AN CHÚIRT UACHTARACH

THE SUPREME COURT

[2024] IESC 51

Supreme Court Record No. 2023/115

O' Donnell C.J.
Charleton J.
O'Malley J.
Woulfe J.
Collins J.

Between:

B.M. AND J.M. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND B.M.)

Applicants/Appellants

-and-

CHIEF APPEALS OFFICER, SOCIAL WELFARE APPEALS OFFICER, MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr. Justice Woulfe delivered on the 12th day of November, 2024

1. I agree with Collins J. that the appeal herein should be dismissed. I wish to add only some brief comments about the scope of Article 41.2 of the Constitution, as referred to by Collins J. at para. 98 of his judgment, which I have had the benefit of reading in draft form.

2. In my opinion the inexorable logic of the decision of this Court in *O'Meara v. Minister for Social Protection* [2024] IESC 1 ("*O'Meara*") is that only a married woman is entitled to rely on Article 41.2.1 of the Constitution, and only married mothers are entitled to rely on Article 41.2.2.

3. In our judgments in *O'Meara*, both Hogan J. and myself advanced the diametrically opposite view to the above proposition, when dissenting from the majority on the issue of whether the Family in Article 41 is confined to the family based on marriage, as per *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 ("*Nicolaou*"). We both quoted the observations of O'Donnell J. (as he then was) in *Gorry v. Minister for Justice* [2020] IESC 55 ("*Gorry*") that whatever else may be said about Article 41.2, it had not been suggested that the "woman" and "mother" contemplated in those provisions is limited to a married woman, even if that was overwhelmingly the model in existence at the time the Constitution was drafted.

4. In his judgment in *O'Meara*, however, O'Donnell C.J. (with whom Dunne, O'Malley, Murray and Collins JJ. agreed) revisited his observations in *Gorry* and stated that they now appeared to be incorrect, citing some academic authority. He then stated as follows (at para. 94):

> "The question of the extent of Article 41.2 does not arise for decision in this case. If it were to arise, it would require an analysis of the text in context, in this

> case Article 41 in its entirety. To that extent the argument is somewhat circular as it would be influenced by the answer to the question posed in this case."

5. As regards the question of how the scope of Article 41.2 would be influenced by the decision in *O'Meara*, it seems clear to me that there can be only one answer to that question, and that the decision means that the scope of Article 41.2 must now be viewed in the terms set out in para. 2 above. As Hogan J. stated in his judgment in *O'Meara* (at para. 12):

> "Third, both Article 41.1.1 and Article 42.1 refer to "the Family" (the word is capitalised in both provisions). The understanding as to what constitutes "the Family" must therefore be the same in both provisions. If the reasoning in *Nicolaou* is correct, then it must necessarily follow for example, that the reference to "woman" in Article 41.2.1 and "mothers" in Article 41.2.2 must simply be to married women and married mothers respectively."

6. The logical corollary of the majority judgment in *O'Meara*, therefore, is that only members of a marital family fall within the scope of Article 41. That being so, then it must follow that the reference to "woman" and "mothers" in Article 41.2 has to be viewed as a reference to married women and married mothers only. It must follow in turn that the first applicant cannot rely on Article 41.2 precisely because she is not married.

7. In questions for the State respondents raised by the Court in advance of the hearing, the State respondents were asked whether it was correct that the State did not contest the applicants' entitlement in principle to rely on Article 41.2, notwithstanding that they did not constitute an Article 41 Family. As part of its response the State respondents stated as follows (at para. 18):

> "Second, looking at the context, [Article 41.2] forms part of Article 41, which is entitled "The Family" and which…has been reaffirmed by the Court in *O'Meara* as being limited to the marital family. The use of the words "in particular" at the start of Article 41.2 suggest that the provision is "a particular incidence of the general recognition and guarantee of protection of the Family in Article 41.1": see Respondents' Submissions, para. 87. Thus, understood in its immediate context, particulary in light of the judgments in *O'Meara* (including the comments of Hogan J., para. 12), it is reasonable to conclude that the references to "woman" and "mothers" in Article 41.2 are to be understood as those women and mothers who form part of an Article 41 Family."

8. Notwithstanding the above, the State respondents went on to state that this was not an appropriate case in which the Court needed to consider or decide whether Article 41.2 is limited to the marital family. They added that they had not contested to date the applicants' entitlement to rely on Article 41.2 in these proceedings, but were reserving their position on the question of the personal scope of Article 41.2 to a case in which that question would in fact be determinative.

9. In his judgment Collins J. feels that, in light of the State's position, and having regard to the fact that the issue was not argued either in the High Court or on appeal, the Court ought to proceed on the (assumed) premise that the applicants are entitled to rely on Article 41.2, notwithstanding the fact that they are not part of an Article 41.1 Family. While this approach may be understandable and technically correct, in light of the State's position, nevertheless I find this it somewhat unsatisfactory. This is because the State's engagement with the substance of the Article 41.2 arguments made by the applicants, and the resulting need for this Court to engage with same, may obscure the constitutional reality that women and mothers who are not part of a marital family

cannot rely on Article 41.2 of the Constitution. Article 41.2 is an important provision of the Constitution, albeit one which to date has largely escaped judicial scrutiny. This Court has accepted this appeal pursuant to Article 34.5.4 of the Constitution so that issues of general public importance relating, *inter alia*, to the interpretation and application of this provision can be clarified. Clearly one very important such issue relates to the scope of Article 41.2. If, as now appears clear, this provision applies only to married women and married mothers, it seems to me suboptimal that such clarity does not result from the decision of this Court.

10. In my judgment in *O'Meara*, I suggested (at para. 103) that the interpretation in *Nicolaou* "had the effect of institutionalising a form of discrimination against a section of the population". The reality is that this section of the population includes many of our female citizens, and it seems to me that the approach adopted by the State in this case carries with it a danger of obscuring that reality.