THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 552

[2021 No.783 JR]

BETWEEN:

JOHN O'MEARA

JACK O'MEARA

(A MINOR SUING BY HIS FATHER AND NEXT FRIEND JOHN O'MEARA)

THOMAS O'MEARA

(A MINOR SUING BY HIS FATHER AND NEXT FRIEND JOHN O'MEARA)

AOIFE O'MEARA

(A MINOR SUING BY HER FATHER AND NEXT FRIEND JOHN O'MEARA)

APPLICANTS

-AND-

THE MINISTER FOR SOCIAL PROTECTION,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Heslin delivered on the 7th day of October , 2022

Introduction

1. The backdrop to these proceedings is tragic. In January 2021, a young woman was lost to breast cancer and Covid 19. She was the long-term partner of the first applicant and they had been living together in a committed relationship for 20 years, having met when she was 23 and the first applicant was aged 20. She was mother to the 2nd 3rd and 4th applicants, who were born to their relationship in 2008, 2010 and 2007, respectively. The applicants' pain is unimaginable to those who have not experienced such loss. In circumstances where all 4 applicants were present in court throughout the hearing, this loss as well as their deep love and concern for each other was evident. None of the foregoing is at issue in these proceedings. Nor is it in dispute that the applicants have at all times been, and remain, part of a loving family in the sense in which the term "family" is generally understood in our society.

2. What this case concerns is a specific social welfare payment, namely, the widow's, widowers or surviving civil partner's contributory pension (hereinafter "WCP"). The said payment is established and paid in accordance with Chapter 18 of Part 2 of the Social Welfare Consolidation Act 2005 ("the 2005 Act") for the benefit of married couples and those who enter into a civil partnership.

3. It is acknowledged that the first applicant never married or entered into a civil partnership with the deceased. Thus, the first applicant does not come within the category of persons entitled to receive the WCP.

4. In the present proceedings a challenge is made to the constitutionality of Chapter 18 of Part 2 of the 2005 Act (hereinafter "Chapter 18" or "Chapter 18 of the 2005 Act"). It is also pleaded that Chapter 18 of the 2005 Act is incompatible with European Union law and with the European Convention On Human Rights Act 2003 (hereinafter "the ECHR Act 2003" or "the 2003 Act").

The Focus of the Applicants' Claim

5. Counsel for the applicants made clear at the outset that the arguments based on EU law, although having been carefully considered, could not be pressed further. This court was informed that the focus of the claim was very much on the alleged unconstitutionality of Chapter 18, in respect of the position of the 2nd to 4th applicants. Counsel for the applicants made a submission to the effect that "*if the children through their father were entitled to the payment",* it would represent "*a significant sum of money*" to which the children of a married couple are entitled, but which, contend the applicants, is denied to the 2nd to 4th applicants. This, submitted the applicants' counsel, represented discrimination against the 2nd to 4th applicants.

6. Counsel for the applicants acknowledged at the outset the special position occupied by marriage under the Constitution, in light of Article 41.3. Given that acknowledgement, I asked the applicant's counsel whether the first named applicant conceded that the distinction (between, on the one hand, a married couple, and on the other hand, a couple who cohabited for many years) which appears to be reflected in Chapter 18, did *not* constitute direct discrimination against him? This question was answered by counsel for the applicants by saying that, were the first applicant to advance such a case "on his own", it might come close to being "unstateable", given the very considerable difficulties which would arise having regard to the provisions of the Constitution and jurisprudence from the Court of Justice. In essence, it was made clear that "without the children" the present case would not and could not be brought.

The WCP

7. The WCP was originally introduced for widows on 1 January 1936, under the Widows And Orphans Pensions Act 1935. It was subsequently extended to widowers on 28 April 1994 in the Social Welfare Act 1994. From 1 January 2011, it was further extended to surviving civil partners, by virtue of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (hereinafter the 2010 Act).

8. Section 123 of Chapter 18 contains definitions of, *inter alia*, "civil partner"; "pension"; "relevant time"; "spouse"; "widow"; "widower" and "yearly average". This is followed by s.124 which makes

clear that, subject to the provisions of the 2005 Act, "a widow, widower or surviving civil partner shall be entitled to a pension…"

9. The WCP is a weekly pension paid to the husband, wife or civil partner of a deceased person and is available to those who satisfy the necessary PRSI contributions, be that on their own record or having regard to the record of the deceased spouse or partner.

10. The WCP is not means tested. Thus, it is payable to a qualifying recipient regardless of their income or outgoings, large or small. Furthermore, WCP is paid to a qualifying recipient irrespective of that person's ability to work.

11. However, generally speaking, a person cannot be in receipt of WCP and another social welfare payment at the same time. A person is also disqualified from receiving WCP if they are on a Community Employment scheme.

12. If a qualifying recipient enters into a new marriage or begins cohabiting with another person, they cease being entitled to WCP.

13. It is uncontroversial to say that the WCP comprises one of a range of social welfare payments within a sophisticated system operating in this State and that, whilst a surviving cohabitant is not entitled to WCP, they may be entitled to other social welfare payments, subject to need. Depending on the circumstances, these might include One Parent Family Payment, the Back to Work Family Dividend, Jobseekers Transitional Payment, and the Working Family Payment.

14. Currently, the WCP is €208.50 for someone under, and €248.30 for someone over, the age of 66.

Children

15. To receive WCP, the husband wife or civil partner of a deceased person does not need to (i) have had children with the *deceased* at any time; (ii) have *any* children, be they minors or otherwise, at the time of the application; or (iii) be *in loco parentis* as regards any children.

16. In other words, the existence, or not, of children is wholly irrelevant to the entitlement of a qualifying recipient to be paid WCP. To put it another way, WCP is payable to a qualifying recipient, irrespective of their parental status. That being so, it seems uncontroversial to say that the core objective of the payment is not the support of children. This is in circumstances where the entitlement to be payment of WCP is not linked to the relevant couple having children.

17. The only relevance of children is that, if a recipient has a dependent child (or children) they will be eligible for a Qualified Child increase (€40 / €48 for a child under/over 12). Thus, the increase, although material, represents just a fraction of the WCP itself. Later in this judgment, I will return to that issue.

Chapter 18 – ss. 123 to 127

18. It is useful at this juncture to set out certain relevant portions of Chapter 18 of the Social Welfare Consolidation Act, 2005 (the "2005 Act"). Section 123 of Chapter 18 contains the following definitions: -

> " 'civil partner' in relation to a surviving civil partner who has been party to a civil partnership more than once, refers only to the surviving civil partner's last civil partner and for this purpose that last civil partner shall be read as including as a party to a civil partnership that has been dissolved, being a dissolution that is recognised as valid in the State.
>
> 'pension' means a widow's (contributory) pension in the case of a widow, a widower's (contributory) pension in the case of a widower and a surviving civil partner's (contributory) pension in the case of a surviving civil partner.
>
> 'spouse', in relation to a widow or widower who has been married more than once, refers only to the widow's or widower's last spouse and for this purpose that last spouse shall be read as including a party to a marriage that has been dissolved, being a dissolution that is recognised as valid in the State;
>
> "widower" means a widower or a man who would otherwise be a widower but for the fact that his marriage has been dissolved, being a dissolution that is recognised as valid in the State".

19. Section 124(1) refers to the contribution conditions set out in s. 125 and goes on to provide the following: -

> "124 . . .
>
> (2) A pension shall not be payable to a widow or widower or surviving civil partner for any period after his or her marriage or remarriage or his or her entry into a civil partnership or a new civil partnership.
>
> (3) A widow, widower or surviving civil partner shall be disqualified for receiving a pension if and so long as he or she is a cohabitant . . .".

20. As is clear from the foregoing, the Oireachtas has decided that one does not have to be living with a spouse in order to qualify for an entitlement to WCP following their death. It seems uncontroversial to say that this is a recognition of the fact that, regardless of whether a married couple are cohabiting, they continue to have duties towards each other by virtue of their marriage. Although the deep love and affection of those in a long–term committed relationship, whether unmarried or married, is doubtless similar, the legal rights and obligations to each other are different by virtue of the marriage contract.

21. It is also clear from the foregoing subsections that if a widow or widower who lost a spouse subsequently becomes a cohabitant, they lose WCP but only for so long as they are a cohabitant. Upon that ceasing, the entitlement to WCP resumes.

22. Section 125 sets out the contribution conditions. It was confirmed during the hearing that the contribution conditions are, in objective terms, not particularly onerous. In essence, entitlement is based on the social insurance record of the claimant or their late spouse or civil partner. At least 260 paid social insurance (PRSI) contributions are required, and these must be paid up to the date

of death or prior to reaching pension age, whichever is earlier. There is also a requirement for certain yearly averages.

23. Section 126 specifies that the weekly rate of pension shall be set out in Part 1 of Schedule 2. As the court understands it, the maximum weekly payment is some €213 for a person under 66, and €253 for someone aged over 66.

24. Section 127 makes provision for certain increases and there are four circumstances referred to in which an increase will be payable: -

> "127.— (1) The weekly rate of pension shall be increased by the amount set out –
>
> > (a) in column (4) of Part 1 of Schedule 2 **in respect of each qualified** child who has not attained the age of 12 years who normally resides with the beneficiary, and
> >
> > (b) in Column 5 of Part 1 of Schedule 2 in respect of each qualified child who has attained the age of 12 years who normally resides with the beneficiary.
>
> (2) The weekly rate of pension shall be increased by the amount set out in column (6) of Part 1 of Schedule 2 where the beneficiary has attained **pensionable age and is living alone.**
>
> (3) The weekly rate of pension shall be increased by the amount set out in column (7) of Part 1 of Schedule 2 where the beneficiary has attained **the age of 80 years**.
>
> (4) The weekly rate of pension shall be increased by the amount set out in column (8) of Part 1 of Schedule 2 where the beneficiary has attained **pensionable age and is ordinarily resident on an island**". (Emphasis added)

25. Several comments can fairly be made in relation to the foregoing. Firstly, three out of the four increases relate to the advanced age of recipients and envisage that the recipient of pensionable-age might well be living alone. This speaks to the reality that the pension in question is directed at a particular cohort who may well be of pensionable age. It is true that increases are provided for where the recipient has children living with them, but the fact that the Oireachtas addressed that eventuality (also addressing several more eventualities not involving children at all) does not mean that the focus of the legislation is other than on providing support for the benefit of the surviving member of a married couple.

26. Throughout this judgment, I will refer to the distinction between persons who are married and not married. This is not to ignore the fact that the legislation refers to those who were in a civil partnership. However, in the present case, the applicant was not in a civil partnership and did not envisage entering into a civil partnership.

27. As to the quantum of increase where a recipient has a child or children, the court was informed that the current increase is in the order of €40 per child under the age of 12 and some €48 per child over 12. Three further comments seem to be uncontroversial. First, given the focus in the legislation on addressing eventualities such as the recipient living alone and being over the age of 66, or

attaining the age of 80, persons in such categories would seem to be far less likely to have young children or any children living with them.

28. Second, if one compares the amount of the weekly benefit (€213 - €253) to the increase where the recipient has a child (be that €40 or €48) the latter is a relatively small fraction of the former. There is no question, for example, of the number of children being used as a multiplier in respect of the pension payment itself (e.g., the basic payment is *not* "doubled" where the beneficiary has one child or "tripled" where the beneficiary has two children etc).

29. It seems to me that, as a matter of common sense and basic mathematics, if the focus of the legislation was on making provision for a child, as opposed to providing support to a bereaved spouse, the legislation would have been drafted in a materially different way (e.g. by doubling the payment where there is a child) and the question of children would not be dealt with by way of what is simply a modest increase on the basic payment (in the context of a range of eventualities being addressed, the majority of which relate to the advancing age of recipients and do not concern children at all).

30. A third relevant comment must also be emphasised. As I touched on earlier, the question of children is utterly irrelevant to the *entitlement* to receive WCP. One does not have to have a child in order to be entitled to the pension. The core entitlement is, for present purposes, to be a surviving spouse. In the manner which will presently be seen, the payment which is at the heart of the present proceedings is wholly unlike the payment which was the subject of proceedings in the neighbouring jurisdiction upon which the applicants place very considerable reliance (namely, in *Re: McLaughlin* [2018] 1 WLR 4250; and *R (Jackson) v. Secretary of State for Work and Pensions* [2020] 1 WLR 441, both of which will be examined closely in due course).

<u>The Rationale for WCP</u>

31. Ms Murphy, assistant principal officer of the Department of Social Protection, swore an affidavit on 24 November 2021 on behalf of the respondents and with their authority, in which she verified the contents of the Statement of Opposition. Ms Murphy also made the following averments in relation to the purpose of and rationale for WCP:

> *"5. Widower's (contributory) pension is paid to persons who have entered into a marriage or a civil partnership and who have, therefore, entered into a legally recognised relationship which confers rights and obligations on the contracting partners. Upon the death of the spouse (i.e. a party to a marriage or a civil partnership), a surviving spouse loses a person who owed them certain rights and obligations in law. In recognition of that loss, the Oireachtas as determined that it is appropriate for certain supports to be provided to the surviving spouse or civil partner of that relationship, including assistance in dealing with the economic aspects of that loss. The establishment of benefits of this nature is one of the mechanisms by which the State supports and encourages the institution of marriage and the fostering of the legal and social bonds which derive from that institution."*

32. No affidavit was sworn in response to Ms Murphy's and in that sense the foregoing constituted uncontroverted averments. Most significantly, and in light of the analysis I have set out thus far, it cannot seriously be disputed that the focus of WCP is squarely on the surviving spouse, and not otherwise. Lest that is not already sufficiently clear, the following comments seem to me to be appropriate.

Child Benefit

33. Few parents will be unaware that an element of the social welfare framework in this State constitutes Child Benefit . It is widely known that Child Benefit is payable in respect of a child who is living with their parents or guardians and who is under 16 (or under 18 if in full-time education or training or has a disability) and that, depending on the circumstances, the benefit is paid to the child's mother, stepmother, father, stepfather or the person caring for the child.

34. I mention the foregoing at this point because it is a well-known example of a payment which is generally understood to be principally aimed at the benefit, and support, of children. The child is, on any rational approach, the *focus* of the payment. This cannot be said in relation to WCP where, to qualify, one does not have to have, or ever have had, a child.

35. There may of course be situations where a bereaved person has a dependent child, and this is contemplated by the Qualified Child increase, in the manner which has been looked at in this judgment. From a first principles approach, however, the object of the WCP is the bereaved person, not a child (who may or may not feature).

36. Furthermore, given the average lifespan of the population generally, and taking nothing away from the tragedy of the loss of the deceased's young life, it seems uncontroversial to say that many recipients of the WCP will, due to their age, no longer have dependent children. However, the central point for present purposes is that a qualifying recipient is entitled to WCP irrespective of whether children were a feature of the relationship.

37. In contrasting, on the one hand, Child Benefit (which has the needs of children as its focus) and, on the other hand, the WCP (which does not) it is important to note that the nature of Child Benefit was examined by the Supreme Court in the recent decision of *Michael & Anor. v. Minister for Social Protection* [2020] 1 ILRM 1. At issue was the question of payment of Child Benefit to parents whose immigration status had not yet been determined and the child in question had either status as an Irish citizen or as a refugee. The case succeeded before the Court of Appeal which, having regard to the right to equality of all citizens pursuant to Article 40.1 of the Constitution, concluded that the State did not provide an objective justification for the statutory exclusion of the child's eligibility for Child Benefit prior to the grant of status to her mother, which exclusion offended Article 40.1.

38. In setting - aside the Court of Appeal's decision, the Supreme Court made clear, *inter-alia*, that Child Benefit is not a payment made *to* a child (albeit routed through the child's parent or guardian) or one which a child is *entitled* to receive. It seems to me that, insofar as the foregoing is true with regard to Child Benefit (which clearly has as a primary aim, the deferring of costs associated with

bringing up a child), it is all the more true in respect of WCP (which does not have that primary aim). As Dunne J Stated from para. 50 onwards of her judgment in *Michael:*

> "Child Benefit is a payment made by the State to eligible persons to assist in meeting some of the costs associated with bringing up a child as was pointed out by Tara Burns J. in the affidavit referred to above. It is a universal benefit payable to all those who are eligible regardless of their means. As was acknowledged by the Court of Appeal in its judgement in a passage referred to previously, "… *Child Benefit is not in any sense hypothecated by law for the benefit of the child or otherwise held on trust by the parent for her interest, so that the parent is in principle free to do with these monies as he or she may think fit".* It is as was Stated in the Court of Appeal "… *a payment made by the State to parents to assist in defraying the additional expenses associated with child-rearing*". The State does not in any way dictate the manner in which Child Benefit can be spent and that is a matter which is entirely within the discretion of the person to whom the Child Benefit is payable."

39. The learned judge emphasised the foregoing at para. 52, wherein she stated *inter alia*:

> "…the qualified person in receipt of Child Benefit is entitled to use Child Benefit for whatever purpose they consider appropriate and are not obliged to spend it exclusively on the qualified child or for the benefit of the qualified child directly or indirectly as the case may be. No doubt, the majority of people use Child Benefit for the benefit of their children but this may be done by pooling the sum of money available by way of Child Benefit with other family resources for the benefit of the family as a whole. Nevertheless, Child Benefit , when payable, is not something that is required to be used solely and exclusively for the benefit of the child concerned. The child concerned or a person acting on behalf of the child is not entitled to dictate to the recipient of the Child Benefit at that sum of money is used. The child is not entitled to receive the payment of Child Benefit ."

40. It seems to me that I am entitled to take the view, *per* the principles in *Michael,* that:

(i) WCP is not a payment which, as a matter of law, is made for the benefit of children;

(ii) WCP is not a payment which the recipient holds on trust for the benefit of any child or children as may be dependent on him or her;

(iii) The recipient of WCP is entirely free to spend the monies in question in such manner as they deem appropriate;

(iv) The 2nd to 4th applicants are not *entitled* to receive the payment of WCP;

(v) The 2nd to 4th applicants cannot point to any *right* to the use or benefit of all, or any, of the WCP.

41. The foregoing seems to me to be highly significant, given that a key submission made by counsel for the applicants was to the effect that *"if the children through their father were entitled to the*

payment", they would be the recipients of a significant sum of money which is currently denied to them, but to which children of married parents are entitled. Having regard to the analysis of Dunne J in *Michael*, it seems to me that the foregoing submission on behalf of the 2nd to 4th applicants is based on a fundamental error as to the nature of WCP and the party *entitled* to the payment. It seems to me that, even if their parents had married, the 2nd to 4th named applicants would never, as a matter of fact or law, have been "*entitled to the payment*", be that "*through their father*" or otherwise.

42. Furthermore, it seems to me that the 2nd to 4th named applicants in the present proceedings are at a further 'remove' from the position which pertained in the *Michael* case. I say this in circumstances where Child Benefit is, without doubt, a payment made by the State to eligible persons in order to assist in meeting some of the costs associated with bringing up a child, whereas that cannot be said in relation to WCP, which is payable irrespective of whether or not the recipient has children or is *in loco parentis*.

43. O'Donnell J (as he then was) also delivered a judgement in *Michael* and, during the course of the hearing before me, counsel for the applicants opened several passages from that decision (in particular, paras. 1; 7; 8; 17-19; 21-22 and 26). The current Chief Justice made clear that he agreed with the decision of Dunne J but Stated (at para. 1) that "*…the case raises difficult issues of the application of the equality guarantee of the Irish constitution, and for that reason may merit further consideration".* Among his observations was to State (at para. 8) that "… *in the case of Child Benefit , it is important to recognise that there is no sense, either legal or factual, that the benefit can be said to belong to the child"* and, just as Dunne J had done, he quoted from the Court of Appeal's decision in that regard (Hogan J).

44. The foregoing fortifies me in the views I have expressed earlier in this judgement, to the effect that there is no question of the payment which is at issue in these proceedings *belonging* to the 2nd to 4th named applicants (but for a change in the marital status of their parents). Similarly, there is no question of the payment belonging to the children of someone who is currently in receipt of WCP and who was married to her or his deceased spouse.

45. Counsel for the applicants laid particular emphasis on the contents of para. 17 in *Micheal*, wherein O'Donnell J (as he then was) Stated the following:

> "17. First, it is important to keep the forefront of attention here the fact that the claim which succeeded in the Court of Appeal was one which might be described as a claim of indirect discrimination. That is not indirect indiscrimination in the sense in which that term is commonly used in the law, where it is alleged that the application of an apparently neutral provision bears disproportionately upon a particular protected group. Here, it is used in the sense that the rights holder is not the direct or proximate object of the legislative provision challenged, but rather is affected, if at all, indirectly. In this case, the argument is that the person entitled to assert the right to [e]quality before the law under Article 40.1, Emma, is affected by the legislative provision, but through the definition of "qualified person" in respect of claimants for social welfare benefit generally, and Child Benefit in particular. While this indirect impact was explicitly acknowledged

at para. 17 of the judgment, and quoted at para. 8 above, there is, I think, some merit in the argument advanced on behalf of the appellant Minister that the focus slips significantly, and decisively, and that the analysis is converted into one in which the legislation is scrutinised, and found wanting, as if it directly sought to remove a benefit or impose a detriment upon a citizen child because of the immigration status of her parent, and where, moreover, the status of the parent is therefore considered not relevant to the benefit sought to be conferred or the detriment imposed. The question for resolution is posed at a number of points in the judgment as whether the Oireachtas "can deprive a citizen child of an entitlement" or withhold the payment of Child Benefit to an Irish citizen child because of the immigration status of the parent claiming the benefit. This is, I respectfully suggest, the wrong question and blurs an important, and indeed critical, distinction which is relevant to this case. The issue for determination can, I think, be framed more accurately as a question of whether the Oireachtas can exclude a claimant for benefit on grounds of immigration status, even though the child in respect of whom the benefit is claimed is an Irish citizen and may profit from the grant of the benefit, and suffer if it is refused. The very fact that this is a more complex and less clear-cut question suggests that the analysis of the equality claim is more nuanced and difficult. However, that is a difficulty with which it is necessary to engage."

46. Counsel for the applicants submitted that *"an equivalent question arises"* in the present case. As I understand that, that question, according to the applicants, it is framed in the following terms: *Whether the Oireachtas can exclude the 2nd to 4th named applicants for benefit on grounds of the marital status of their parents*?

47. In the manner already discussed, it seems to me that the nature of, and *raison d'être* for, Child Benefit , on the one hand, and WCP, on the other, are materially different. For the first to be payable at all, a child is very obviously, involved. For the latter to be payable, a child is not. Moreover, as a matter of common sense, there may very often be no dependent children involved where WCP is payable. That being so, it does not seem to me that WCP can reasonably be considered to be a *benefit* which is claimed *in respect of a child*.

48. I take this view, leaving aside, for present purposes, that factually and legally no child has a right to, or entitlement in, WCP. In other words, the nature of Child Benefit and its focus on the child seems to me to be so different from the nature and focus of WCP (which is on a bereaved spouse, or civil partner) that, in my view, the latter is not a benefit coming within the question re-framed by O'Donnell J (as he then was) in his judgment in *Michael.* The learned judge proceeded, from para. 18 onwards, to engage in the analysis of the question identified by him in para. 17 and he did so as follows:

"18. The starting point is that the direct object of the provisions (in common with other provisions in the social welfare code) is to determine that a person whose immigration status has not been positively resolved cannot be treated as having a right to reside, and capable of being habitually resident, and therefore a qualified person for the purpose of a claim to any benefit. In its own terms, that is not asserted to be, and in my view is

> not, a discrimination forbidden by Article 40.1. No distinction is made on any impermissible ground, or any issue or on any distinction, which should attract the close scrutiny of the court. The Act does not limit benefit to citizen claimants. The distinctions it does make are between those habitually resident, and those who are not, and at a further level, between those with a right to reside here, and those who do not have, or who have not yet acquired, such a right. Such distinctions are rational, and moreover are obviously directed towards both the purpose for which benefit is made available to those habitually resident, and limitations upon it, which are clearly within the decision-making power of the Oireachtas. Nor can it be suggested that the definition of those who have and have not a right to reside is itself impermissibly discriminatory either on its terms or in its effect. The starting point, therefore, must be that the terms of the legislation itself do not in their direct application breach Article 40.1.
>
> 19. It follows from this analysis that any claim here must be of indirect and, as it were, secondary discrimination. An otherwise permissible provision pursuing a valid objective within the decision-making power of the Oireachtas may nevertheless be found to be invalid if it interferes impermissibly with a right protected by the Constitution, even if that was not the direct objective of the legislation, but can nevertheless be said to be within its contemplation, or even a consequence of the legislation which is not too remote. Given the fact that the legislation specifically contemplates Child Benefit being paid in respect of a "qualified child" and that the intended object of the benefit is clearly to assist parents with the costs of child rearing, I agree that Emma and Michael in this case are fully entitled to challenge the operation of s. 246 insomuch as it affects them even indirectly…."

49. Even if I am entirely wrong in the view that, for the purposes of a consideration of the constitutionality of Chapter 18 of the 2005 Act, (and unlike the position in respect of Child Benefit as analysed in *Michael*) WCP cannot be considered to be a *benefit* which is claimed *in respect of a child,* the distinction which underpins the qualification requirements in respect of WCP relates to the marital status of the recipient, namely, the first applicant.

50. Few law students will be unaware of the decision in *Murphy v. Attorney General* [1982] I.R. 241, in which the Supreme Court declared certain provisions of the tax code unconstitutional on the grounds that they potentially placed a higher tax burden on a double-income married couple than on a similarly placed cohabiting non-marital couple, contrary to Article 41 of the Constitution. It is well settled that the State is entitled to differentiate between marital and non-marital couples without breaching Article 40.1. Indeed, the following is stated at para 34 of the applicant's legal submissions:

> "With regard to differential treatment of Mr O'Meara as a claimant for WCP in his own right, it must be acknowledged that since *Nicolaou,* the courts have identified a difference in moral capacity and social function as between married couples and unmarried cohabitants. While he does not accept that in his individual case any such difference exists, he acknowledges the authorities to the effect that an inequality will not be set aside as being repugnant to the Constitution if any State of facts exist which

may reasonably justify it (*Murphy v. Attorney General* [1982] IR 241, 283) and that the legislature is entitled to look towards the general (*Donnelly*, para. 65). He cannot refute the State's argument that **the aim of supporting and encouraging marriage is *prima facie* rationally related to exclusion of cohabitants from WCP, and that, for that reason, the exclusion is not arbitrary, or capricious,** or otherwise not reasonably capable, when objectively viewed." (emphasis added)

51. Later in this judgment, I will refer to the *Donnelly* decision (i.e. *Donnelly v. Minister for Social Protection* [2021] IECA 155; and the Supreme Court's decision in the same case, which was delivered on 4th July 2022).

52. Reference in the applicants' submissions to the *Nicolaou* case was, of course, to *The State (Nicolaou) v. An Bord Uchtala* [1966] IR 567, wherein the Supreme Court ruled that an unmarried father (Mr Nicolaou) and his child were not part of a family recognised by Article 41. In that case the child's mother had placed her child for adoption without Mr Nicolaou's knowledge or consent and, in response to the father's objection that this infringed his family rights pursuant to Article 41, the Supreme Court held that the father could not plead rights afforded by Article 41 as he was not a member of a constitutionally-recognised family. This outcome derived, according to the Court, from the wording of Article 41 itself.

53. To say the foregoing is not to denigrate in any way the love and care of the applicants for each other, in the context of being what, it seems fair to say, most people in Irish society would, without hesitation, regard as a 'family'. It is simply to recognise that in Article 41.3.1, the State pledges "…*to guard with special care institution of Marriage, on which*…" it states "…*the Family is founded*…".

54. Although several authorities could be cited, it is sufficient to refer to the Supreme Court's decision in *O'B v. S* [1984] 1 IR 316, wherein, as the head-note confirms, it was held: "*5. That the 'family' recognised in Article 41 of the constitution is the family which is based on a valid marriage in accordance with the law of the State".*

55. It is also fair to say that, given the special place of marriage in the Constitution (*per* Article 41.3.1) the 'starting point' is that it is *not* contrary to Article 40.1 for the State to treat married and non-married persons differently. By that I mean, where the Oireachtas draws such a distinction (reflected, for present purpose, in the Chapter 18 requirements for entitlement to WCP) the position is not that the legislation is unconstitutional, or has a presumption of unconstitutionality, but that it might be 'saved' by Article 41.3.1.

A distinction which is *rational* and *not arbitrary*

56. It seems to me that the contents of paragraph 34 of the applicants' legal submissions concede, very appropriately, that the distinction between married and unmarried persons, which is reflected in the qualification requirements in Chapter 18 of the 2005 Act, is (i) rational; (ii) not arbitrary or capricious; and that (iii) the aim of supporting and encouraging marriage is *prima facie* rationally related to the exclusion of cohabitants from WCP. That being so, I have great difficulty identifying a basis for this court to subject the distinction at the heart of this case to the type of "close scrutiny" to which the learned judge referred in para. 18.

57. With regard to the Chief Justice's analysis in para. 19 of *Michael,* I ask rhetorically: How can Chapter 18 of the 2005 Act "*be found to interfere impermissibly with a right protected by the Constitution",* given that the aim of supporting and encouraging marriage (an institution which is given special status in the Constitution) is *prima facie* rationally-related to the exclusion of cohabitants from WCP?

58. The foregoing seems to me to be a fundamental difficulty with the applicants' case, even if I am wrong in the view that (in contrast to Child Benefit) the "*intended object"* of WCP is not to benefit children (O'Donnell J describing Child Benefit as *"clearly to assist parents with the costs of child rearing",* which, in my view, simply cannot be said of WCP, given that parental status is irrelevant to WCP entitlement). At para 22 in *Michael,* the current Chief Justice Stated *inter-alia* the following:

> "…It is not contended that there is a discrimination being made between citizens and non-citizens. Indeed, if the outcome of the case in the Court of Appeal were embodied in legislation, it would, paradoxically, positively permit just such a form of discrimination between a citizen, in this case Emma, and a non-citizen, Michael, and their respective families. Here, however the discrimination alleged in the legislation is one between citizens. It is argued that Emma is being treated differently from a comparator citizen child with a qualified person parent, or other person entitled to make a claim. This involves a quite different analysis. There is no a priori reason to scrutinise carefully such a distinction. It has been said that all legislation discriminates, and it could be said that most legislation certainly distinguishes between citizens. The reasons which might cause a court to scrutinise, carefully, a legislative distinction between citizens and non-citizens do not arise in this case, and as observed in the decision of the Court of Appeal, a good deal of latitude is normally afforded to the Oireachtas in making such distinctions, in the absence of some intrinsic or essential characteristics such as gender, race, ethnic origin or marital status, for example, being used as the basis of the distinction."

Indirect discrimination

59. In the present case, Counsel for the applicants acknowledges that the claim advanced by the 2nd to 4th applicants is that of indirect discrimination. He makes equally clear that he regards as the appropriate comparators the child or children of a marital family (or the children of persons in a civil partnership). Thus, the discrimination alleged is between citizens. Although at 'first blush', the reference to "*marital status*" in the final sentence of para. 22, might suggest that "*the close scrutiny of the court*" is essential, this does not seem to me to be so, given that, in the manner previously discussed, the distinction between married and unmarried persons which underpins the qualification requirements in Chapter 18 of the 2005 Act is rational and not arbitrary or capricious. Moreover, the aim of supporting and encouraging Marriage is *prima facie* rationally-related to exclusion of unmarried cohabitants from WCP. Counsel for the applicants also laid particular emphasis on para. 26 of the decision by O'Donnell J (as he then was) in the *Michael* case, wherein the learned judge stated:

> "26. Claims made by reference to Article 40.1 of the Constitution pose undoubted difficulties of analysis. Equality before the law is, however, guaranteed by Article 40.1 of the Constitution and is, along with the liberty protected by the balance of that Article, an important pillar of the fundamental rights provision, and indeed a theme of the Constitution as a whole. It is important, therefore, that analysis of claims under Article 40.1 avoids the twin hazards of oversimplified justification for any legislative differentiation which would insulate almost any legislation from challenge on the one hand, and an overly rigid structure of analysis and a demanding scrutiny from which no provision can escape, on the other…"

60. Counsel for the applicants suggested that it is necessary for this court to engage in the close scrutiny referred to in *Michael* and that this court is presented with a difficult balancing exercise. I am not convinced that this is so in the present case, given that (i) the legislation under challenge is not directly discriminatory; (ii) the distinction which underpins it is rational and not arbitrary; and (iii) the aim of supporting and encouraging Marriage (which is an institution enjoying a special and privileged position under the Constitution) is *prima facie* rationally-related to exclusion of unmarried cohabitants ("cohabitants") from WCP.

61. Mr Justice O'Donnell made clear in *Michael* how an indirect discrimination claim, of the type which the 2nd to 4th named applicants bring, might be maintained. He did so at para. 19 in the following terms:

> "19…However, in analysing the claim it cannot be forgotten that it is indirect and secondary, and moreover that the direct impact of the legislation is not discriminatory. Furthermore, in my view, the absence of any **evidence that the indirect effect was the object of this legislation, or that it was motivated by any prejudice or stereotyping in that regard may mean that it would require something substantial, either in terms of the impact of the provision or the class of person affected, to lead to a finding of invalidity by reason of indirect effect, where the direct object was both permissible and non-discriminatory**. In almost every case there will be a direct impact of legislation on some people, but there will often be ripple effects and indirect consequences on others. It may be that a substantial discriminatory impact would need to be established before such impacts, which might otherwise be the inevitable and perhaps unavoidable remote consequences of legislation, are found to invalidate it. However, it is not necessary to decide that issue here. It is, however, important that the claim, when properly analysed, is a claim of an indirect secondary discriminatory impact of a provision both neutral and non-discriminatory on its face, and not discriminatory in its direct impact." (emphasis added)

62. In the present case, the applicants have adduced no evidence to support the proposition that the indirect effect (which they say amounts to discrimination contrary to Article 40.1) was "*the object of the legislation*". Indeed, no such arguments is even advanced. The *object* of Chapter 18 is plainly not to place minor children of an unmarried couple in a different category to minor children of married parents. Legitimate choices made by parents may have knock-on consequences for their

children, but that is true with respect to a whole swathe of issues. The object of the legislation at issue is to provide support to the surviving member of a couple (with the entitlement to support not depending in any way on the existence of a child or children). Other pieces of legislation have children as their object and focus. This is not the position here.

63. Furthermore, it was neither argued nor established that Chapter 18 is "*motivated by any prejudice or stereotyping".* In addition, no evidence whatsoever has been put before the court which relates to the impact of Chapter 18 on any others or the "*class of person*" said to be affected, still less "*something substantial"* in the sense referred to by the current Chief Justice in *Michael.*

64. Earlier, in this judgment I made reference to contents of para. 24 of Mr Justice O'Donnell's decision (in the context of the correct comparator) and it is appropriate, at this juncture, to quote that paragraph *verbatim* because the analysis in it provides an invaluable guide to the assessment of the applicants' claim in the present case:

> "24. It is not, however, sufficient to identify the comparator as a citizen child, and argue that he or she is treated differently from, and better than, Emma in this case, by reference to the respective immigration status of their parents. In the first place, and most obviously, the fact remains that the claim in this case is one of indirect discriminatory effect. A direct discrimination is made by the Act between, as it were, Emma's mother, and the mother of the comparator citizen child who is a qualified person for the purposes of the 2005 Act. As already discussed, that is, however, a perfectly permissible distinction based upon rational grounds, and a legitimate State objective. Therefore, while Emma is the same as the comparator child for the purposes of citizenship, she is different from the comparator in respect of the claimant through whom she hopes to benefit. The difference of treatment here is rationally related to, and indeed consequent upon, that difference, and therefore is not an impermissible discrimination contrary to Article 40.1. Instead, it can be seen as a performance of the requirement, to treat like persons alike in relation to that aspect in which they are alike, and differently in relation to those qualities or features in respect of which they are different."

65. Chapter 18 of the 2005 Act makes an explicit differentiation or discrimination between someone in the position of the first applicant and someone who has lost their spouse, as defined in the 2005 Act. Their personal pain is no different, but their marital status plainly is. The former qualifies for WCP by virtue of their marital status, which is a status different to that of the latter. What was true in respect of Child Benefit is just as true in respect of WCP. In other words, the distinction based on marital status (which is reflected in the qualification requirements in Chapter 18) can in my view also be described as "*a perfectly permissible distinction based upon rational grounds and a legitimate State objective*". No concession by the first named applicant is necessary for this court to state the foregoing with confidence. Thus, the 2nd to 4th applicants are different from the comparator (the surviving spouse of a marriage) in respect of the claimant (their unmarried father) through whom they hope to benefit. There is no unlawful discrimination contrary to Article 40.1. Rather, the difference in terms of treatment is a consequence of and rationally related to a legitimate and

permissible distinction which is reflected in Chapter 18. As Mr Justice O'Donnell noted "… *it can be seen as a performance of the requirement, to treat like persons alike in relation to that aspect in which they are alike, and differently in relation to those qualities or features in respect of which they are different."* In short, it is permissible for the State to differentiate between, on the one hand, a couple who chose to get married and, on the other, a couple who made a different choice. As a consequence of the permissible distinction, but very much a "side-effect" of the furtherance by the State of the legitimate aim of supporting and encouraging marriage, the 2nd to 4th applicants find themselves in a different position to the children of a married couple where one of the parties to the marriage has died. That does not render Chapter 18 unconstitutional, nor amount to unlawful indirect secondary discrimination.

66. What is not in doubt is that the applicant's argument is made, indeed can only be maintained, on the basis that (i) the legislation impacts the minor children, as opposed to their father, and (ii) is secondary in nature - in short, an indirect-discrimination argument. Such an argument was rejected by the Supreme Court in *Michael* as regards Child Benefit and, for the following reasons, I am satisfied that it cannot succeed in the present case with regard to WCP.

Alleged *entitlement* to payment

67. First, and as I mentioned earlier, a fundamental element of the argument advanced is that, but for marital status, the children in question would, "*through their father"* be "*entitled to the payment".* This is not so. No child has any right or entitlement to WCP, irrespective of the marital status of their parents.

Bereaved *spouse*

68. Second, the applicants' case is premised on the basis that the purpose of the WCP is to support *"bereaved families"* (the phrase used in para. 10 a. of the Statement of Grounds). I do not agree. It seems to me that the purpose of the WCP is to provide support to a *bereaved spouse* (as defined in the 2005 Act) in recognition of the fact that the surviving individual has lost someone who had legal obligations to them in the context of their marriage, thereby supporting and encouraging the institution of marriage and the fostering of the legal and social bonds derived from marriage. The loss of a long-term life partner is no less cruel or painful, but it cannot be controversial to say that there is a distinction between the public nature, formality, legal obligations and status of marriage which is reflected, *inter-alia,* in the purpose of the WCP which has the bereaved *spouse* as its object. As to the purpose or rationale for the WCP, this court is entitled to accept the averments made by Ms Murphy at para. 5 of her 24 November 2021 affidavit, which I quoted *verbatim* earlier in this decision.

Qualified person

69. Third, it seems to me that the assessment of alleged discrimination must be undertaken by reference to a *qualified person*, namely, a person entitled to receive the benefit. At paras. 64 and 65 of her judgement in *Michael,* Dunne J observed that the approach taken by the Court of Appeal was to consider whether an Irish citizen child resident in the State could be deprived of Child Benefit by reason of their parent's immigration status and whether this offended Article 40.1, in

circumstances where other citizen-children resident in the State could avail of Child Benefit thorough their parents or guardians. The Court of Appeal concluded that the approach of the Oireachtas amounted to an inherent unfairness and lack of proportionality. The Supreme Court made clear that this was not the correct approach.

70. Dunne J held that the Court of Appeal's conclusion could only have been reached on the basis that the child in question had an "*entitlement to Child Benefit*" but this was not the case. In para. 65 she made clear that Child Benefit is "*… A payment made to a qualified person - that is the person with whom the child normally resides. The fact that the child is a citizen of Ireland is not the determining feature.*" In para. 68, the learned judge stated that: "*The restriction of payment to those who are habitually resident is neutral in the sense that it applies to all applicants for Child Benefit equally*" later stating that "*The requirement in relation to habitual residence is addressed to the qualified person only. The legislation at issue relates to a benefit payable to the qualified person and not the qualified child. That being so, it does not appear to me to be appropriate to compare the position of Emma, a citizen child, with the position of any other citizen child. As pointed out by O'Donnell J in the passage above [Murphy v. Ireland para.28] the principle of equality requires that like persons should be treated alike.* ***<u>As the payment of Child Benefit is to a qualified person, the like person for this purpose should be another qualified person, not the child whose existence may give rise to the payment.</u>***" (emphasis added)

71. The analysis by the Supreme Court in respect of Child Benefit applies equally with respect to the 2nd to 4th applicants' claim regarding WCP, in my view. The requirement in relation to marital status is addressed to the qualified person only, namely, the first applicant. The legislation at issue relates to a benefit payable to the qualified person (the first applicant) and *not* the qualified children (the 2nd to 4th applicants).

72. It is true that s. 127 (1) (a) and (b) of Chapter 18 makes provision for increases in the weekly rate payable in respect of any "qualified child" under, or over, 12 years of age. That does not, however, mean that, what Chaper 18 calls a "qualified child", is or becomes the qualified person entitled to receive the payment i.e. the beneficiary. The surviving spouse (or civil partner) as defined in the 2005 Act remains at all material times the qualified person i.e. the beneficiary.

73. As I mentioned earlier, s. 127 (2), (3) and (4) goes on to provide for increases in the weekly rate where the beneficiary "*has attained pensionable age and is living alone*"; "*has attained the age of 80 years*"; or "*has attained pensionable age and is ordinarily resident on an island*". The foregoing fortifies me in the view that the purpose and object of the legislation challenged in these proceedings is the support of a bereaved spouse, not a bereaved family, and it is also perfectly plain that the Oireachtas contemplated that those benefiting from the support might well be older persons, including those who had attained retirement age (persons who, as a matter of common sense, would be less likely to have young children residing with them). My point is not that the Oireachtas ignored the possibility of a bereaved spouse having dependent children (this was addressed by way of an increase, but in the context of a greater number of increases also being provided for pensioners living alone, as well as beneficiaries over 80).

<u>Correct comparator</u>

74. Returning to the analysis by Dunne J, and applying it to the present case, it seems to me that, because the payment of WCP is to a qualified person, the correct person by way of comparator should be another qualified person, *not* the 2nd to 4th applicants.

75. Nor, in my view, is it fair to say that in the present case it is the *existence* of a child or children which *gives rise to the payment* of WCP. It does not. That was true in *Michael* in respect of Child Benefit, where the existence of a child was a *sine qua non* for any payment entitlement. In the present case, it is the existence of a bereaved person who has lost a spouse (someone who owed them legal duties by virtue of their marriage) which gives rise to the payment. The existence of a child is certainly *not* a pre-requisite of a person's entitlement to WCP. The existence of a child simply gives rise to a marginal increase on the payment, the object of which is to support the bereaved spouse. With respect to the appropriate comparator, Dunne J put matters as follows at para. 101 of her judgement in *Michael:*

> "101. It seems to me that the Court of Appeal fell into error in concluding that Emma as an Irish citizen resident in the State had a strong claim to be treated in the same way as fellow citizens similarly resident in the State. In fact, **the Court of Appeal should have considered the position of her mother, the qualified person, to whom Child Benefit would be payable provided that her mother, Ms. Y, met the eligibility requirements of the Act of 2005.** Child Benefit is payable, as has been seen, to a qualified person. The qualified person has to be habitually resident in the State. Ms. Y, having regard to the fact that she did not have refugee status or permission to reside in the State, did not have habitual residence in the State. There was no difference in treatment between Ms. Y and any other qualified person in terms of the requirement of habitual residence. Once her status was changed by reason of the permission granted to her to remain in the State on the basis that she was the mother of Emma, an Irish citizen child, Ms. Y was treated in precisely the same way as any other qualified person and no distinction was made between her and any other such person. **It is important to bear in mind that one has to look at the status of the claimant for Child Benefit and not that of the child in respect of whom Child Benefit may be payable.** Bearing that in mind, the Act of 2005 does not give rise to any inequality of treatment in terms of those entitled to claim Child Benefit ." (emphasis added)

76. In short, there is no evidence before this court of any difference in the treatment of *children.* Rather, a rational distinction is made between *adults* who decided to enter into marriage, and those did not.

Parental decision-making

77. Without for a moment being in any way critical of what was doubtless a valid decision *not* to enter into a marriage contract, it seems to me to be objectively true to say that the proximate cause of what the 2nd to 4th named applicants' regard as an unconstitutional denial to them of a benefit, is the perfectly valid, but very personal, decision-making by their parents.

78. On any analysis, a decision not to enter into a marriage contract, but to cohabit as committed long-term partners, is a private decision deserving of society's and the law's respect. However, that fact also raises a significant point of distinction between the facts at play in *Michael* and those in the present case, which seems to me to be appropriate to refer to given that the applicants lay such emphasis on principles outlined in *Michael,* particularly in the decision by O'Donnell J (as he then was).

79. It is fair to say that, in *Michael,* it was not within the 'gift' of the parent seeking Child Benefit to alter, unilaterally, her immigration status. It was not for, example, open to her to acquire citizenship 'for the asking'. The position is otherwise in the present case, with regard to marriage. It was entirely within the gift of the parents of the 2nd to 4th named applicants to marry at any stage (in particular, during the first 19 of their some 20 years together). Had they done so, the qualification requirements under Chapter 18 would have been met. I want to emphasise again and in the very clearest of terms that to say the foregoing is not a criticism. The last thing this court would wish to do is to add to the pain of any of the applicants. I mention the foregoing, however, because it seems to me to be a relevant matter of fact which emerges from the evidence in this case i.e. what might be called the decision-making power or autonomy or 'agency' of the parent(s) is a significant difference to the situation which pertained in *Michael* but illustrates that the indirect discrimination argument made by the 2nd to 4th applicants would simply not arise, had their parents made different but equally valid decisions, which were at all times theirs to make.

Decision *not* to marry

80. The evidence before this Court includes averments by the first named defendant to the effect that a conscious decision was made *not* to marry and the reason for this decision was also averred to. At para 8 of Mr O'Meara's 25 August 2021 affidavit, he avers inter-alia that: "*Michelle's parents split up young, so she never wanted to get married. We were just happy to stay going the way we were."* The foregoing was obviously a very personal decision made by the relevant couple and one deserving of respect. It did, however, have consequences, in that it meant the couple - irrespective of what was plainly their enormous love for and commitment to each other - did not enter into the institution of marriage and, thus, did not assume the particular rights and obligations between spouses which the entering into the institution of marriage, and what has been called the 'marriage contract', entails.

Decision *to* marry

81. It is also clear from the evidence that, having lived together as a committed and loving unmarried couple for some two decades, a *different* decision was taken with regard to marriage, i.e. they decided to marry. Once more, this was a highly personal and private decision which was theirs alone to make and just as deserving of respect as any decision not to, but a decision which highlights that it would represent a change in their *status* (including in the context of Article 41.3.1). The latter decision is also averred to para. 8 of Mr O'Meara's affidavit. There, he explains that "*We had decided to go to a registry office and do something quiet. But with COVID-19 it was delayed and of course we weren't expecting this."* Mr O'Meara went on to aver that the couple still thought that they

would "*still have time to sort out marriage".* Tragically, this proved not to be so, and the first applicant's late partner was cruelly taken before the couple could get married.

82. During the hearing and in the applicant's submissions, very significant reliance is placed on the decision of the UK Supreme Court *In re McLaughlin* [2018] 1 WLR 1441. As to the facts, the headnote makes clear that the case concerned the parents of 4 children who had lived together for 23 years before the father's death, but had never married. He had made sufficient national insurance contributions for the mother to have been entitled to, *inter alia*, widowed parents allowance had they been married. After his death her claim for widowed parents allowance was rejected on the basis that she was not a spouse as required by the particular legislation. The mother sought judicial review on the grounds that the legislation was incompatible with her rights under Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, read with Article 8 of, or Article 1 of the first protocol to, the Convention. A declaration of incompatibility was made. The Court of Appeal in Northern Ireland allowed an appeal. For the majority, Baroness Hale allowed the appeal against that decision and made a declaration that the relevant legislation was incompatible with Article 14 of the convention, read with Article 8 , insofar as it precluded any entitlement to widowed parents allowance by a surviving unmarried partner of the deceased.

83. Although counsel for the applicants quoted at some length from *McLaughlin,* the facts in that case disclose a fundamental difference with respect of the legislation which was at issue. At para. 1 of the judgement Baroness Hale makes clear that "*Widowed parent's allowance is a contributory social security benefit payable to men and women who are widowed* ***with dependent children****."* (emphasis added). In other words, to be entitled to the relevant payment, the widow or widower had to have dependent children. That is utterly different to the situation which pertains as regards WCP. At para. 26 of *McLaughlin,* the following was made clear:

> "26. It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the 2 persons that they are not in an analogous situation. The factors linking the claim to article 8 are also relevant to this question. It was for this reason that **Treacy J was able to distinguish between Ms McLaughlin's claim for the bereavement payment and her claim for widowed parent's allowance. In the case of the former he held that the lack of a public contract between Ms McLaughlin and Mr Adams meant that her situation was not comparable with that of a widow and her claim must fail**: paras *66-67.* That decision has not been appealed. In the case of the latter, he held that the relevant facet of the relationship was not there public commitment but the co-raising of children. For that purpose marriage and cohabitation were analogous: para *68.*
>
> 27. In my view that analysis is correct. **Widowed parents' allowance is only paid because the survivor is responsible for the care of children** who were at the date of death the responsibility of one or both of them. Its purpose must be to benefit the children. The situation of the children is thus an essential part of the comparison…"

84. The foregoing highlights the crucial distinction between the payment at issue in *McLaughlin,* and the WCP payment which is the subject of these proceedings. In the High Court, the claim for bereavement payment (the receipt of which did not require the existence of a child) failed and was not appealed. The payment at the heart of *McLaughlin* was "*only paid because"* of the existence of dependent children, for whom the survivor was responsible. That is fundamentally different to the qualifying criteria for WCP. Whereas in *McLaughlin* the court could say of the payment that its "*purpose must be to benefit the children",* that simply cannot be said of the WCP.

85. It is perfectly clear from a reading of McLaughlin that, in circumstances where the relevant benefit was not payable unless the survivor had dependent children, the UK Supreme Court was dealing with a benefit squarely aimed at benefitting *children*. That is simply not the situation as regards WCP. It also seems to me that had the relevant benefit at issue in *McLaughlin* been one payable to a surviving adult, irrespective of their parental status, the decision of Baroness Hale is likely to have gone a different way. The court in *McLaughlin* Stated *inter alia* the following: -

> "Notably, *Yiğit v. Turkey* involved only the mother. It did not involve any of her children, who were entitled to bereavement benefits in their own right. As shown by the helpful intervention of the National Children's Bureau, which hosts the Childhood Bereavement Network, in the great majority of Council of Europe States children of the deceased are directly eligible for bereavement benefits up to a certain age. The United Kingdom is unusual in **channelling benefits for children through their parents**". (emphasis added)

86. I pause at this point to observe that it would be wholly inaccurate to say that WCP is a 'benefit for a child which is channelled through their parent'. It is nothing of the sort. It is a benefit aimed squarely at supporting an adult who has lost a spouse who, by virtue of their marriage, owed them legally recognised duties and rights (leaving aside, for the purposes of the analysis, the love and affection common to all committed couples, regardless of martial status). Later (at para. 33) in *McLaughlin*, Baroness Hale stated the following: -

> "33. Further, to quote *Yiğit v Turkey* again, at para 70:'The contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law'. The margin of appreciation is the latitude which the Strasbourg court will allow to member States, which is wider in some contexts and narrower in others. As the Grand Chamber explained, in a much-quoted passage in *Stec v United Kingdom (2006) 43 EHRR 47, para 52:*
>
> > 'The scope of this margin will vary according to the circumstances, the subject matter and the background. As a general rule, very weighty reasons would have to be put forward before the court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its

> needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'.".

87. The 'reasonable foundation' in the present case constitutes the particular status of marriage enshrined in our State's Constitution and the legitimate aim on the part of the Oireachtas to promote and support marriage. Indeed, Baroness Hale's judgment explicitly acknowledges the legitimacy of that aim in the context of ECHR jurisprudence. She put matters as follows from para. 36 in *McLaughlin*: -

> "36. The legitimate aim put forward by the respondent is to promote the institutions of marriage and civil partnership by conferring eligibility to claim only on the spouse or civil partner of the person who made the contributions. There is no doubt that the promotion of marriage, and now civil partnership, is a legitimate aim: this was the reason why the denial of widow's benefits to an unmarried partner was held justified in *Shackell v. United Kingdom* CE: ECHR: 2000: 0427 DEC 004585199; and why the preference given to civil over religious marriage was held justified in *Yiğit v. Turkey* 53 EHRR 25.
>
> 37. The mere existence of a legitimate aim is not enough: there has to be a rational connection between the aim pursued and the means employed. Although this is not spelled out in the Strasbourg case law, it follows from the fact that the measure must pursue a legitimate aim . . ."

88. In the present case, there is both a legitimate aim and a rational connection between that aim and Chapter 18 of the 2005 Act, which constitutes a means of pursuing the aim. The distinguishing feature of *McLaughlin* was plainly that the payment at issue was directed to supporting children. As Baroness Hale made clear at para. 39: "*The allowance exists because of the responsibilities of the deceased and the survivor towards their children".*

89. The foregoing is simply not the case with regard to WCP. Baroness Hale went on at para. 39 to say that: -

> "The purpose of the allowance is to diminish the financial loss caused to families with children by the death of a parent. That loss is the same whether or not the parents are married to or in a civil partnership with one another".

90. The WCP has an entirely different purpose. It is not directed at supporting "families" nor is it directed at providing support to "families with children". It is directed at supporting a bereaved spouse and is a payment to which they are entitled if they were married to the deceased. WCP is payable irrespective of whether there is any child or dependent child involved. Indeed, it seems uncontroversial to say that, in very many cases, there may not be. In my view, the facts in *McLaughlin* are so utterly different to those in the present case that *McLaughlin* adds nothing to the analysis of the issues at play in this case other than to emphasise the legitimacy of the aim of

promoting the institutions of marriage and civil partnership, which aim is reflected in Chapter 18 of the 2005 Act.

91. At this juncture, it is also important to State that *McLaughlin* has previously been distinguished and, in my view very properly so, in a judgement delivered on 19 March 2021 by Ms Justice O'Regan in *McGovern v. Chief Appeals Officer* [2021] IEHC 202, wherein my learned colleague dealt with the self-same legislative provisions (Chapter 18 of the 2005 Act) as well as similar arguments made with regard to persons in the self-same position as the applicants.

92. Regan J rejected a challenge to the same legal provisions which the applicants impugn in these proceedings. However, rather than simply deal with the present application on the basis that, in light of the '*Worldport*' principles (see *In re Worldport* [2005] IEHC 198), the decision in *McGovern* is dispositive of the present claim, I felt it appropriate to engage in the more detailed analysis which is contained in this judgment. I did so, given the sophistication with which the case was argued on behalf of the applicants and lest any point was raised in the present case which was not raised and dealt with in *McGovern.*

93. *McGovern* concerned whether the applicant was entitled, in the circumstances of his case, to WCP (in accordance with Chapter 18 of the 2005 Act) under Irish legislation, under the Constitution, or under European law. It is entirely fair to say that the primary argument and one which takes up much of the judgement revolved around the recognition, or not, of a divorce obtained in another jurisdiction. The applicant's claim for WCP was disallowed on the basis that the divorce from his first wife (whom he married in 1982) was not recognised as valid in this State. The applicant had married a second time (in 1994) and that couple had two children (born 1999 and 2001, respectively. Sadly, his second wife died (in October 2016). Mr McGovern made the relevant application for WCP in November 2016 at (a time when his children were 17 and 15, respectively). Neither of those children were party to the proceedings which Mr McGovern commenced in 2020 (at a time when both had achieved their majorities).

94. It is clear, however, that Mr McGovern argued, *inter-alia,* that his two children were discriminated against, by virtue of the withholding of WCP. During the hearing before me, the court was provided, without objection, with a copy of the written submissions which had been made by the applicant in *McGovern,* and the following comprise *verbatim* quotes from those submissions:

> "75. While the main purpose of the widowers pension is to benefit the surviving member of a couple, it also provides a benefit to the children of that couple (as evidenced by the pensions increase for qualified child provision for children of that couple)…
>
> 76. Following the *dicta* of *McLaughlin,* Holman J stated in *Jackson* (case *supra,* at paragraph 57):
>
>> "*That* 'need [for] a greater level of support' *soon after the bereavement when there are deep end and children cannot be differently according to whether the parents were married or not."*

> 77. It is submitted, therefore, that the dismissal of the applicant's appeal and withholding of his widowers pension… unfairly and irrationally penalises and discriminates against his 2 children, who would otherwise be beneficiaries."

95. In light of the foregoing, it seems clear that, although not the principal challenge in McGovern, what the applicants have argued in the present case was an argument which made, and failed, before this Court in *McGovern*. In my view nothing appears to turn on the fact that the sole applicant in *McGovern* was the person who, but for his marital status, would all things being equal receive the WCP (as opposed the situation in the present case where minor children are also parties to the proceedings), given what was argued in *McGovern*. Clarke J (as he then was) made the following clear in *Worldport*:

> "14. …It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority –v- Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Chapter 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the *ratio* in *Industrial Services* and decline to take the view, as urged by counsel for the Bank, that that case was wrongly decided."

96. There is no question of *McGovern* having been decided in the absence of a review of significant relevant authority. Indeed, the principal authority relied on by the applicants in the case before this court, namely, the UK Supreme Court's decision in *McLaughlin* was specifically relied on by Mr McGovern in his unsuccessful application before Ms Justice O'Regan, as was the English High Court's decision in *Jackson* (which followed *McLaughlin*). Furthermore, the judgment in *McGovern* discloses no clear, or any, error. Nor has any material length of time elapsed since the decision in *McGovern*

was delivered. In short, there are no reasons, still less substantial reasons, for this court to come to a different view than expressed by O'Regan J in *McGovern.*

97. More recently, in the Supreme Court's decision in *Kadri v. The Governor of Wheatfield Prison* [2012] IESC 27, Clarke J (as he then was) made reference to *Worldport* and to subsequent authorities which Mr Justice Fennelly had considered in a separate decision given in the same case. Mr Justice Clarke Stated (from 2.2) the following:

> " 2.2 It seems to me that that jurisprudence correctly states the proper approach of a High Court judge in such circumstances. A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing.
>
> 2.3 In his judgement Fennelly J referred to the series of judgements of the High Court on the point in issue in this case. The trial judge considered himself bound by that line of authority. In the light of the case law to which I have earlier referred it seems to me that the trial judge was correct in that approach unless he viewed that line of authority as <u>**obviously wrong**</u> or having been arrived at without proper consideration of relevant case law or the like…" (emphasis added)

98. Guided by the principles in *Worldport*, as re-emphasised in *Kadri,* I cannot see any basis for departing from the previous decision made in the *McGovern* case. Indeed, it is fair to say that at no stage did the applicants address, specifically, the *Worldport* principles, by way of identifying what they contended to be the basis for departing from the decision in *McGovern* (a case which is not the subject of any appeal to the Court of Appeal or Supreme Court). As to what was decided in *McGovern,* it is appropriate to quote the following passages:

> "<u>8. De facto family</u>
>
> 8.1 The applicant argues that his de facto family should be recognised in this jurisdiction as indeed it was by the Revenue Commissioners, and he should not be discriminated against by reason only of the fact that he was not lawfully married as recognised in this jurisdiction to Ms. Carbery.
>
> 8.2 The applicant relies on the judgment of the UK Supreme Court in *McLaughlin*, a judgment of Lady Hale of 30 August 2018 involving the payment, after the death of one parent for the benefit of children. In that decision the UK Supreme Court held that there should be no disparity as between children of a marriage and children of cohabitees.
>
> 8.3 Reference was made in McLaughlin to the European Court of Human Rights (ECtHR) judgment of *Shackell v. United Kingdom* (Application no. 45851/99, 27 April 2000), where the Court denied the claim of Widow's Benefit to an unmarried surviving partner and held that discrimination as between the survivor of an unmarried partner and a married partner was justified as marriage conferred a special status, and the lack of public contract between cohabitees meant that the

situation was not comparable to a widow. *McLaughlin* also noted that a Strasburg court allows a wide margin of appreciation to Member States, in or about justification of a different treatment in law. *In McLaughlin* the allowance was payable as it was held to be payment in respect of children and therefore the marital status of the parents was irrelevant.

8.4 The payments being considered in this judgment are clearly for the benefit of a surviving spouse or civil partner, with additional sums payable if there is a dependant child. Such payment is readily distinguishable from the payments referred to in McLaughlin.

8.5 In *Shackell v. United Kingdom*, the Court, consistent with a like status in Ireland (as per paras. 6-8 of the affidavit of Joan Gordon of 1 December 2020) recognised the validity of a difference in treatment of parties to a marriage (or other civil contract), to the treatment of parties without such public contract.

8.6 I am satisfied that neither *McLaughlin* nor *Shackell v. United Kingdom* are of any support at all to the applicant in suggesting that his de facto family status must be recognised by the Irish State for the purpose of determining that the applicant is eligible to the claimed pension and grant.

9. Conclusion

9.1 In all of the circumstances the applicant has not demonstrated his entitlement to any of the reliefs claimed, and I am further satisfied that there would be no benefit in making a reference to the CJEU. All of the reliefs claimed by the applicant are therefore refused."

99. Plainly, neither the Court of Appeal nor the Supreme Court are constrained in the manner this court is. Although I regard myself as bound to follow the decision in *McGovern,* it will be clear from my judgment that, although required to follow *McGovern*, I have reached the same conclusions as the court came to in that case*,* having conducted a thorough analysis afresh, lest not doing so resulted in any point not being considered.

Jackson

100. It is fair to say that the English High Court's decision in *Jackson,* upon which the applicants also rely, does not develop (but merely follows) the analysis in *McLaughlin.* Once again, the benefit at issue was materially different to the WCP. As to the facts, the claim was brought by an adult and his children who sought judicial review challenging the lawfulness of provisions in the UK Pensions Act of 2014 and the Bereavement Support Payment Regulations of 2017. The challenge was brought on the basis that the relevant legislation was discriminatory, and contrary to Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, read with Article 8 of the Convention and Article 1 of the first protocol thereto, insofar as the relevant payment was payable to a surviving parent with a dependent child where his spouse or civil partner died, but not where is unmarried cohabitee or non–civil partner died.

101. As p. 1449 of the decision in *Jackson* made clear, there were three payments referred to (see paras. 26 – 27) as follows. "BSP" (i.e. Bereavement Support Payment) did not depend upon the existence of a child. However, "WPA" (i.e. Widowed Parents Allowance) and "HRBSP", (i.e. Higher Rate Bereavement Support Payment) both depended on the existence of children.

102. At para. 28 of his judgment, Holman J observed *inter alia* that: -

> " . . . where the State may pay over twice as much to a person who has a dependent child than to one who does not, it is, to my mind, fanciful to suggest that part, if not all, of that extra sum is not intended to benefit, and does not usually benefit, the child or children".

103. The foregoing highlights the very different factual situation at play in *Jackson.* Earlier in this judgment I noted, firstly, that WCP is payable regardless of whether any child is involved; and, secondly, even where there is a child, the increase provided for (*per* s. 127 (1)) represents, in relative terms, a small fraction of the pension payment itself.

104. Furthermore, Holman J explicitly acknowledged at para. 37 of his decision in Jackson that: -

> "The position in relation to a bereavement payment to the survivor cohabitee simpliciter, who has no child or children, may be different. That was not the subject of any appeal in *McLaughlin* - see para 26 - and is not the issue before me. However, the majority in *McLaughlin* clearly considered that in the case of a payment which benefits children (viz, WPA in that case or, in my view, HRBSP) the situations of marriage and cohabitation are analogous".

105. Again, the fact that to have a dependent child was a qualification requirement for the receipt of HRBSP renders *Jackson* of no assistance with regard to the determination of the issue which is before this Court.

106. At para. 44 in *Jackson*, the special status of marriage was explicitly acknowledged, wherein Holman J stated *inter alia*: -

> " . . . I bear very firmly in mind that Strasbourg jurisprudence clearly recognises the special status of marriage, or now also civil partnership. The jurisprudence recognises that States have a margin of appreciation to treat the status of marriage and civil partnership differently, and more favourably, including within the realm of social policy and social security. This is very clear from *Burden v United Kingdom* 47 EHRR 38 at paras 63-65 where the ECtHR focused on 'the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature' as making marriage and civil partnerships 'fundamentally different to' cohabitation, despite its long duration…".

107. The foregoing principles are central to the case before this Court and, in my view, create an unsurmountable obstacle for the applicants with regard to their claim that Chapter 18 is incompatible with the European Convention on Human Rights Act 2003. The reality is that *Jackson* provides no greater assistance than the decision in *McLaughlin* (and the latter provides none). Even if the

decision in *McGovern* is not dispositive of the present claim (and I believe it is, having regard to the '*Worldport*' principles), I am entirely satisfied that both *McLaughlin* and *Jackson* must be distinguished, given the very different nature of the payments which were at issue in those cases.

Presumption of constitutionality

108. It is, perhaps, unnecessary to point out the long-established principle that legislation enacted by the Oireachtas enjoys a presumption of constitutionality (and there was certainly no dispute between the parties as to the foregoing principle). It is useful, however, to keep in mind the strength of that presumption because the corollary represents the formidable burden resting on an applicant who contends that legislation is unconstitutional. With regard to the foregoing, it seems appropriate to quote the observations of Ms Justice O'Malley in the Supreme Court's recent decision (of 4 July 2022) in *Donnelly & Ors v. Minister for Social Protection & Ors* ("*Donnelly*")

> "162. …it should I think be pointed out that the position of the presumption of constitutionality in the jurisprudence of this State has been firmly entrenched since, at least, the decision of Hanna J in *Pigs marketing Board v. Donnelly* [1939] I.R. 413 (a case which was concerned with the interpretation of the relevant provisions of both the constitution of Saorstat Eireann and Bunreacht na hEireann). Hanna J held that the courts must accept as an axiom that a law passed by the elected representatives of the people was presumed to be constitutional unless and until the contrary was **clearly shown**. That principle has never been seriously questioned since." (emphasis added)

109. Although a "balance of probabilities" test often features in proceedings on the civil side, that is certainly not the burden facing the applicants, who must clearly show that the legislation in question is unconstitutional. It is uncontroversial to say that the 'bar' is set high, in particular, given that the legislation impugned involves decisions which were taken by the Oireachtas with regard to the spending of, obviously finite, public monies (see *Lowth v. Minister for Social Welfare* [1998] 4 I.R. 321). As O'Malley J put it in Donnelly:

> "163. It is also clear from the authorities that it is particularly necessary for the courts to respect the role of the legislature in enacting laws concerned with social and revenue matters, because the raising and spending of public money involves policy decisions that are more appropriate to the elected members of the legislature than to the courts. The point is that the allocation of different roles by the constitution means that the courts must be particularly aware of the danger of usurping the task of the legislature and imposing their own choices in the areas under consideration. This danger is, I think, more likely to arise in a case such as the instant appeal, where the claim is based purely on a claim to equality and the appellants do not suggest that any other right has been interfered with. I would not see the distinction between different types of legislation is giving rise to a *separate* test with *different* criteria, but it is one of the significant factors that determines the level of intensity of the Court's scrutiny."

Legislation conferring benefits on some but not others

110. In the present case, the 2nd to 4th applicants each contend that their right to equality has been infringed (contrary to Article 40.1). In approaching the case made by the applicants, this court must, however, also recognise the reality that legislation will often confer benefits on some, but not on others. At para. 167 of the learned judge's decision in *Donnelly*, Ms Justice O'Malley explained that:

> "167. … [t]he drawing of distinctions is an intrinsic part of the process of legislating. The Oireachtas is obliged to define the categories of persons affected by its legislation, whether for the purpose of imposing liabilities or to confer benefits, and it does so on the basis of policy decisions that are reserved to it by the constitution. Both the separation of powers and the presumption of constitutionality preclude an approach by the courts that can only be posited, in effect, on an assumption that *any* resulting disparities between individuals are to be perceived as, at least, a potential breach of rights requiring justification by the State…"

111. Later, at para. 168, the learned judge added:

> "168. … It would be at least theoretically possible to frame many challenges to legislation in terms of an equality claim, on the basis that the plaintiff has been subjected to a liability or refused a benefit in circumstances where he or she can claim to be similarly positioned to other individuals who have been treated differently. Direct resort to a proportionality test would seem to put the courts in the position of another house of the Oireachtas with the power not only to overturn the choices made by the elected members (as already happens where legislation is found to contravene the Constitution), but in effect to alter such choices and create new legislation based on the judges view of what the more proper choices would have been."

112. With regard to the facts, the first applicant (Mr. Donnelly) alleged that legislation which excluded his eligibility for a particular social welfare payment in respect of his severely disabled son (the second applicant) during a prolonged period when his son was in hospital breached Article 40.1. The payment in question (the domiciliary care allowance, or "DCA") is payable in respect of a "qualified child", being someone under 16 with a severe disability requiring continual or continuous care substantially in excess of the care and attention normally needed by a child of the same age. Of particular relevance to the case was that, in principle, DCA is not payable when a child is resident in a hospital if the cost of the child's maintenance there was met in whole or in part by the State. The appellants argued that the legislation created an unjustifiable discrimination against them, compared with parents caring for severely disabled children in the home. They argued *inter alia* that Mr. Donnelly and his wife did, as a matter of fact, provide care for between 8 and 12 hours a day, seven days a week, while their son was in hospital and that this level of care was considered necessary by the professionals treating him and liaising with their family. Mr. Donnelly gave up employment for this purpose and the family thereby lost income. Plainly the facts in Donnelly are markedly different to those which present in the present case but it is useful to quote *verbatim* paras. 200 and 201 of the decision of O'Malley J: -

> "200. I think, therefore, that it is reasonable to draw the inference that amongst the purposes of the allowance was that of encouraging parents in their decision to care for children with severe disabilities at home rather than leaving them in residential institutions, and to give assistance to those who might have felt financially unable to give the extra care and attention needed by the child. These were, and remain, legitimate policy objectives that benefit children, parents, families and the wider community. There is also the legitimate consideration that the State is no longer put to the expense of maintaining large-scale residential institutions. However, it does fund hospitals that specialise in the treatment of sick children. Seen in this light, the exclusion of children who are being maintained for some long-term reason in an institution, whether residential or medical, is not on its face irrational.

113. I pause at this juncture to observe that the focus of the relevant payment at issue in Donnelly was squarely on the child, in stark contrast to WCP. The learned judge went on to say the following at para. 201: -

> "201. In those circumstances, this is not a case in which the Court could make a finding of invalidity on the basis of obvious irrationality, or illegitimate discrimination, merely by considering the terms of the statute. The question, then, is whether there is evidence in the case that could ground a finding that the exclusion is, as a matter of fact, irrational or illegitimate. In my view, there is not. It was necessary for the appellants to adduce some evidence of the impact of the exclusion on the group of which they are members, in order to demonstrate that Mr. Donnelly was not simply an unusual or "hard case" and that the group of parents who were eligible (i.e., those caring for children at home) was not likely to have greater needs than the group of parents caring for children in hospital. However, once the Children's Trust Tadworth/Contact a Family report was ruled inadmissible (as it had to be, under the rules of evidence) there was no such evidence".

114. In the present case, this Court is dealing with a wholly different scenario, in that the first applicant accepts, very properly, that Chapter 18 of the 2005 Act, which excludes unmarried persons, is rationally related to the legitimate aim of encouraging and supporting marriage and, thus, the exclusion is neither arbitrary nor capricious when viewed objectively. For the reasons set out in this judgment, the second to fourth named applicants have not brought home any claim based on secondary indirect discrimination.

115. Another important principle, not in dispute in this case, is that the Court's role is not to seek to form its own assessment as to the measure or extent of any disparity. In the well-known case of *MacMathuna v. Ireland* [1995] 1 IR 484, the plaintiffs claimed that the abolition of a tax allowance for the children of married parents, and what were contended to be inadequate annual increases in social welfare allowances for the children of married parents, constituted unequal treatment in breach of Article 40.1, as well as a breach of Article 41. As the head-note of the case records, the Supreme Court held follows:

"5. That with regard to the unequal treatment allegedly suffered by the plaintiffs, there were abundant grounds for distinguishing between the needs and requirements of single parents and those of married parents living and rearing a family together; and that **once such disparity had been justified, the courts could not interfere by seeking to assess what the extent of that disparity should be**." (emphasis added)

Shackell

116. In *Shackell v. United Kingdom* (Dec) App No. 45851/99, 27 April 2000, the European Court of Human Rights considered a claim by a woman who commenced a long–term relationship with her male partner in 1978. The couple never married, but lived together until he died in 1995, aged 39, due to an accident at work. The couple had three children, born 1989, 1991 and 1994. The applicant's late partner was a self–employed builder who paid full social security and national insurance contributions as a self–employed earner. His contribution record was such that, had he been married to the applicant, she would have been entitled to social security benefits as his widow, upon his death. In 1996, the applicant submitted a claim for widow's benefits, which claim was rejected on the basis that the benefits could only be paid where the claimant had been married to the deceased. The applicant appealed the first instance refusal, arguing that a breach of Article 8 of the European Convention on Human Rights ("the Convention"). Her appeal was rejected by the Social Security Appeal Tribunal in Britain. A further appeal was dismissed, at the domestic level, by a social security commissioner in 1998. The applicant was refused leave to appeal to the UK Court of Appeal and the ECtHR considered the applicant's claim that the legislation in question was incompatible with Article 14 ECHR when read in conjunction with Article 8 and Article 1 of Protocol 1. On internal p. 5 of the decision in Shackell, the court put matters as follows: -

"The applicant in the present case seeks to compare herself to a widow, in other words a woman whose husband, as opposed to partner, has died. The Court recalls that the European Commission of Human Rights held, in a case concerning unmarried cohabitees who sought to compare themselves with a married couple that 'these are not analogous situations. Though in some fields, the *de facto* relationship of cohabitees is now recognised, there still exist differences between married and unmarried couples, in particular, differences in legal status and legal effects. Marriage continues to be characterised by a corpus of rights and obligations which differentiate it markedly from the situation of a man and woman who cohabit' (Lindsay v. the United Kingdom, Comm. Dec. 1.11.86, D.R. 49, p. 181).

The Court notes that that decision of the Commission dates from 1986, that is, over 14 years ago. The Court accepts that there may well now be an increased social acceptance of stable personal relationships outside the traditional notion of marriage. However, marriage remains an institution which is widely accepted as conferring a particular status on those who enter it. The situation of the applicant is therefore not comparable to that of a widow".

117. I pause at this juncture to observe that the foregoing *dicta* applies equally to the situation of the first applicant in the case before this Court. The decision in *Shackell* then continued: -

> "In any event, the Court recalls that under its case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it 'has no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' (see, among other authorities, see the Schmidt and Dahlström v. Sweden judgment of 6 February 1976, Series A no. 21, pp. 32-33, § 24, and the Van Raalte v. the Netherlands judgment of 21 February 1997, Reports of Judgments and Decisions 1997-I, p. 186, § 39).
>
> Further, the Court reiterates that 'States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background…' (see the Petrovic v Austria judgment of 27 March 1998, Reports of Judgments and Decisions 1998-II, p. 587, § 38). The Court again notes that marriage remains an institution that is widely accepted as conferring a particular status on those who enter it and, indeed, it is singled out for special treatment under Article 12 of the Convention. The Court considers that the promotion of marriage, by way of limited benefits for surviving spouses, cannot be said to exceed the margin of appreciation afforded to the respondent Government".

118. The foregoing applies equally in the present case and illustrates, definitively in my view, that the applicant's claim which was made by reference to the ECHR cannot succeed. Moreover, it is worth recalling that the decisions in both *McLaughlin* and *Jackson* explicitly acknowledge the special status of marriage in Strasbourg jurisprudence as well as the margin of appreciation enjoyed by States to recognise the special status of marriage. In other words, insofar as the ECHR argument made by the applicants, the relevant analysis in both *McLaughlin* and *Jackson* is squarely against them. Before leaving the *Shackell* decision, it is useful to note that the applicant further argued that her children were being discriminated against, in violation of Article 8 taken in conjunction with Article 14 of the Convention. The applicant argued that the refusal to pay her widow's benefits in respect of her children had a direct financial consequence on her family life. This argument was rejected in the following terms, as is clear from para. 2 on internal p. 6 of the *Shackell* decision: -

> ". . . whilst it is true that the applicant does not receive Widowed Mother's Allowance, the reason for her not being eligible is that she and her late partner were not married. It is not related to the status of the children, and it follows that the applicant's ineligibility for Widowed Mother's Allowance is compatible with the Convention for same reasons as those set out at paragraph 1. above"

119. The foregoing is just as true with regard to WCP, namely, "*It is not related to the status of the children"*. Rather, WCP is payable irrespective of whether there are *any* children involved and, in the manner previously discussed, it seems uncontroversial to say that given the likely age profile of a

great many of the potential recipients, the existence of young or dependent children will be the exception, rather than the norm. Regardless of those observations, the decision in *Shackell* comprises a clear statement of the law from the perspective of the Convention and presents an insurmountable problem for the applicants in the present case.

Evidence of indirect discrimination of others

120. It is not for a moment to criticise the applicants or their advisors to say that no evidence was put before this Court in relation to the position of any other persons who are said to be adversely affected by legislation which the applicants claim to be unconstitutional. This is not to suggest that the absence of such evidence was a determining factor in terms of the outcome of this case. It does seem fair, however, to observe that it is not possible, from a mere reading of the statute itself, for this Court to have even a general sense, still less an accurate understanding, of the number of persons in a similar situation to the applicants or the contended for effect on them of so being. Thus, although this is a claim which was not run on the basis that the first named applicant, alone, had a stateable claim (rather, it was a case alleging secondary indirect discrimination of his children, albeit in the context of their family unit) there was no evidence before this Court as to the scale of what was said to be this allegedly unconstitutional secondary discrimination. By contrast, there is discernible from the face of the legislation at least some sense of its scale in terms of the persons to whom Chapter 18 is directed. Its terms make it clear that it is directed to every married couple (and civil partnership) in this State.

121. All of us will some day have to face our end. For a married couple, this will inevitably involve the passing of one marital partner, before the other (barring, say, a tragic accident which claims both lives simultaneously). Thus, without specific evidence having been adduced, and none was necessary, the court can readily see that the support facilitated by Chapter 18 is extremely wide in scale, given that, on its face, it has the potential to apply to 50% of married persons, and 50% of those in civil partnerships (i.e. the survivors) throughout the State.

122. The foregoing takes nothing away from the heart-breaking tragedy experienced by the applicants. Rather, it illustrates that the legislation in question is not directed towards persons in *their* situation, but to a very specific and plainly very large but different cohort of society. It also illustrates the role of the Oireachtas in terms of the delicate exercise of decision-making in respect of finite funds, be that in furtherance of legitimate social policy objectives or in terms of meeting particular needs. Making such decisions is not a role which this Court can legitimately play.

123. According to counsel for the applicant, the case nets down to, on the one hand, a marital family finding themselves entitled to a non means tested sum and, on the other hand, an equivalent family, but not based on marriage, being disentitled to the same sum, notwithstanding the latter having duties to each other and to their children which are equivalent to the former. It seems to me that there are two fundamental flaws in this submission. First, the proposition assumes that the aim of the WCP is to support families. It is not. The legislation is aimed at providing support to a bereaved spouse following the death of someone they were married to. Children may or may not be a feature (and very often not, it seems fair to say, given the likely age profile of the majority of those whom the Oireachtas had in mind when enacting Chapter 18 of the 2005 Act).

124. Second, the foregoing submission posits as comparators a marital family versus a family not based on marriage. These are not the appropriate comparators. The appropriate comparators are, on the one hand, someone entitled to receive the benefit because they meet the qualification requirements in Chapter 18 (i.e., for present purposes, a married person who has lost their husband or wife) and, on the other, an unmarried person who has lost their life-partner. There is, of course, an added complication, namely, the question of cohabitation.

125. On the facts before this Court, the first applicant cohabited with his partner of 20 years who was taken from him and their children in the cruellest of fashions. In the manner examined earlier, cohabitation is not a qualification requirement for the entitlement to WCP. This is because, by entering into the marriage contract, the relevant parties assume legal rights and duties towards each other. It is that institution which the legislation legitimately seeks to support and promote. When persons are married, they do not cease to have those legally-recognised duties to each other, even if they have ceased to cohabit.

126. I mention the foregoing because, although the first applicant is someone who did, in fact, cohabit with his life-partner, there will inevitably be situations in this State of persons who were in long term committed relationships and who cohabited with their partner but, for whatever reason, have ceased to cohabit prior to the death of that partner. In principle at least, it seems uncontroversial to say that there may well be cases where unmarried persons enjoyed a committed long term relationship as cohabitees, but where that relationship ceased and cohabiting ended many years before the death of one of them. I mention the foregoing because it seems to me to speak to certain practical issues as follows.

127. In submissions, counsel for the applicants contended that, when viewed objectively, "*there is no rational basis for excluding these people*" from receipt of the payment in question. When I asked counsel to clarify who the words "*these people*" referred to (i.e., was it a reference to the second to fourth applicants alone or did the phrase refer to all applicants?), his response was to the effect that "*Article 8 of the Convention bolts all applicants together as a unit*". Elsewhere in submissions, counsel for the applicants contended that "*Once children are involved, Article 8 family life rights are engaged, as is Article 1 of Protocol 1 concerning property rights*" and the gravamen of the submission was that, as regards the adverse effect of the impugned legislation and the entitlement to relief: "*The first applicant is bound to the children, and they to him".* Indeed, amongst the submissions made on behalf of the applicants was to contend that "*By excluding cohabiting couples, it raises a serious issue of treating the children as illegitimate under the law".*

128. The foregoing brings me to the practical issues which would inevitably arise, were the applicants correct. The logic of the case advanced by the applicants, even in its refined form (which acknowledges that the first applicant has not been discriminated against) is that the WCP is properly payable to all, regardless of marital status. That being so, the inescapable logic of the applicant's argument is that even if the deceased had not cohabited with their partner for years, or decades, the pension was payable (subject only to social insurance requirements being met). As we know, to have a child is not a qualification requirement for receipt of WCP and, thus, the logic of the applicant's

argument is that WCP is also properly payable to an unmarried person who never had children with their partner, irrespective of how many years, or decades earlier the couple *ceased* to cohabit.

129. Two comments seem appropriate in relation to the foregoing. First, the logical consequences, were the applicants correct (and, with respect, I am entirely satisfied that they are not) would represent 'policy' decisions which are the exclusive preserve of other branches of government. Moreover, it would represent, in substance, the allocation of finite resources to persons and groups in circumstances where the need for or appropriateness of providing such support has not been determined by the Oireachtas. It seems to me that to do what the applicants contend for, would involve this Court violating the separation of powers principle and interfering, impermissibly, in the carefully constructed architecture of the State's social welfare system, of which the WCP represents a part. It would, in substance, be for this court impermissibly to involve itself in the difficult task, entrusted to the Oireachtas, of making decisions as to who is to obtain the benefit of scarce public resources. Second, these (albeit theoretical) consequences are in stark contrast to the legitimate aim of Chapter 18 itself, namely the support of *marriage*. The consequences sketched out above undermine that legitimate aim of the Oireachtas, highlighting for me that, no matter how well argued and despite the enormous sympathy this Court has for the applicants as individuals, this is a claim which must be dismissed. Why this is so can be summarised succinctly, as follows, i.e. for the reasons explained in this judgment, this court cannot accept the submission made on behalf of the applicants that the reason for WCP "*is to protect the family which includes the children*". That is not the reason for or aim and focus of WCP. Nor was this case ever about families or the applicants' family. This case hinges on a legitimate decision made by the State to support, not families, but those who made the choice to enter, for present purposes, the marriage contract (thereby assuming legal rights and obligations *inter se* as married persons) where their spouse has died.

130. By way of a final word, I want to emphasise, lest it not already be clear, that nothing in this judgment is intended either to cause further distress to the applicants or to suggest for a moment that their grief and pain is in any way less than the loss experienced by a family where a married parent dies in such tragic circumstances. As commonly understood in modern Irish society there are many forms of family and 'family unit', and the family unit where the relevant adults have made a choice not to marry makes a valuable contribution to Irish society, insofar as its bonds are those of mutual love and affection, care and support. Doubtless this description applies to the first named applicant's relationship with his late partner and, indeed, to the family unit which now comprises of all the applicants in these proceedings, for which this court has nothing but respect. The sincere wish of the Court is that the mutual love and affection of the applicants will help them to achieve some measure of healing and happiness in the future.

131. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with

remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate." The parties should communicate forthwith. In default of agreement between the parties on any issue, including the question of costs, short written submissions should be filed in the Central Office within 14 days.