THE HIGH COURT

[2024] IEHC 413

[Record No. 2023/1278 JR]

BETWEEN

ZG AND EW (A MINOR) SUING BY HIS AUNT AND NEXT FRIEND ZG

APPLICANTS

AND

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

CLÚID HOUSING ASSOCIATION

NOTICE PARTY

JUDGMENT of Ms. Justice Bolger delivered on the 8th day of July 2024

1. This is a challenge to the constitutionality of s. 39 of the Residential Tenancies Act 2004 (hereinafter referred to as "s. 39") which raises important issues about the scope of the constitutional provisions on equality in Article 40.1 and the rights of a minor child. For the reasons set out below, I am refusing this application.

Background

2. This application is brought by the minor applicant (hereinafter referred to as "the applicant") and his aunt who is also now his legal guardian and is also his next friend in the proceedings. The applicant is currently 15 years old and had lived with his late mother as a one-parent family in an apartment (hereinafter referred to as "the family home") rented by her from the notice party landlord pursuant to a Part 4 tenancy. The applicant's father is in his life, but he resides elsewhere. In July 2023, the applicant's mother died suddenly.

3. Section 39 provides for the termination of a Part 4 tenancy on the death of the tenant, subject to subsection (1) which allows certain persons who occupied the property with the tenant at the time of their death, to elect to become the tenant, i.e., take on the benefits and responsibilities of the Part 4 tenancy. The persons permitted to take on the tenancy are identified by s. 39(3)(a) as the following:-

> *"(i) a spouse [or civil partner within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010] of the tenant,*
>
> *(ii) a person who was not a spouse of the tenant but who [was the tenant's cohabitant within the meaning of section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 and lived with the tenant] in the dwelling for a period of at least 6 months ending on the date of the tenant's death,*
>
> *(iii) a child, stepchild or foster child of the tenant, or a person adopted by the tenant under the Adoption Acts 1952 to 1998, being in each case aged 18 years or more, or*
>
> *(iv) a parent of the tenant".*

Thus, an adult child of the tenant who resided in the property at the time of the tenant's death could take over the tenancy. A minor child under the age of 18 at the date of death cannot, although such a minor child might acquire a right to continue to reside in the property if their parent or grandparent or adult sibling or stepparent took on the tenancy and agreed to allow them to continue to reside there.

4. In the applicant's case, there was no one who qualified pursuant to s. 39 to become the tenant of his family home and in September 2023 the notice party sought to terminate the tenancy. The applicant's mother's family are very committed to the applicant, and he has resided with his maternal grandparents in their home since his mother's death, although he did visit his own family home regularly and spent time there up to when the notice party sought to terminate the tenancy. His maternal aunt, his next friend in the within proceedings, and also named as an applicant has been appointed as his legal guardian. She currently resides at an address close to the applicant's family home and has averred to her willingness to move into that family home, which is convenient to her place of work, to care for the applicant and allow him to continue to reside in the home he shared with his late mother. His aunt has not given any explanation in her affidavit as to the suitability or non-suitability of her present accommodation as a residence for the applicant, but she has said that she believes it was important for the applicant to visit his own home in the aftermath of his mother's death. She

and the applicant's grandmother have averred that they believe it is important for the applicant to be able to go to his home and that losing his home would be too much for him.

The applicant's case

5. The applicant, with the support of his aunt and legal guardian and his maternal grandparents, seeks declarations that s. 39 is unconstitutional and in breach of the European Convention on Human Rights in prohibiting the continuance of an existing tenancy and/or terminating a tenancy and/or failing to provide security of tenure for a child of a tenant, who is under the age of 18 years, upon the death of the tenant during the course of a tenancy agreement and/or interfering with his property rights and/or family life rights. The applicant's case around the Convention was described initially as a secondary case and later, during his reply, counsel for the applicant said they were moving away from that claim. Such shifting sands in grounding a claim challenging the legality of a legislative provision is not ideal. Whilst this judgment focuses primarily on Article 40.1, as the applicant did in the course of the hearing, I do, albeit more briefly, address the other constitutional articles and the Convention for the avoidance of any doubt, given the importance of addressing any suggestion that a legislative provision may be legally fragile.

6. The grounds on which the applicant asserted unequal treatment was pleaded in a somewhat opaque manner. The statement of grounds refers (at para. 15) to the rights of the child, his property rights and/or family life rights pursuant to Articles 40.1, 40.3, 40.5, 41 and 42A of the Constitution and his protected status pursuant to Article 14 of the ECHR. It went on, at para. 16, to plead that the provisions of s. 39 must be administered without discrimination on any of the grounds identified in Article 14 of the ECHR Act 2003, including the age of the applicant. The State criticised the applicant for seeking to assert a claim of discrimination on grounds of his membership of a one-parent family, which they said was not pleaded and on which leave had not been granted. The brevity of the pleaded points and the evidence before the court was not particularly helpful to establishing the applicant's case. Nevertheless, I consider the pleadings just about encompass the case that the applicant's counsel developed more fulsomely in oral argument to the effect that the applicant claimed to have been unlawfully treated less favourably on grounds of indirect discrimination as a minor child member of a one-parent family.

7. The State was also critical of the applicant for not proceeding by way of plenary proceedings where they said the rights and entitlements of landlords and tenants, and the full

housing and care circumstances of the applicant, could have been fully explored in evidence. Whilst plenary proceedings may be more suitable in allowing an applicant a greater opportunity to discharge the burden of proof on them and disprove the presumption of constitutionality, including by calling evidence, that does not mean an applicant cannot proceed by way of judicial review. In *Donnelly v. Ireland* [2022] IESC 31, O'Malley J. observed that proceedings challenging the constitutionality of legislation will often be more appropriately dealt with in plenary form, but she expressly said she was not criticising the choice of the judicial review option that was taken by the applicant in that case, which she said they were entitled to take.

8. I am satisfied that this applicant was entitled to proceed by way of judicial review rather than plenary proceedings.

9. The applicant sought to make a case similar to that successfully made before the Supreme Court in *O'Meara v. Minister for Social Protection* [2024] IESC 1, in contending that s. 39 is unconstitutional because it is under-inclusive in failing to make provision for a minor child who lives with one parent in a Part 4 tenancy property. The manner in which the situation might be rectified and, in particular, how the rights and obligations of the minor child's legal guardian might operate in practice, including upon the child becoming an adult, was, according to the applicant's counsel, for the State to regulate. Counsel for the State fairly described this as an abdication of responsibility. It falls short of the burden of proof an applicant must discharge in asserting that a legislative provision is unconstitutional, confirmed by the Supreme Court in *Donnelly* and in *O'Doherty and Waters v. Ireland* [2022] IESC 32. There are clearly important practical challenges in how a Part 4 tenancy arising from the constitutional rights of the minor child might operate and how a minor child's rights (asserted by the applicant to be his constitutional rights) would exist alongside whatever rights their legal guardian have and/or the rights of any other person whom the legal guardian may wish to have residing with them, including upon the minor child reaching their majority. The person on whom the corresponding obligations, that normally go hand in hand with rights, will fall is also at issue. Those challenges are just one example of the need for the law to treat minors differently to adults, a point to which I will return below in discussing the scope of Article 40.1.

Articles 40.3, 40.5 and 42A of the Constitution

10. Before addressing Article 40.1, I will briefly address the provisions of Articles 40.3, 40.5 and 42A and the Convention, all of which claims were deprioritised by the applicant in the course of the hearing. There is no basis for any of those claims as they were formulated in the pleadings. The 2004 Act seeks to balance the rights that a landlord has in their own property with the rights of their tenant by granting the tenant Part 4 statutory rights to security of tenure, which rights may have to be balanced with those of the landlord and the return of the property in certain specified circumstances. The State's attempt to balance the rights of tenant and landlord is a creature of statute and does not operate to confer a property right on the tenant or on any person lawfully residing with the tenant. Any right to a Part 4 tenancy or a right to reside in a property rented from a landlord, is not a constitutionally protected property right, but rather it is a statutory right formulated by the Oireachtas and rendered subject to the qualification criteria set out therein.

11. Neither does the applicant secure rights to a tenancy or the continuation of a tenancy from Article 40.5, which guarantees the inviolability of the dwelling. As recognised by McKechnie J. in *Meath County Council v. Murray* [2017] IESC 25, [2018] 1 IR 189, Article 40.5 prohibits *"any entry other than such as is in accordance with law"*. Here, s. 39 provided for the termination of a tenancy on the death of the applicant's mother and, unless the applicant can successfully challenge s. 39 on other grounds, Article 40.5 does not assist him.

12. The applicant's claim insofar as it sought to rely on Article 42A is misplaced, as its application is expressly limited to proceedings relating to the safety and welfare of a child or adoption, guardianship, custody or access. It does not create the sort of general jurisdiction (described by the State's counsel as a purported "*constitutional trump card*") which the applicant asserts, whereby certain views, including those of a child, which unsurprisingly may be subjective, and/or the views of their carer, may have to be prioritised and preferred over the views of the State. The applicant's aunt and grandmother cited support from the views of the applicant's doctor in seeking to progress their view that it was in the applicant's best interests to remain in his family home. The doctor had written a letter stating that the applicant's well-being should be taken into account before the locks were changed and describing the applicant's deprivation of access to his family home as "*damaging*". The letter, which was the only medical evidence made available to the court, does not go as far as saying that it was in the applicant's best interests for him or his legal guardian to continue to reside in the property. The doctor, quite properly, did not comment on how legal issues surrounding

a tenancy or how the rights and responsibilities of the applicant or his legal guardian might or should be determined into the future.

13. If I am wrong on my views on the limited scope of Article 42A, then I am satisfied that s. 39 does not fail to uphold and safeguard the rights of the child for the reasons I set out below in my discussion in relation to Article 40.1 on the legal distinctions between minors and adults that the law recognises and endorses, as it is in the best interests of a minor child for them to be protected from the responsibilities of adulthood.

The European Convention on Human Rights

14. The applicant's attempts to rely on Article 8 of the Convention are also misplaced. The Court of Human Rights in *Ghailan & ors v. Spain* (App. No. 36366/14, 23 March 2021), at para. 53, held *"[t]he Court reiterates that Article 8 does not recognise, as such, a right to be provided with a home…"*. The applicant relied on *Yordanova & ors v. Bulgaria* (App. No. 25446/06, 24 April 2012), where the court held that any person at risk of the loss of their home should be able to have:

> *"…the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8, notwithstanding that, under domestic law, he has no right of occupation"*.

In the within case, this applicant's right to an impartial hearing in the form of the Residential Tenancies Board is not at issue but, rather, it is the fact that the Board would presumably find itself bound by the provisions of section 39. However, s. 39 represents the balance that the State has chosen to strike between the rights of a tenant and other lawful occupants and the landlord, as it is entitled to do so; *FJM v. United Kingdom* (App. No. 76202/16, 6 November 2018).

Article 40.1: The Constitutional guarantee of equality

15. Indirect discrimination occurs where a provision impacts more heavily on the members of a particular group or imposes a requirement which they may find more difficult to satisfy because of their membership of such a group. It differs from direct discrimination, which occurs where someone is treated less favourably on grounds of a protected characteristic, in that indirect discrimination can be justified. Article 40.1 does not refer to direct or indirect discrimination, concepts that are well known in national and European equality law. Nevertheless, the Supreme Court has confirmed that Article 40.1 does include claims of indirect discrimination. In *Michael and Emma* [2021] 3 I.R. 528, the plaintiffs were minor children

whose parents had unsuccessfully applied for child benefit during a time they had permission to reside in the State pending their application to remain, which meant that they were treated as persons not habitually resident in the State and therefore not qualified. They challenged this as, *inter alia*, impermissible discrimination contrary to Article 40.1. O'Donnell J. (as he then was) in the Supreme Court described their claim as indirect or secondary discrimination which, in the absence of evidence that the indirect effect of treating them less favourably was the object of the legislation, or that it was motivated by prejudice or stereotyping,

> *"…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."* (para. 20)

16. A similar indirect application of a statutory provision was found to exist in *Re Article 26 and the Illegal Immigration (Trafficking) Bill 1999* [2000] 2 I.R. 360. Section 5 of the Bill precluded anyone from questioning the validity of specified orders or decisions made under the Immigration Act 1999, the Refugee Act 1996 and the Aliens (Amendment) No 2 Order 1999, other than by judicial review, but this only applied to certain non-nationals. The import of indirect discrimination in an Article 40.1 challenge was described by Keane C.J., giving the single decision of the court, as follows:-

> *"The question still remains whether s. 5 of the Bill by this indirect means imposes conditions or restrictions on the exercise of a right by a certain category of non-nationals in a manner that is unfair, arbitrary or invidious so as to constitute unequal treatment within the meaning of Article 40.1 or whether the same is justified by objective reasons other than* (sic) *the mere fact that they affect only that category of non-nationals".* (at p. 402)

The court concluded (at p. 403) that the position was *"justified by an objective legitimate purpose independent of the personal status or classification of the persons independent of the personal status or classification of the persons affected by them"* and therefore could not be regarded as violating the right to equal treatment guaranteed by Article 40.1.

17. The children of one-parent families are not directly excluded or targeted by section 39. Such a child could come within s. 39 if they are over the age of 18 at the time of the death of their tenant parent and resided in the property with them. A child under the age of 18 could benefit from a tenancy conferred by s. 39 on their late parent's partner or their grandparent or adult sibling who resided at the property at the time of their parent's death, as long as the new tenant was willing to allow them to continue to reside in the property. The section does have a discriminatory impact on a child under the age of 18 who had lived in the rented property with their single parent without an adult sibling or such other person covered by section 39. The requirement in s. 39 for the child to have resided in the property with such a person in order to be able to continue living in the home they shared with their late parent will impact more heavily on a minor child in a one-parent family as compared to a minor child in a two-parent family. It is therefore indirectly discriminatory on grounds of family status, or to use the phrase pleaded by the applicant, his family life rights. Similarly, the minor child excluded from s. 39 because of the absence of other persons covered by the section in their household at the time of their parent's death, is indirectly excluded on grounds of age, given that an adult child without household members covered by s. 39 will come within the section's protection whereas a minor child in similar circumstances will not.

18. However, it is not enough to simply establish less favourable treatment, particularly where such treatment is indirect rather than direct discrimination. The question cited by the Supreme Court at para. 15 above must still be resolved. The Supreme Court repeated the need to establish more than just unequal treatment in the decision of O'Malley J. in *Donnelly*, an approach endorsed again and more recently by the Supreme Court in *O'Meara*. *Donnelly* was a challenge to the suspension of the payment of an allowance to parents of a severely disabled child while that child was resident in an institution, including a hospital, for more than 13 weeks, including where the child's parents continued to provide care to their child in hospital. The plaintiffs argued that the provision was unfair to the point of constitutional invalidity because it conferred a benefit on others but excluded them, an argument very similar to that mounted by the applicant in the within proceedings. O'Malley J. observed that *"[t]he drawing of distinctions is an intrinsic part of the process of legislating"* which the Oireachtas does on the basis of policy decisions reserved to it by the Constitution (at para. 167), and it *"is entitled to make policy choices"* (at para. 192). She said that finding for the plaintiff would involve the court in legislating for a new and different benefit which *"would clearly be a breach*

of the separation of powers, which reserves that power and obligation to the Oireachtas" (para. 170). She set out the application of Article 40.1 in an oft-cited and followed summary at para. 188:

> *"(i) Article 40.1º provides protection against discrimination that is based on arbitrary, capricious or irrational considerations.*
>
> *(ii) The burden of proof rests upon the party challenging the constitutionality of a law by reference to Article 40.1º.*
>
> *(iii) In assessing whether or not a plaintiff has discharged that burden, the court will have regard to the presumption of constitutionality.*
>
> *(iv) The court will also have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy.*
>
> *(v) Where the discrimination is based upon matters that can be said to be intrinsic to the human sense of self, or where it particularly affects members of a group that is vulnerable to prejudice and stereotyping, the court will assess the legislation with particularly close scrutiny. Conversely, where there is no such impact, a lesser level of examination is required.*
>
> *(vi) The objectives of a legislative measure, and its rationality (or irrationality) and justification (or lack of justification) may in some cases be apparent on its face. Conversely, in other cases it may be necessary to adduce evidence in support of a party's case."*

O'Malley J. set out what is required for a successful challenge to legislation as a breach of Article 40.1:-

> *"…the challenge can only succeed if the legislative exclusion is grounded upon some constitutionally illegitimate consideration, and thus draws an irrational distinction resulting in some people being treated as inferior for no justifiable reason. The Constitution does not permit the court to determine that the plaintiff should be included simply because a more inclusive policy, assimilating more people sharing some relevant characteristic into the class, would be 'fairer'."* (at para. 192, which was expressly approved of by O'Donnell C.J. in *O'Meara* at para. 25)

O'Malley J. went on to say the court is also obliged to ensure that *"groundless assumptions or prejudices have no role in determining the legal rights of the individual."* In applying the

appropriate test of whether the provision in question was arbitrary, capricious or irrational, O'Malley J. concluded that the purposes of the suspension of the allowance were *"legitimate policy objectives that benefit children, parents, families and the wider community"* and was not, therefore, in breach of Article 40.1.

Assessing the impact of s. 39

19. The basis for the applicant's exclusion from s. 39 is that he was aged under 18 at the time of his mother's death, i.e. his legal status as a minor. The impact of this is more severe on him as the now sole member of his one-parent family, but that impact on grounds of his family status is the effect rather than the reason for his less favourable treatment.

20. The law treats minors differently from adults in many ways, ranging from the entitlement conferred on minors and not on adults to a constitutional right to primary education in Article 42.4 of the Constitution, the right of a disabled child to an assessment of their needs pursuant to the Disability Act 2005 and the right of a child to be maintained by a parent who has the means to do so pursuant to the Family Law (Maintenance of Spouses and Children) Act 1976. Other rights arise from what might be described as the subordinate status of minors, whereby they are precluded or excused from rights or obligations that adults (or sometimes persons over a certain age but under 18) have, for example, they cannot serve on juries; be served or sold alcohol; vote; drive; marry; enter into most types of contracts; engage in paid employment; have consensual sexual relations. Neither are they considered responsible, depending on their age, for what might otherwise be considered criminal activity. Indeed, whilst freedom from age discrimination itself is recognised as a fundamental right in European equality law (*Mangold*, Case C-144/04, ECLI:EU:C:2005:709) the application of age equality in the Equal Treatment Directive 2000/78 affords Member States discretion, in Article 6, as to when age discrimination can be justified. The principle of age equality is implemented in Ireland via the Employment Equality and Equal Status Acts; the former only protects persons over the age of 16 from age discrimination and the latter, persons over 18 other than in relation to the provision of car insurance which can only apply to persons over 17 anyway.

21. This treatment of minors is part of society's attempts to protect them and to ensure they are not subject to the responsibilities or the freedoms of adulthood until they reach their majority (or possibly sooner in relation to some of the restrictions applied to younger minors). Legitimate different treatment in law also applies to minors who have lost their parent(s) or whose parents are unable to care for them, who have an almost unique right to the provision

of accommodation (pursuant to s. 5 of the Childcare Act 1991) and the right to the payment of social welfare payments to their legal guardian. Amongst the most significant of a minor's rights in law is their right to be maintained by their parent. If their parent cannot meet those maintenance obligations, whether because that parent has died or has failed, refused or neglected to discharge their obligations to their minor children, those obligations will fall on the State and will be discharged by the State. In taking over those obligations the State will sometimes act paternalistically and a minor child may legitimately not be afforded autonomy or agency over how they are maintained and accommodated, albeit the State should still endeavour to consider their best interests in deciding on how they are to be cared for. A lack of autonomy can also exist in a child's right to education as they do not have a right to attend the school of their choosing or to resist their removal from a school that has lawfully decided to expel them where the school's decision is properly upheld by a committee pursuant to s. 29 of the Education Act 1988. Limits on autonomy and choice also apply to a child whose parents cannot provide them with accommodation, whether due to death or inability or refusal to do so. Such a child is entitled to be maintained and housed by their legal guardian, with financial and possible housing assistance from the State, or to be accommodated directly by the State. Whilst such accommodation must be *"suitable"* as per s. 5 of the Childcare Act 1991, it is not required to be the accommodation of the child's choosing, whether in terms of quality, style or location. That is not to say that the State might not and should not endeavour to minimise disruption to a homeless and/or recently bereaved minor child, but how and in what circumstances that might be done is a policy choice for the State and is not a constitutional right of the minor child.

22. The applicant's counsel placed heavy emphasis on what he said was the recognition of the rights of the children in *O'Meara* and, in particular, cited para. 32 where O'Donnell C.J. said:-

> *"Significantly, nor is there any difference in the duties and obligations the parents married or unmarried owe to their dependent children. In the light of the essential equality of children under the Constitution vis-à-vis their parents, and the rights which they all have to look to their parents for support, both emotional and financial, and the loss which they all suffer on the death of a parent, the stark differential treatment in the 2005 Act requires particular justification."*

The equality rights of the children identified there are vis-à-vis their parent(s), whereas here, the applicant asserts an equality right as against the State in how it restricts the persons permitted by s. 39 to continue a Part 4 tenancy upon the death of the tenant. The Supreme Court's decision in *O'Meara* does not support such a case where the claim, whilst asserted on behalf of the widower and his three minor children for whose benefit the widower's allowance would have, in part, been paid, was only for the payment of the allowance to the surviving parent and not for a payment directly to the children. The allowance claimed by Mr. O'Meara is made to a surviving spouse (or now a qualified non-marital partner) with additional payments for any dependent children. If the surviving spouse or partner were to die before any dependent child reach adulthood, the payment would cease and thereafter the maintenance of any minor children would fall to be considered under the social welfare code for orphans, if the minor and/or their legal guardian chose to invoke those entitlements. The same applies to housing. Where a single parent who has provided accommodation for their minor child dies, the child's accommodation needs fall to be provided by their legal guardian, with whatever assistance from the State the guardian may be entitled to, or ultimately accommodation will be provided for the child directly by the State. The minor child (or their legal guardian on their behalf) is not entitled, as a matter of either the child or the guardian's right derived from their guardianship of the child, to continue to reside in a Part 4 tenancy rented home the child shared with their late parent(s), even if the child may derive such a right to continue to reside there from the s. 39 rights that other adult members of their household may be able to invoke.

23. The difference in treatment that s. 39 affords to adult and minor children on grounds of age or the greater impact its application may have on a minor member of a single-parent family is not arbitrary, capricious or irrational. It is part of the State's discharge of its duty to ensure the care of a minor child, whose parent is unavailable or unable to care for them, whilst simultaneously recognising that minor children have and should have different rights and corresponding obligations than those that are granted to or required of adults. Minors are properly and lawfully denied access to and are afforded protection from the freedoms and the responsibilities of adulthood.

24. Caring for children, whether by a parent or guardian or the State, and allowing them to be children without adult responsibilities may involve denying them autonomy, or at least some autonomy. They are entitled to maintenance and protection, sometimes over and above those afforded to adults, but alongside that protection, they do not always get to choose or

direct how that maintenance or protection is put in place for them. Their rights to be accommodated by their parents or guardians, or in their absence, by the State, is but one example of the protection that is afforded to a minor child without the freedom (or responsibility) to choose or source where or what type of accommodation that might be. Those decisions, insofar as they are available, are made for the minor, whether by their parent, their guardian or the State.

25. What the applicant seeks here is to allow or even require the minor child to take on what are and should be sole responsibilities of the adults who have or have acquired responsibility to care for them. The applicant's case vaguely suggests (made in oral submission and without having been pleaded) that his aunt and legal guardian could acquire the Part 4 tenancy in the family home on his behalf. That is not sufficient given the lack of clarity around the guardian's consequent rights and corresponding duties both on her own behalf and on behalf of any other person with whom she may wish to share her home, both now during the applicant's minority and in the not so distant future upon the applicant reaching adulthood.

26. Neither is it sufficient for the applicant to assert that legislating for the constitutional entitlement he asserts to have, and rendering s. 39 inclusive, is a matter for the State, along with all the operational challenges that may be involved. The antithesis of a constitutional right to equality should be its relative simplicity, i.e., this person is entitled to equality either individually or vis-à-vis another. Thus, Mr. O'Meara, as a partner in a long standing and committed personal relationship, was entitled to be treated the same as a spouse whose spouse had predeceased them, and his children were entitled to equal treatment with the children of a marital union. Here, the applicant suggests a comparator of a minor child who lives in the family home with other adults, whether their surviving parent, stepparent, adult sibling or grandparent who is entitled to continue a Part 4 tenancy pursuant to section 39. But those minor children are not in a like-for-like comparison with the applicant as they, unlike the applicant, have other adults living with them in their household who may choose to take on the responsibility of the deceased parent's Part 4 tenancy as of statutory right which may then enable those minor children to seek (for example from an adult sibling) or derive (for example from a surviving parent) a right of ongoing residence from the new Part 4 tenant. The within applicant seeks, without clarity or pleadings, to bring his adult legal guardian into a legally binding arrangement of a Part 4 tenancy with the rights and the obligations that flow from

that. The situation lacks a sufficiently relevant comparison that might allow a constitutional equality claim to be mounted.

27. The applicant, in effect, seeks special treatment, which is a recognised aspect of equality law, for example, the extensive rights afforded in law to a pregnant employee on grounds of their pregnancy as of right rather than by way of comparing their treatment to that of a non-pregnant employee. The applicant's claim to special treatment, i.e. that the applicant's legal guardian will somehow step into the Part 4 tenancy, whether temporarily or permanently, is misplaced in circumstances where the State already have arrangements in place to ensure special treatment and protection of the minor child of a deceased lone parent (i.e. different and additional to that afforded to a minor child of a living lone parent), including the payment of an allowance to their legal guardian and/or payment of an orphan's pension and, where necessary, the provision of accommodation to a child pursuant to s. 5 of the Childcare Act.

Conclusions

28. For the reasons set out above, the applicant has not discharged the burden of proof on him to establish that s. 39 is unconstitutional or in breach of the ECHR. I therefore refuse this application.

Indicative view on costs

29. The applicant, who was a minor, has brought a case before the court that, it seems, had not been considered previously, vis-à-vis the constitutionality of s. 39 and has given the court the opportunity to consider the constitutional guarantee of equality in the context of different treatments of minors and adults and of minor children who had lived in a household with other adults as well as their parents and minors who did not. In accordance with s. 169 of the Legal Services Regulation Act 2015, my indicative view on costs is that each party should bear their own costs. I will put the matter in for 10:30am on 23 July 2024 to allow whatever submissions the parties wish to make on final orders including costs.

Counsel for the applicant: Derek Shortall SC, Gerard Martin Byrne BL

Counsel for the respondents: Niall Buckley SC, Ellen Gleeson BL

Counsel for the notice party: Brian Conroy SC, Mema Byrne BL