THE SUPREME COURT

Record No. S:AP:IE:2021:000068

Between:-

ROBERT DONNELLY AND HENRY DONNELLY (A MINOR SUING BY HIS FATHER AND NEXT FRIEND ROBERT DONNELLY)

Applicants/Appellants

-and-

THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

Respondents

-and-

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

WRITTEN LEGAL SUBMISSIONS ON BEHALF OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

I. Introduction

1. This appeal concerns Domiciliary Care Allowance ('DCA'), a benefit payable under the Social Welfare Consolidation Act 2005 (as amended)('SWCA') in respect of a child with a severe disability requiring continual care in excess of that normally needed by a child of the same age. The Appellants claim that the exclusion from DCA of children resident in hospital for extended periods of time under the SWCA is contrary to Article 40.1 of the Constitution and/or Article 14 of the European Convention on Human Rights, read in light of Article 8 and Article 1 of the First Protocol.

2. On 14 October 2021, the Supreme Court granted the Irish Human Rights and Equality Commission ('the Commission') leave to appear as *amicus curiae* in this appeal.

3. The appeal raises important questions in relation to the proper interpretation and application of Article 40.1 of the Constitution and the test applicable to the assessment of the compatibility of legislation with that provision.

4. The constitutional guarantee of equality in Article 40.1 ranks first among the fundamental rights protected under the Constitution and is "*a vital and essential component of the constitutional order"*.[1] Yet, there remains very significant uncertainty about the principles governing its application. This uncertainty is not merely an academic concern; it affects the extent to which Article 40.1 is effective in practice in ensuring equality before the law and in combating discrimination under the law.

5. In the judgment under appeal, the Court of Appeal referred to the judgment in *Brennan & Others v. Attorney General* in which Barrington J. described the concept of equality before the law as one of the most difficult and elusive in the Constitution.[2] Murray J. continued:

> *This is, in part, a product of the broad and diffuse range of circumstances in which the provision may be engaged and the varying legal responses required by different types of legal classification. The degree of scrutiny demanded by distinct categories of differential treatment imposed by law, the allocation of the burden of proof in specific types of cases and the extent of the deference afforded to legislative judgment in a variety of contexts fall to be rationalised and accommodated within a tightly packed constitutional mandate framed by two qualifications: 'citizens shall, as human persons, be equal before the law'. That direction is followed by what has been described as 'the proviso': '[t]his shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function'.*[3]

[1] *Murphy v. Ireland & Others* [2014] 1 IR 198, 227 (*per* O'Donnell J).
[2] [2021] IECA 155, §30 (referring to *Brennan & Others v. Attorney General* [1983] ILRM 449, 479). This is not the experience of the Irish Constitution alone: see e.g. Baer, "Equality: the Jurisprudence of the German Constitutional Court" (1998) 5 *Columbia Journal of European Law* 249 (observing that, while the right to equality was the most frequently cited right in the jurisprudence of the German Constitutional Court, it was the area of constitutional law containing "*the greatest number of conundrums*").
[3] [2021] IECA 155, §30.

While the terms of Article 40.1 are the essential starting point for the interpretation and application of that provision, they provide limited guidance on many of the complex issues to which it gives rise. For this reason, it is instructive to consider Article 40.1 within the wider constitutional scheme and in light of the analogous guarantees of equality binding on the State under EU and international law.

II. Issues in the Appeal

6. In accordance with the request of the Court in its determination of 29 July 2021, the parties agreed a joint statement of issues, which identifies four central issues arising in this appeal.

7. The first, second and third issues all relate to Article 40.1 of the Constitution.

8. In Issue 1, the Court is asked to address the overarching question of whether Section 186(d)(1)(a) and Section 186E of the Social Welfare Consolidation Act 2005 (as amended) and/or the relevant regulations thereunder are incompatible with Article 40.1 of the Constitution. More specifically, the Court is asked whether the judgment of the Court of Appeal (at §§ 45-67) correctly identifies and applies the appropriate test for determining whether a legislative provision is repugnant to Article 40.1.

9. In Issues 2 and 3, the parties raise a number of more specific issues in respect of this test. In Issue 2, the question is raised as to the appropriate comparator for the purpose of assessing whether Section 186(d)(1)(a) and Section 186E of the Social Welfare Consolidation Act 2005 (as amended) and/or the relevant regulations thereunder are compatible with Article 40.1 of the Constitution and the circumstances to be attributed to the comparator.

10. In Issue 3, the Court is asked whether, in the context of a challenge to the compatibility of legislation with Article 40.1 of the Constitution, the entire burden of proof rests on the Appellants and, more specifically, the nature of the burden of proof the Appellants bear regarding the effect of the legislation on non-parties who are also members of a defined legislative category.

11. The fourth and final issue concerns the compatibility of Section 186(d)(1)(a) and Section 186E of the Social Welfare Consolidation Act 2005 (as amended) and/or the relevant regulations thereunder with the European Convention on Human Rights, having regard to the case-law of the European Court of Human Rights and the decision of the Supreme Court of the United Kingdom in *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47.

12. While the first to third issues are to a certain extent overlapping, the Commission will address these issues in turn.

III. Submissions

(i) Issue 1: the Test for Assessing the Compatibility of Legislation with Article 40.1

13. In Issue 1, the Court is asked whether Section 186(d)(1)(a) and Section 186E of the Social Welfare Consolidation Act 2005 (as amended) and/or the relevant regulations thereunder are incompatible with Article 40.1 of the Constitution. More specifically, the Court is asked whether the judgment of the Court of Appeal (at paragraphs 45-67) correctly identifies and applies the appropriate test for determining whether a legislative provision is repugnant to Article 40.1.

The Judgment under Appeal

14. In the judgment under appeal, the Court of Appeal stated that any claim of unconstitutional discrimination revolves around the relationship between three variables:

    (i) First, a treatment of the claimant by legislation which is alleged to be discriminatory;
    (ii) Secondly, a similarly positioned comparator with whom the claimant asserts he or she can be juxtaposed for the purposes of asserting a claim to that effect;

(iii) Thirdly, a suggested justification for that difference.[4]

Thus, in order to establish that legislation is contrary to Article 40.1, an applicant must first identify a difference of treatment which is alleged to be discriminatory. In considering whether this difference of treatment is discriminatory, it is necessary to demonstrate that the claimant is treated differently from a similarly positioned comparator. If so, the question then arises as to whether such difference of treatment can nonetheless be justified under Article 40.1.

15. In identifying the legal test applicable to the justification of a difference of treatment between comparable persons for the purposes of Article 40.1, the Court of Appeal undertook a detailed analysis of the case-law under Article 40.1 and did so in two stages.

16. In a first stage, Murray J. identified the general principles applicable to the justification of a difference of treatment. Having referred to the early emphasis on invidious discrimination in the case-law, Murray J. described the formulation used by Henchy J. in *Dillane v. Attorney General* as being "*more informative*". In that case, Henchy J. stated:

> *When the State ….makes a discrimination in favour of, or against, a person or category of persons, on the express or implied ground of a difference in social function, the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of.*[5]

Murray J. went on to recognise that the test of rationality had increasingly been described as involving a proportionality test and in this regard referred *inter alia* to the test as articulated in *Brennan v. Attorney General*, where Barrington J. stated that the

[4] [2021] IECA 155, §35.
[5] [2021] IECA 155, §45.

classification in legislation "*must be for a legitimate legislative purpose…..it must be relevant to that purpose, and …. each class must be treated fairly*".[6]

17. In a second stage, Murray J. referred to two judgments of the Supreme Court which addressed the application of Article 40.1 to the social welfare code: *MhicMathúna & Anor v. Ireland* and *Lowth v. Minister for Social Welfare*. Having recalled that these judgments were binding on the Court of Appeal, Murray J. summarised four principles deriving from those judgments which are considered further below.[7]

18. Applying these principles to the case at hand, the Court of Appeal concluded that the difference of treatment between the positions of the two classes of parents and children impugned in these proceedings was "*rationally connected to the decision to pay that allowance*" and could not be regarded as arbitrary, capricious or otherwise not reasonably capable of supporting the selection or classification complained of.[8] In assessing legislation conferring benefits or allowances under Article 40.1, the Court considered that it was necessary to "*look to the general*" i.e. to assess whether generally the legislation is justified and acting reasonably in deciding that the needs of Class A are greater than those of Class B. In circumstances where there was no evidence that the class of which the Applicants formed part were generally treated adversely vis-à-vis those persons with whom they were to be compared, the Court concluded that the Applicants had not established that the impugned legislation was contrary to Article 40.1.[9]

The Appropriate Test for Assessing Compatibility with Article 40.1

19. In the Commission's submission, the Court of Appeal correctly identified the general principles governing the justification of differences of treatment for the purposes of Article 40.1 in the first stage of its analysis. However, the Court of Appeal fell into error by treating the Court's judgments in *MhicMathúna & Anor v. Ireland* and *Lowth*

[6] [2021] IECA 155, §47.
[7] [2021] IECA 155, §55.
[8] [2021] IECA 155, §59.
[9] [2021] IECA 155, §65.

v. Minister for Social Welfare as laying down what would in effect be a distinct test under Article 40.1 for the assessment of legislation in the field of social protection.

General Principles

20. It is clear from the text of Article 40.1 that the guarantee of equality before the law in the first paragraph of that provision is not absolute. The second paragraph of that provision makes it clear that this guarantee does not mean that the State cannot have "*due regard to differences of capacity, physical and moral, and of social function*" in its legislation.

21. While the test for determining whether an interference with the guarantee of equality can be justified has been formulated in different terms over time, it is settled case-law that, at a minimum, a legislative classification which distinguishes between comparable persons or classes of persons must have a legitimate purpose, must be relevant to that purpose and must not be unfair, unjust or unreasonable.

22. As the Court of Appeal recognised, this test has increasingly been regarded as incorporating an element of proportionality into its analysis. Indeed, the authors of Kelly observe that the principle of proportionality "*though not explicitly named as such, appears from Quinn's Supermarket Ltd v Attorney General"*.[10] In its judgment in *Re Article 26 and the Employment Equality Bill 1996*, the Supreme Court used the language of proportionality in assessing whether section 15 of the Bill was consistent with Article 40.1 of the Constitution.[11]

23. In the Commission's submission, it is appropriate that an interference with the constitutional guarantee of equality is not merely rational but that it is also proportionate to the legitimate objective being pursued. This is the test generally applied to the assessment of limitations on fundamental rights under the Constitution and nothing in the text of Article 40.1 precludes its application to the equality guaranteed. Indeed, having regard to the fundamental nature and status of Article 40.1, the guarantee of equality should not be afforded a lower level of protection or subject to a lower standard

[10] Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (5th ed., Bloomsbury, 2018), §7.2.142.
[11] *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 374.

of scrutiny than that applied to other fundamental rights protected under the Constitution.

24. Such an approach is also consistent with the assessment of interferences with the analogous guarantees of equal treatment under EU law and the ECHR. Thus, in assessing whether a limitation on the prohibition on discrimination in Article 21 of the Charter of Fundamental Rights is justified, the Court of Justice carries out its assessment by reference to the principle of proportionality in Article 52 of the Charter.[12] Similarly, under Article 14 ECHR, the European Court of Human Rights considers a difference of treatment to be 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*".[13]

MhicMathúna* and *Lowth

25. The Court of Appeal was correct to identify the judgments of this Court in *MhicMathúna* and *Lowth* as leading authorities addressing the application of Article 40.1 to the social welfare code, which were binding on the Court. However, for reasons set out below, it is submitted that the Court of Appeal erred in its summary of the principles deriving from those judgments and its analysis of their effect on the case at hand. In this regard, the Court of Appeal made reference to four factors, which it is appropriate to consider in turn.[14]

26. First, it is stated that the Court should afford significant deference to the Oireachtas in the allocation of benefits and allowances such as the DCA. While the Commission acknowledges that, in the context of Article 40.1, as in other contexts, it is appropriate that the courts afford due deference to the Oireachtas in its choices as to the allocation of scarce public funds, it is submitted that this does not remove the need for a careful consideration of whether a particular difference of treatment asserted to be discriminatory in this context is contrary to Article 40.1. Indeed, as the Court of Appeal

[12] See e.g. judgment of 29 April 2015, *Léger*, C-528/13, EU:C:2015:288, §§51-69.
[13] See e.g. *Stec v United Kingdom* (2006) 43 EHRR 1017, §51.
[14] [2021] IECA 155, §55.

itself recognised later in its judgment, the State "*cannot simply draw a curtain around legislation such as SWCA and insulate it from challenge under Article 40.1 by asserting that there is no right to social welfare benefits, that the courts must act with deference towards decisions allocating public resources as between citizens and that differential treatment of like positioned persons in the making of provision for social protection for these reasons alone survives challenge*"; nor can it simply say "*that withholding benefits or allowances from one category of persons is justified because the State wishes to limit demands on public funds*".[15] While the Court must take into account the nature of the legislation at issue in assessing whether a particular justification for a difference of treatment in such legislation is established, the mere fact that the legislation is in the field of social welfare or taxation does not mean that it is subject to a distinct test for compatibility under that provision.

27. Secondly, it is stated that, once the State has *"identified*" grounds for distinguishing between the needs and requirements of the comparator and of the claimant in the action, the court cannot interfere by seeking to assess what the extent of the disparity should be. In *MhicMathúna*, Finlay CJ, in rejecting the challenge based on Article 40.1 in that case, agreed with the High Court judge 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*". He continued: "*Once such justification for disparity arises, the Court is satisfied that it cannot interfere by seeking to assess what the extent of the disparity is*".[16] In the Commission's submission, there is a subtle but important distinction between the *dictum* of Finlay CJ in *MhicMathúna* and the principle as summarised by the Court of Appeal in this case: it is only once the justification for disparity in treatment arises, rather than once it is identified, that the court cannot interfere by seeking to assess the extent of the disparity. Mere identification of a justification is not sufficient to defend a challenge to legislation under Article 40.1, even in the context of the social welfare code; such justification must 'arise' in the sense of being established to the satisfaction of the Court in order to meet the requirements of the Constitution, as indeed occurred in *MhicMathúna* itself. If the Court were entirely precluded from having regard to the extent of disparity of treatment

[15] [2021] IECA 155, §84.
[16] *MhicMathúna v. Ireland* [1995] 1 IR 484, 499.

effected by a particular measure, it would not be possible to engage in any meaningful analysis of whether that measure runs contrary to Article 40.1.

28. Third, the Court of Appeal stated that, where the State has "*concluded that the needs of the class to which the comparator belongs are greater than those of the class to which the claimant belongs*", the provision will not be found unconstitutionally discriminatory if the court is satisfied that *generally* the comparator class was likely to have such greater needs than the claimant's class. This principle appears to be derived from the *dictum* of Hamilton CJ in *Lowth* that, for the purposes of the case, it was only necessary 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…. to meet such needs*".[17] In the Commission's submission, it is open to doubt whether, in making reference to the treatment "*in general*" of different classes of persons for the purposes of Article 40.1, Hamilton CJ intended to lay down a test of general application. In the following paragraph, Hamilton CJ specifically stated that the Court was not purporting "*to review in any way the established jurisprudence in relation to the construction of Article 40.1 of the Constitution or the basis of the right to equality enshrined therein*".[18] Indeed, in *MhicMathúna*, the High Court had underlined the importance of the analysis under Article 40.1 being carried out by reference to the facts and circumstances of the specific case and cautioned against assumptions or hypotheses outside those facts and circumstances.[19] This being so, in the Commission's submission, it is not sufficient for the State simply to conclude that the needs of one class are in general greater than another for the constitutionality of a difference of treatment in social welfare legislation to be upheld. It is necessary to assess whether the difference of treatment is rational and proportionate to the legislative objective being pursued by that difference of treatment by reference to the facts and circumstances and the evidence adduced in the particular case.

29. Fourth, it is stated that these principles apply even where the ground of distinction is of a kind that might in other contexts require particular scrutiny such as gender (*Lowth*) or marital status (*MhicMathúna*). It is true that, in *Lowth* and *MhicMathúna*, the

[17] *Lowth v. Minister for Social Welfare* [1998] 4 IR 328, 342.
[18] *Lowth v. Minister for Social Welfare* [1998] 4 IR 328, 342.
[19] *MhicMathúna v. Ireland* [1989 IR 504, 510.

Supreme Court did not address in an overt way the nature of the particular grounds of discrimination or the standard of scrutiny applicable. Indeed, both judgments are characterised by relatively brief analysis of the applicable legal principles and an emphasis on the evidence adduced in defence of the claims. That being so, in the Commission's submission, *Lowth* and *MhicMathúna* should not be interpreted as excluding different forms of scrutiny according to the grounds of discrimination invoked because of the particular legislative context.

30. Although Article 40.1 does not guarantee equality before the law by reference to specific protected grounds, it is now recognised that that provision "*involves particular protection against legislation for differentiations based on immutable human characteristics or features intrinsic to the human personality and sense of self*".[20] The Court of Appeal correctly recognised that disability is among the grounds which enjoy such protection.[21] Where the Court is assessing the compatibility of legislation differentiating on such grounds with Article 40.1, it is entitled to have regard to the grounds of discrimination, and the level of scrutiny and protection which they warrant, even where the legislation forms part of the social welfare code.

31. Even if, contrary to this primary submission, the Court of Appeal correctly identified the principles deriving from the judgments in *MhicMathúna* and *Lowth*, it is submitted that this Court should revisit those principles in light of the developments in its constitutional equality and fundamental rights jurisprudence in the intervening years. If and insofar those judgments are to the effect determined by the Court of Appeal, they unduly hamper the capacity of Article 40.1 to serve as an effective guarantee of equality before the law in practice.

Application to the Present Case

[20] *Murphy v. Ireland* [2014] IESC 19, §34; *M v. Minister for Social Protection & Others* [2019] IESC 82, judgment of O'Donnell J., §20.
[21] [2021] IECA 155, §44.

32. Having regard to its role as *amicus curiae*, the Commission endeavours not to entrench upon matters of factual dispute between parties. However, mindful of the Court's comments in *J.J.*,[22] the Commission would make the following brief observations.

33. In the Commission's view, the exclusion of the Appellants from access to the DCA on account of the Second Named Appellant's hospitalisation does give rise to *prima facie* discrimination on the ground of disability. While the Respondents have explained that the distinction in the legislation between a child being cared for at home and a child being cared for in hospital is based on the fact that, while in hospital, the State will discharge the costs of care, the Commission is concerned that this distinction does not reflect the overarching role and responsibility of the parent in the care of his/her child and the practical reality of caregiving for children with severe disabilities such as the Second Named Appellant.

34. First, the primary role of the parent vis-à-vis his/her child is given express protection under the Constitution, most notably in Article 42. While the parent will not be in a position to provide medical care of the kind that may be required in hospital, as the facts of this case illustrate, even in circumstances where the child requires such medical care, the child is also likely to require the care of his/her parent. Both the High Court and the Court of Appeal praised the very significant efforts of the First Named Appellant and his wife in this case.

35. Second, where a parent is charged with the continual care of a child with a severe disability who is in the ordinary course eligible for DCA, the role and responsibility of the parent does not, as a practical matter, stop and start according to whether the child is hospitalised. Where charged with such care, a parent may have to make significant adjustments to his/her personal and, in particular, professional life on a medium to long-term basis. While the legislation has some regard to this consideration by providing a limited exception for relatively short periods of hospitalisation, it makes no provision at all for the position of parents, such as the First Named Appellant, whose

[22] In *Re J.J.* [2021] IESC 1, the Supreme Court "*encourage*[d] *intervening parties to go further in explaining how the approach they assert would likely resolve the particular case"*: Judgment §178.

responsibilities and needs may be even more onerous by reason of the severity of the child's disability and the duration of hospitalisation that this may entail.

36. For these reasons, while acknowledging that the allowance is primarily intended to support the parent and child in the context of care at home with a limited exception for short periods of hospitalisation, it is not apparent to the Commission that the exclusion from access to the allowance of parents who must provide care at hospital over an extended period of time by reason of the severity of the child's disability is rational and proportionate.

(ii) Issue 2: the Appropriate Comparator for the Purposes of Article 40.1

37. In Issue 2, the Court is asked about the appropriate comparator for the purpose of assessing whether Section 186(d)(1)(a) and Section 186E of the Social Welfare Consolidation Act 2005 (as amended) and/or the relevant regulations thereunder for the purposes of Article 40.1 of the Constitution and the circumstances to be attributed to the comparator.

Judgment under Appeal

38. The Court of Appeal addresses the appropriate comparator for the purposes of Article 40.1 at paragraphs 35 to 44 of the judgment under appeal. In summary, Murray J. rejected the argument of the Respondents that it was wrong for the applicants to frame the inquiry by reference to a comparison between HD and a child being cared for at home and, in doing so, distinguished the judgment of this Court in *M v. Minister for Social Protection*.[23] Having done so, Murray J. concluded:

> *The position and needs of the child are the determining factors in distinguishing between those parents who are and those who are not entitled to the payment. So, while here the payment is made to the parent as it was in M., the justification in this case for withholding it is rooted in the position of the child, not exclusively that of*

[23] *M v. Minister for Social Protection & Others* [2019] IESC 82.

the parent. It follows that the child's status is one of the critical considerations in determining the validity of the distinction drawn within the legislation.[24]

In this regard, Murray J. observed that the court was not required "*to blind itself to the fact that RD asserts his claims in this case as the parent, guardian and carer of a child with disability nor to the effect of the fact that (on his case) it is because of the extent of his child's disability that he has been both deprived of DCA and required to expend a great deal of his time in caring for him*":

Simply put, if RD's entitlement to DCA is derivative from his child's disability, and if (as he contends) it is the extremity of the disability that results in withholding of the allowance, the fact of that disability must be centrally relevant in assessing the validity of its non-payment.[25]

It follows that the appropriate comparator for the purposes of Article 40.1 was the parent of a child with a severe disability who, because of his/her disability, could be cared for by at home.

39. Whereas such a parent would be entitled to DCA, the First Named Appellant was not so entitled on account of his child's hospitalisation over an extended period of time by reason of the severity of his disability.

Assessment

40. In the Commission's submission, the Court of Appeal's analysis and conclusion on the appropriate comparator in this case cannot be called into question. While there are different views between the parties as to the implications of the choice of comparator, it does not appear that either the Appellants or the Respondents dispute the reasoning or conclusion of the Court of Appeal in this respect.

[24] [2021] IECA 155, §43.
[25] [2021] IECA 155, §44.

41. As stated by O'Donnell J. in *MR and DR v. An tArd Chláraitheoir*,[26] cited in the judgment under appeal, in identifying a comparator or class of comparators, in each case it is necessary to focus very clearly on the context in which the comparison is made.

42. Similarly, as a matter of EU law, the Court of Justice has underlined the importance of such a contextual approach. Thus, in its judgments in *CHEZ Razpredelenie Bulgaria* and *Cresco*,[27] the Court observed that "*whether the requirement that situations must be comparable for the purpose of determining whether there is a breach of the principle of equal treatment has been met must be assessed in the light of all the elements which characterise them and, in particular, in the light of the subject matter and purpose of the national legislation which makes the distinction at issue*". According to the Court, it is not necessary that "*the situations be identical, but only that they be comparable and that ….the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner, in the light of the benefit concerned*".[28]

43. For these reasons, it is submitted that the analysis and conclusion of the Court of Appeal on the appropriate comparator should be upheld.

(iii) Issue 3: Burden of Proof

44. Thirdly, the Court is asked whether, in the context of a challenge to the compatibility of legislation with Article 40.1 of the Constitution, the entire burden of proof rests on the Appellants and about the nature of the burden of proof the Appellants bear regarding the effect of the legislation on non-parties who are also members of a defined legislative category.

The Judgment under Appeal

[26] *MR and DR v. An tArd Chláraitheoir* [2014] 3 IR 533, 611.
[27] Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, judgment of 22 January 2019, *Cresco*, C-193/17, EU:C:2019:43, paragraph 42.
[28] *Cresco*, C-193/17, EU:C:2019:43, paragraph 43.

45. In the judgment under appeal, Murray J. summarised the debate on the location of the burden of proof in cases alleging a violation of Article 40.1, noting the argument that, in certain cases of alleged discrimination, the burden of proof shifts to the State to establish the justification for the impugned difference of treatment. While observing that the authorities binding on the Court of Appeal continued "*to stress the burden on a claimant having regard to the presumption of constitutionality*", particularly in cases involving legislative judgments regarding the allocation of resources, the Court acknowledged that "*there are statements in the cases indicating that in some circumstances the law may develop in the direction of imposing an onus of some kind on the respondents in such cases*".[29]

46. However, Murray J. considered that, in contrast to the position in *Lowth* which "*required an evidence based justification extraneous to the statute*", the legislation at issue in this case required "*no such explanation*" because the difference of treatment arose in the statute itself. The Court did not consider that there could be an obligation on the State "*to both point to an objective justification for the measure and to affirmatively prove by evidence that the legislation was not arbitrary, nor capricious and not disproportionate*" as this would alter "*pre-existing law governing the presumption of constitutionality in cases involving alleged discrimination in the allocation of public funds*".[30] Having analysed the evidence put forward by the Appellants, the Court concluded that it had not been provided with evidence that would prove that the classification at issue lacked any proportionate or rational basis.[31] Earlier, in the judgment, the Court had pointed to lack of evidence to the effect that a substantial majority of the members of the class of which the Appellants formed part were being treated adversely compared to like positioned comparators.[32]

The Burden of Proof in Article 40.1 Cases

[29] [2021] IECA 155, §70.
[30] [2021] IECA 155, §74.
[31] [2021] IECA 155, §83.
[32] [2021] IECA 155, §66.

47. In the Commission's submission, the proper allocation of the burden of proof in claims of discrimination is critical to ensuring that Article 40.1 of the Constitution provides effective protection of equality before the law.

48. In the ordinary course, and in accordance with the presumption of constitutionality, it is for a claimant to prove that the legislation which he or she challenges is in breach of Article 40.1. However, it is submitted that, in appropriate cases, the burden of proof may shift to the State to justify a difference of treatment which is shown to constitute *prima facie* discrimination.

49. While the case-law of this Court has not articulated such a principle in express terms, it is implicit in much of the case-law under Article 40.1 that, where the State seeks to justify differences of treatment between classes of persons, it falls to the State to put forward appropriate evidence in support of such justification. Where the claimant has established facts from which discrimination may be presumed, it is not enough for the State to assert a justification without adducing evidence in support thereof. Whether or not this is formally or explicitly labelled as a shifting of the burden of proof, it has the same practical effect.

50. As the authors of Kelly have observed, over the past twenty years, "*there has been growing evidence of a two-tier approach to the burden of proof in constitutional equality cases*".[33] In cases where the classification impugned is based on essential attributes of the human person, such as sex, race, religion or – as in this case – disability, it may fall to the State to establish that the classification is for a legitimate legislative purpose. In this regard, reference is made to the judgments of this Court in *Re Article 26 and the Employment Equality Bill 1996, An Blascaod Mór Teo v Commissioners of Public Works (No 3)*, and *D v Residential Institutions Redress Committee*.

51. While the authors of Kelly refer to the judgment in *Lowth* as sending "*mixed signals about this potentially new approach to the burden of proof in equality cases*",[34] it is important to note that, even in *Lowth,* where the Court adopted a highly deferential approach to the choices of the Oireachtas under the social welfare code, the Court

[33] *Kelly: The Irish Constitution* (5th ed., Bloomsbury, 2018), §7.2.89.
[34] *Kelly: The Irish Constitution* (5th ed., Bloomsbury, 2018), §7.2.91.

placed significant emphasis on the evidence adduced by the State in support of the difference of treatment between men and women in rejecting the plaintiffs' claim.

The Burden of Proof in Discrimination Law More Generally

52. In considering this issue, it is important to recognise the particular challenges to which claims of discrimination give rise. Because direct evidence of discrimination is rarely available, and where it exists will frequently be unavailable to the claimant, claims of discrimination are in practice difficult to prove. Even where the claimant is in a position to adduce evidence which may give rise to a presumption of discrimination, there will generally be significant limits to the evidence to which the claimant will have access, particularly as to the effects of a particular measure or regime beyond his or her individual case. It is for this reason that a partial shifting burden of proof is widely recognised as an integral part of discrimination law.

53. While this case does not fall within the scope of EU law, in many areas such as employment and the provision of goods and services on the grounds of race and gender, Irish anti-discrimination is governed by EU law and EU law provides an important reference point on this issue.

54. In EU law, it has long been recognised that, in order to ensure effective protection of the fundamental right to equal treatment, a partial shift of the burden of proof is necessary in discrimination claims. Initially recognised in the case-law of the Court of Justice in the context of equal pay on the ground of sex, this principle has since been incorporated in the various EU legislative instruments on anti-discrimination and is recognised as an essential element of the general principle of equal treatment.

55. In its judgment in *Danfoss*, the Court of Justice recognised that the concern for effective protection that underlay EU legislation in the field of equal pay required such legislation to be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality.[35] The principle as originally articulated was not based either on the provisions of EU legislation or indeed the Treaty provision on equal pay but on

[35]Judgment of 17 October 1989, Case 109/88, *Danfoss*, EU:C:1989:383, §14.

the general principle of equal treatment under EU law. Similarly, in subsequent cases such as *Enderby*, while recognising that it was, in the normal course, for the person alleging facts in support of a claim to adduce proof of facts proving the existence of discrimination, the Court of Justice stated that "*the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay*".[36]

56. This principle was subsequently given express recognition in EU legislation. In Directive 97/80, the EU legislature adopted a general instrument on the burden of proof in cases of discrimination based on sex.[37] In recital 17, the EU legislature expressed its concern that "*plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory*". In recital 19, it is recognised that "*it is all the more difficult to prove discrimination when it is indirect*". The aim of the Directive is expressed in Article 1 as being:

> *…. to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.*

To this end, Article 4 of the Directive obliged the Member States to take such measures as are necessary, in accordance with their national judicial systems, to ensure that, "*when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment*".

[36] Judgment of 27 October 1993, *Enderby*, C-127/92, EU:C:1993:859, §14.
[37] This has since been replaced by Directive 2006/54/EC.

57. As the grounds of discrimination protected under EU law have expanded beyond sex, so too this principle has been recognised as one of general application. Thus, in Directive 2000/78, which prohibits discrimination in employment and occupation on the grounds of religion or belief, disability, age or sexual orientation, Article 10(1) requires a similar shifting of the burden of proof to the respondent once the claimant has established facts from which it may be presumed that there has been direct or indirect discrimination. This is also the case under Article 8 of the Race Directive, Directive 2000/43, which has a much broader material scope of application including employment, access to goods and services and access to social services, including social protection, and Article 9 of the Gender Goods and Services Directive, Directive 2004/113.

58. With the Charter of Fundamental Rights, the principle of equal treatment was recognised as a fundamental right with multiple dimensions, comprising a general guarantee of equality before the law (Article 20), a prohibition of discrimination on grounds including sex, race and disability (Article 21), a specific guarantee of equality between men and women (Article 22) as well as rights of the child (Article 24), rights of the elderly (Article 25) and rights of persons with disabilities (Article 26). As the Court of Justice has emphasized, the instruments of EU anti-discrimination legislation give concrete expression to the fundamental right to equal treatment.[38] This being so, the shifting of the burden of proof, originally rooted in the general principle of equal treatment and the necessity of ensuring its effectiveness, may now be regarded as an aspect of the fundamental right to equal treatment under EU law.[39] In accordance with the State's obligations under EU law, the shifting of the burden of proof is expressly provided for in section 85A of the Employment Equality Acts 1998-2015 and section 38A of the Equal Status Acts 2000-2018.

59. While these principles of EU law may not be directly applicable to the interpretation of Article 40.1 in this specific context, they are nonetheless relevant to consider as an integral part of the State's wider constitutional framework. If the fundamental right to equal treatment under EU law were to provide a significantly higher level of protection

[38] See e.g. judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 47.
[39] Muir, "The Essence of the Fundamental Right to Equal Treatment: Back to the Origins" (2019) 20(6) *German Law Journal* 817, 824 and 829.

against discrimination than that provided under Article 40.1, whether by reason of the rules on the shifting of burden of proof or otherwise, there is a risk of widely diverging standards of protection according to whether or not a particular claimant could bring his or her case within the scope of EU law.

60. Moreover, this approach to the burden of proof in discrimination claims is not confined to EU law. It is also reflected in international instruments binding on the State and in the constitutional law of other jurisdictions. For present purposes, the Commission points to three pertinent examples.

61. First, under the European Convention of Human Rights, while applying the general principle that it is the party making the claim that bears the burden of proof, the European Court of Human Rights has recognised that, in discrimination cases, the state respondent may be required to rebut an arguable claim of discrimination, particularly where an issue lies wholly or in large part within the knowledge of the state respondent's authorities but also where it would otherwise be very difficult for an applicant to prove the claim of discrimination, including in cases of indirect discrimination.[40]

62. Secondly, under the United Nations Convention on the Rights of Persons with Disabilities, which the State ratified on 20 March 2018, Article 5(1) provides a general guarantee of equality and non-discrimination, analogous to that enshrined in Article 40.1 of the Constitution. Article 5(2) and 5(3) require States to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds and to take all appropriate steps to ensure that reasonable accommodation is provided. In its General Comment No. 5, the Committee on the Rights of Persons with Disabilities has provided guidance on the obligations of States under this provision and has *inter alia* identified the steps States should take at the national level to ensure the full implementation of article 5 of the Convention. In particular, the Committee states that "*procedural rules should shift the burden of proof in civil procedures from the claimant to the respondent*

[40] See e.g. *Salman v. Turkey*, Judgment of 27 June 2000 (GC), (Application no. 21986/93) §100; *Anguelova v Bulgaria*, Judgment of 13 June 2002 (Application no. 38361/97), §111; *D.H.and Others v. the Czech Republic*, Judgment of 13 November 2007 (Application No. 57325/00), §§177-180; *Cînţa v. Romania*, Judgment of 18 February 2020 (Application no. 3891/19).

in cases where there are facts from which it may be presumed that there has been discrimination".[41]

63. Thirdly, in the jurisprudence of the Supreme Court of Canada, it is long established that, once a claimant has established a *prima facie* case of discrimination on a protected ground, the onus will shift to the respondent to rebut the presumption of discrimination. For example, in its judgment in *O'Malley*, which dealt with a claim of employment discrimination relating to reasonable accommodation, the Court justified a shifting of the burden of proof on the basis that "*it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence*".[42] The Court has also applied this approach in the assessment of claims of discrimination under the Canadian Charter of Rights and Freedoms. Thus, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*,[43] the Court confirmed that an application under the Charter involves a two-step process that successively imposes separate burdens of proof on the plaintiff and the defendant. First, the plaintiff must establish *prima facie* discrimination. In *Bombardier*, the Court provided detailed guidance on what this entailed. Second, once the plaintiff established such *prima facie* discrimination, the burden shifts to the defendant to justify the conduct or practice.

64. For all these reasons, the Commission submits that, in claims of discrimination under Article 40.1 of the Constitution, while the claimant must bear the burden of establishing a *prima facie* case of discrimination, once this has been established, the burden of proof should shift to the respondent to justify the impugned difference of treatment.

65. If the claimant were to bear the burden of proving that any justification or defence relied upon by the respondent were not established, as the judgment of the Court of Appeal appears to suggest, this would place a very heavy burden on the claimant which would

[41] Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination*, CRPD/C/GC/6, paragraph 73(i).
[42] *Ont. Human Rights Comm. And O'Malley v. Simpsons-Sears* [1985] 2 SCR 536, §28.
[43] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)* [2015] 2 SCR 789.

be difficult to discharge in most if not all cases. Such an approach would be inconsistent with the fundamental nature of the guarantee of equality under Article 40.1 and the obligations it implies and imposes on the State.

66. Finally, in this regard, it is relevant to note an important development in the broader legal framework governing equality and non-discrimination for public bodies. Under section 42 of the Irish Human Rights and Equality Commission Act 2014, a public body, in the performance of its functions, is required to have regard *inter alia* to the need to eliminate discrimination and to promote equality of opportunity and treatment of its staff and the persons to whom it provides services. More specifically, a public body must assess, address and report on the human rights and equality issues which it considers to be relevant to its functions and purpose. In circumstances where there is a positive equality duty of this kind imposed on public bodies, it would be even more onerous (to the point of constitutional unfairness) to allocate the entire burden of proof in discrimination claims to claimants who are likely to be at a significant disadvantage in terms of access to information and evidence as well as access to resources.

67. In enacting legislation which imposes a positive duty on public bodies in a manner which may go so far as to potentially include the Minister in the discharge of his regulatory functions but clearly applies to Department officials in assessing the application of a scheme, to eliminate discrimination and promote equality (see definition of "public body" in section 2 of the 2014 Act), the Oireachtas has provided by law for a duty on public bodies to actively consider the impact of measures introduced from an equality and discrimination perspective. The significance of the enactment of this positive duty warrants further consideration and reflection.

68. We submit that the public sector duty means that public bodies, as a matter of course, are required to conduct what amounts to an equality impact assessment of measures to be adopted and/or applied. It should follow that where this duty is properly discharged it would result in ready access by the public body to a record of consideration of any disparate or discriminatory impact the measure may produce for individuals and the justification for same.

69. It is submitted that it is appropriate that the Court's approach to where the burden of proof lies in equality cases be informed by the enactment by the Oireachtas of a public

sector duty in terms provided for in that section. Further, to the extent that the presumption of constitutionality impacts on the burden of proof on a claimant in a case such as this and derives from a respect for the separation of powers, it is of some significance, it is submitted, that the Oireachtas has provided for a specific, positive duty in these terms and thereby given a mandate to the Courts in holding public bodies to a duty to demonstrate equality proofing of measures effected in discharge of public law functions. [44] It is recalled in this regard that the presumption of constitutionality does not have a constitutional origin but is a canon of interpretation developed by the Courts and flows from "*that respect which one great organ of the State owes to another*".[45] Where the legislative organ of State has provided for a public sector duty in the terms of section 42, however, the Courts requiring a public body to demonstrate compliance with that positive duty in the discharge of public law functions should more properly be seen as an exercise in respecting the Legislative organ rather than an improper interference in the legislative domain.

Application to the Present Case

70. Applying these principles to the present case, the Commission submits that, once the Appellants put forward a *prima facie* case of discrimination on ground of disability, it should be for the Respondents to justify the impugned difference of treatment.

71. As noted above, both the High Court and the Court of Appeal praised the very significant efforts of the parents in the care of the Second Named Appellant including during his stay in hospital. On the basis of the evidence before the Court, it is apparent that, even while the Second Named Appellant was in hospital, the nature of his disability was such that he required the continual care of his parents and that such care was significantly in excess of that normally needed by a child of his age. While the parents of children with less severe disabilities who do not require hospitalisation in this way would be entitled to the DCA, the Appellants were not so entitled solely because the care was provided in the hospital, rather than at home. In the Commission's

[44] While, in accordance with section 42(11), nothing in the section shall "*of itself operate to confer a cause of action*" on any person against a public body in respect of the performance by it of its functions under section 42(1), there is otherwise no exclusion on reference to, or reliance on, the section 42 duty in legal proceedings.
[45] Buckley v. Attorney General [1950] IR 67, 80.

submission, these facts appear to be sufficient to establish a *prima facie* case of discrimination on the ground of disability.

72. Contrary to the conclusion of the Court of Appeal, it is submitted that the lack of evidence as to the effect on members of the class to which the Appellants belong *generally* is not, and cannot be, fatal to the Appellants' claim. In the vast majority of cases, a claimant would have very significant difficulty in accessing or assembling such evidence.

73. Assuming that a *prima facie* case of discrimination is established, it falls to the Respondent to justify the impugned difference of treatment. In the context of a challenge under Article 40.1, the fact that the difference of treatment is expressly provided for in the statute itself does not alter that position or mean that an evidence based justification is not required. While this fact, and the fact that the challenge arises in the field of social protection in which due deference must be afforded to the choices of the Oireachtas, are of course important factors which must be taken into account in assessing whether the difference of treatment is justified, they are not determinative of that question. Indeed, in the legislation impugned in these proceedings, provision is made for an exception to the usual rule that the DCA is not payable while a child is in an institution such as a hospital but on a very limited basis. In the affidavit sworn on behalf of the Minister, it was explained that the DCA was paid "*in recognition of the additional obligations and expense that are placed on parents for caring for children in their home*" and that, in circumstances where the Second Named Appellant was admitted to hospital, his care needs were "*being met by public funds*".[46] However, for the reasons identified above in the context of Issue 1, it is not apparent to the Commission that the exclusion from access to the allowance of parents who must provide care at hospital over an extended period of time by reason of the severity of the child's disability is rational and proportionate.

(iv) Issue 4: the Claim by reference to Article 14 ECHR

[46] [2021] IECA 155, §19.

74. The fourth and final issue relates to whether Section 186(d)(1)(a) and Section 186E of the Social Welfare Consolidation Act 2005 (as amended) and/or the relevant regulations thereunder are incompatible with the European Convention on Human Rights, having regard to the case-law of the European Court of Human Rights and the decision of the Supreme Court of the United Kingdom in *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47.

Judgment under Appeal

75. In the judgment under appeal, the Court of Appeal considered claim based on Article 14 ECHR by reference to the judgment in *Mathieson.* In that case, the Supreme Court of the United Kingdom concluded that the exclusion of the Appellant from the continued payment Disability Living Allowance by reason of his extended period of hospitalisation – where the Regulations only permitted the continued payment in such circumstances for a period of 84 days – was in breach of the Applicant's rights under Article 14 ECHR.

76. Murray J. summarised the Respondents' position on the judgment in *Mathieson* in the following passage:

> *First, they say that in Mathieson, the court was concerned with an allowance which, under the governing legislation in that jurisdiction, was payable to the child and not the parent. Second, they stress that Mathieson was concerned with the legality of the withdrawal of the allowance, not with whether it should be granted in the first instance. Thirdly, they point to the evidence that was before the court in Mathieson, urging that the absence of such evidence in this case is fatal to the reliance placed by the applicants upon it*.[47]

77. While rejecting the first and second submissions, the Court accepted the third submission which it described as both correct and critical.[48] According to the Court of Appeal, the Supreme Court granted the relief in *Mathieson* on the basis of the evidence before it that the 84-day rule was groundless in fact. In this regard, the Court of Appeal

[47] [2021] IECA 155, §109.
[48] [2021] IECA 155, §§110-112.

noted that the Supreme Court had granted declaratory relief as to the breach of the Appellant's rights rather than in respect of the regulations themselves.

Assessment

78. In the Commission's submission, it is clear from the judgment of the Court of Appeal that, at the level of principle, the analysis of the Supreme Court of the United Kingdom in *Mathieson* is equally applicable to this case. What is different, according to the judgment under appeal, is the evidence which has been placed before the Court.

79. For the reasons set out above in addressing Issues 1 and 3, the Commission submits that the evidential deficit in this case is not as stark as appears from the judgment of the Court of Appeal.

80. First, the Appellants have put forward compelling evidence as to their own circumstances and the level of care provided during the First Named Appellant's period of hospitalisation. The letter from Ms Murray provides further support in this regard. In the Commission's submission, the assessment of a claim of discrimination contrary to Article 40.1 must be carried out primarily by reference to the facts and circumstances of the particular case.

81. Second, while the Appellants have not adduced evidence as to the position of similarly affected persons *generally*, for the reasons set out above, it would impose a very heavy onus indeed on a claimant to require such evidence as a matter of course. While the Appellant in *Mathieson* was able to put forward some evidence to this effect, even in that case, it is clear from the judgment of the Supreme Court that the evidence was primarily based on material prepared by charities for advocacy purposes which in the ordinary course would be examined critically but which was accepted in the case at hand because no evidence at all on these issues had been put forward by the Respondents.[49] That being so, some caution is warranted in drawing the conclusion that the difference in the evidential position in *Mathieson* is fatal to the Appellants' case

[49] *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47, judgment of Lord Wilson, §36.

under Article 14 ECHR in these proceedings, particularly where the underlying facts are so similar.

82. Thirdly, this focus on the evidence underlines the very significant difficulties that a claimant, whether under Article 40.1 of the Constitution or Article 14 ECHR, may face if there is no shifting of the burden of proof once the claimant establishes a *prima facie* discrimination. The difficulty or impossibility for claimant to adduce evidence of certain matters relevant to the claim of discrimination, which may be particularly in the knowledge of either the respondent or other persons, would significantly limit the ability of these provisions to provide effective protection against discrimination. For this reason, as noted above, the European Court of Human Rights has recognised in the context of Article 14 ECHR that, in appropriate cases, where an applicant has put forward an arguable claim of discrimination, the burden may shift to the respondent to rebut the presumption of discrimination arising, whether because an issue lies particularly within the knowledge of the respondent or because it is otherwise very difficult for the applicant to prove the claim of discrimination.[50]

Application to the Present Case

83. While acknowledging the difference in the evidential position in this case and in *Mathieson,* the Commission does not consider that the difference in the evidential position – particularly viewed in light of the difficulty faced by claimants in establishing claims of discrimination – is fatal to the Appellants' claim under Article 14 ECHR. For similar reasons to those set out above in addressing Article 40.1 of the Constitution, on the basis of the evidence before the Court, it is not apparent to the Commission that the exclusion from access to the allowance of parents who must provide care at hospital over an extended period of time by reason of the severity of the child's disability is rational and proportionate.

[50] See e.g. *Salman v. Turkey*, Judgment of 27 June 2000 (GC), (Application no. 21986/93) §100; *Anguelova v Bulgaria*, Judgment of 13 June 2002 (Application no. 38361/97), §111; *D.H.and Others v. the Czech Republic*, Judgment of 13 November 2007 (Application No. 57325/00), §§177-180; *Cînţa v. Romania*, Judgment of 18 February 2020 (Application no. 3891/19).

IV. Conclusion

84. For all these reasons, the Commission submits that the Supreme Court should allow this appeal. While the judgment of the Court of Appeal provides a very important analysis of the jurisprudence under Article 40.1, the conclusions drawn by the Court underline many of the challenges to which that provision gives rise and the significant consequences that they entail for victims of discrimination. This appeal provides an important opportunity to clarify the principles applicable under Article 40.1 of the Constitution. If equality is "*among the highest and noblest aspirations included in the Constitution of every modern state*", and the principle of equal treatment of all human persons is "*implicit in the free and democratic nature of the State*" and "*permeates the Constitution*",[51] it is important that this is reflected in the interpretation and application of Article 40.1 of the Constitution and that this provision is capable of providing effective protection in practice against serious forms of discrimination.

David Fennelly BL

Siobhán Phelan SC

28 October 2021

(Word Count: 9,534 words)

[51] *M.D. (a minor) v. Ireland* [2012] 1 IR 697, 714 (*per* Denham CJ).