of their status as members of a same sex couple (an immutable characteristic), this constitutes an intrusion into the sphere of their private and family life, into which the State does not intrude in respect of couples of the opposite sex; and

(v) While it is the case that opposite sex parents who avail of DAHR abroad will be similarly affected, the discrimination disproportionately and

Forum: Vol. 1989: Issue. 1, Article 8.. A practical example of the application of the concept is addressed in the employment equality context by Meenan in Meenan, *Employment Law* (2nd Ed. 2023 Chapter 12 - Employment Equality "Section N. - Multiple Discrimination".

necessarily affects same sex couples due to their necessary reliance on scientific methods such as DAHR as a pathway to parenthood.

79. In respect of Y, there is a distinction in treatment on the grounds of gender, in the disregard of the biological parentage of Y through her genetic motherhood of Z, this being a distinction that is not made in the recognition of the biological parentage of a genetic child of a male genetic parent. A biological father will always be considered a parent for the purposes of citizenship by descent. A biological mother will not, if there is a different gestational mother.

(a) In respect of V, W and Z, the children in both cases, there is a distinction in their treatment in the acquisition of Irish citizenship, which is based on the circumstances of their birth, in a manner that does not apply to children of same sex couples.

(i) Decisions made by their mothers as to which woman in their respective relationships undertook the divisible roles of genetic and gestational mother, have resulted in differences in the children's treatment in the context of acquiring citizenship;

(ii) Both X and Y were required to give birth in order to satisfy the terms of s.7(1), such that V, W and Z can acquire Irish citizenship by descent in a manner equal to the children born to an opposite sex couple; and

(iii) The children are deprived of citizenship by descent from their Irish citizen mother, by reason of her not giving birth.

(b) Z has experienced a distinction in treatment from that of ██ sibling who has acquired Irish citizenship by descent in circumstances where Y is ██ gestational mother.

(i) In that case because Y gave birth, Z's sibling acquired citizenship by descent;

(ii) The creation and birth of Z's sibling took place in precisely the same family, with the same parents and same DAHR circumstances as that of Z – the only difference being the swapping of the divisible genetic and gestational roles between the married couple in the opposite manner to Z; and

(iii) In that family, the two children of the same parents are treated differently by virtue of the State's interpretation of "parent".

80. The State has legislated to provide for citizenship by descent to children born to opposite sex couples, adopted children and in the 2024 Act, for children born through DAHR other than in the Respondents' circumstances. In failing to legislate for citizenship by descent for children born through DAHR outside of Ireland, the child of same sex couple parents who is born outside Ireland through DAHR is not treated equally with these other children, in being deprived of a route to Irish citizenship by descent from their Irish citizen parent.

81. IHREC submits that the parents and children in the within proceedings ought not be subject to any difference in treatment in respect of the statutory provision of citizenship by descent than another family in respect of whose children were born in the absence of DAHR. The use of DAHR in family formation is not unique to same sex couples. However, discrimination on the ground of a child having been conceived using DAHR disproportionately affects same sex couples and their families. It is accepted and acknowledged by IHREC that there are other family formations which will also be affected by the Court's decision.

82. The discrimination that arises in the proceedings occurs in the context of the sexual orientation and gender of X and Y, being immutable characteristics, and impacts on a most fundamental aspect of human life, the formation of a family. The necessity for close scrutiny is all the more compelling, in IHREC's submission, in respect of the children, V, W and Z, having regard to the immutability of the circumstances of their birth, and their rights under Article 42A.

(iv) The Rationale for the Distinction

83. The Respondents are subject to a difference in treatment in the acquisition of citizenship by the children, when compared to families formed within a traditional opposite sex relationship. The rationale for that distinction in treatment requires careful examination.

84. The role of the Court pursuant to Article 40.1, as O'Malley J highlighted in ***Donnelly***, is to ensure that groundless assumptions or prejudices have no role in determining the legal rights of the individual.[62] The fundamental question is whether the exclusion from the right to acquire citizenship by descent is "*grounded upon some constitutionally illegitimate consideration*".[63] IHREC considers that the distinction is grounded in constitutionally illegitimate considerations for the reasons set out below.

85. Having regard to the decision of this court in ***O'Meara***,[64] IHREC has also considered the question as to whether the differentiation is irrational, arbitrary, capricious, or not reasonably capable when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of. IHREC is of the view that it is not, for the reasons set out below.

86. In considering any difference in capacity or social function, that can be relied upon by the State to justify this difference in treatment, it is significant to note that the Oireachtas has elected to legislate in respect of births that occur in the jurisdiction in the context of DAHR. This is a fact that undermines the basis on which a distinction is to be drawn between children born through DAHR outside the State and those who are not, such that it cannot be said to be rational.

87. Insofar as the rationale for the distinction is based on the fact that there is a difference between DAHR carried on inside as opposed to outside the State, again this is undermined in circumstances where Z's sibling, born through DAHR outside the State in the same circumstances as Z (except for the fact that Y is Z's genetic but not gestational mother), has acquired citizenship by descent. The distinction does not relate to the fact that DAHR took place outside the State. The distinction relates to the fact that Y did not give birth to Z.

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[62] At §194.
[63] At §95.
[64] At §21.

88. Further it is within the legislative authority of the State through the Oireachtas to address any particular issues that arise in the context of DAHR outside the State, when legislating for citizenship by descent. The State has not done this and has simply failed to legislate entirely to avail a cohort of children and parents of a right that is available, *inter alia*, to those who are not obliged to use DAHR to create their families.

89. While the State is entitled to determine to whom citizenship by descent might be conferred, it is obliged to legislate for same in accordance with law and not in a manner that offends against constitutional rights.[65] The distinction in treatment outlined above is not required in the context of the State's role in conferring citizenship by descent. It is open to the State to legislate to provide for the particular circumstances at issue here. That is what the State has done in the context of adoption in s.11, and in the context of DAHR carried out in the State in the new s.11A of the 1956 Act. There is no apparent rational or logical reason as to why the State in so doing has sought to exclude children and parents who avail of DAHR outside the State.

90. The distinction in treatment outlined above constitutes discrimination which is based on "*constitutionally illegitimate consideration(s)". In this regard IHREC points to **Part B** (**Same Sex Couples and their Families)** and **Part C** (**Personal, family and children's rights)** of these Submissions in which the Respondents' constitutional rights arising are addressed, which are relied on in support of this submission.

91. IHREC believes that the distinction in treatment has no rational underpinning, is arbitrary, capricious and is not reasonably capable of supporting the treatment of the Respondents.

92. The State has failed to legislate to provide a pathway to citizenship by descent for the circumstances pertaining to the Respondent children[66] and has failed to fulfil its obligations to the Respondents pursuant to Article 40.1 of the Constitution by providing for same in a manner that is consistent with the requirements of that constitutional provision.

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[65] Article 9.1.2

[66] Without prejudice to, and in the alternative to, the position set out in the Y Submissions such that s.7 can be read in a manner than includes Z as a person who can acquire citizenship by descent.

93. Without prejudice to IHREC's Y Submission, such that s.7(1) can be read to include Z after the Double Construction rule is applied, in the alternative it is submitted that if it cannot be so read, s.7(1) by reason of the within submissions on Article 40.1, falls foul of the equality guarantee as a result of being under-inclusive in the context of societal and scientific advances which have occurred since its enactment. In addition, and for the same reasons, s.7(1) is incompatible with Article 8 of the ECHR read in conjunction with Article 14 of the ECHR.

CONCLUSION

94. S.7(1) permits a constitutionally valid interpretation, such that it can be read to include Z as a child born to an Irish citizen parent. In the alternative, if s.7(1) cannot be so read it breaches the Article 40.1 equality guarantee owed to Y and Z and is constitutionally invalid by reason of under inclusivity.

95. The Trial Judge correctly applied the judgment of this Court in ***A, B and C v The Minister for Foreign Affairs***,[67] which was binding on the High Court and which prevented a finding that s.7(1) could have been read as including X, V and W, in the absence of biological parentage.

96. The State has failed to fulfil its obligations pursuant to Article 40.1 of the Constitution in legislating for citizenship by descent in the circumstances pertaining to the Respondents.

97. This Court should therefore make an appropriate declaration that, in the absence of a provision enabling citizenship to be passed from X to V and W, the scheme fails to vindicate their constitutional rights and their rights pursuant to the ECHR.

Síona Molony BL
Lewis Mooney BL
Nóra Ní Loinsigh BL
Cathy Smith SC
24 November 2025

[67] [2023] 1 ILRM 335.