



AN CHÚIRT UACHTARACH
THE SUPREME COURT

[2026] IESC 42

Supreme Court Record No. 2026/22

High Court Record No. 2024/1467 JR

O'Donnell C.J.

O'Malley J.

Hogan J.

Murray J.

Collins J.

Hyland J.

O'Moore J.

Between/

A.A. and B.B.

Appellants

AND

THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY

GENERAL

Respondents

Judgment of Ms. Justice Iseult O'Malley delivered the 13th October 2026

Introduction

1. This is a direct appeal from the decision of the High Court dismissing the appellants' claims for judicial review reliefs (Owens J. – see [2025] IEHC 732). The issues arise from legislative changes made, in March 2024, to the provisions governing the social welfare entitlements of persons who have been granted temporary protection by the State and who are resident in “*designated accommodation centres*”. The appellants, a married couple, are among those affected by the changes. Because they are living in a designated accommodation centre, A.A. (the wife) no longer receives the disability allowance to which she would otherwise be entitled and B.B. (the husband) no longer receives a carer's allowance for caring for her. It is common case that their combined income has been significantly reduced under the new rules.
2. Although the status of “*temporary protection*” derives from European Union law, in this appeal the appellants have not pursued the EU law arguments raised in the High Court. They now make their case purely on the basis of the constitutional guarantee of equality before the law established in Article 40.1 of the Constitution, which they say has been infringed by the legislative amendments. They compare themselves with three categories of persons who can receive the allowances that they used to be paid – other beneficiaries of temporary protection who do not reside in a designated centre, other persons who qualify for disability payments despite living in State-funded residential accommodation such as nursing homes, and recognised beneficiaries of international protection (that is, people who have either full refugee status or subsidiary protection). They say that the distinction drawn between the situation of those persons and their own situation is based purely on their place of residence and is unfair and irrational.

3. It should be noted that as of a date subsequent to the hearing of this appeal, the appellants have sought to have their temporary protection status withdrawn and have applied for international protection. Should that latter application be successful their status will of course change. The appeal is not, however, moot since the question of their entitlements during the period when they were beneficiaries of temporary protection residing in a designated accommodation centre will remain alive.

Background

4. The appellants are a married couple from Ukraine. Russian armed forces commenced their invasion of Ukraine on the 24th February 2022. As is well known, a great many Ukrainians were forced to flee from their homes and seek refuge elsewhere. On the 3rd March the appellants (who lived not far from the border with Russia) were evacuated from their home town and transported to the Polish border.
5. On the 4th March 2022 the Council of the European Union decided to declare the existence of a mass influx of displaced persons from Ukraine. Such a decision is provided for in Article 5 of the Temporary Protection Directive (Council Directive 2001/55/EC of 20 July 2001). The Directive is intended to provide immediate, temporary protection to displaced persons who are unable to return to their country or their region, including people who have fled from armed conflict. It is also intended that protection should be provided on the basis of a balance of effort between the Member States.

6. Pursuant to the terms of the Directive, a decision taken by the Council under Article 5 has binding effects for Member States, requiring them to provide for temporary protection for individuals within the group of displaced persons identified in the decision.
7. Part of the purpose of the Directive is to ensure that the asylum determination procedures of individual Member States are not overwhelmed by large-scale movements of parts of a third-country population. Applications for international protection tend to focus in some detail on the individual circumstances and history of the applicant and conditions in their country of origin, in order to determine whether or not the applicant meets the criteria to be either recognised as a refugee or granted subsidiary protection. For the purposes of the Directive, in contrast, Member States provide immediate, temporary protection on the basis of membership of the defined group of displaced persons. The members of the group are not subjected to an individual assessment comparable to the detailed consideration of the grounds for an international protection application.
8. The Council Decision is subject to review and it is not intended to be of permanent effect. The current Decision has been extended on each review to date, most recently from the 4th March 2027 to the 4th March 2028. (The Government has recently announced a new Temporary Protection Transition Scheme. This does not, however, affect the issues in this appeal.)
9. Temporary protection is not the same as recognition as a refugee or a grant of subsidiary protection and although it carries certain similar rights, they are not as extensive or as

durable. The Directive sets minimum standards for the treatment of persons given protection of this kind. For present purposes, the core obligations on Member States are that beneficiaries must be given access to suitable accommodation or the means to obtain housing (Article 13.1), and medical and other assistance for persons with special needs (Article 13.4). They must also be given “*necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources*”. It is open to individual Member States to provide more than the minimum standard of assistance.

10. The relevant national provisions for temporary protection are set out in the International Protection Act 2015 (“Act of 2015”). (While the International Protection Act 2026 is now mostly in operation, it was not in force during the period relating to the appellants’ claim.) Sections 60(2) and 60(6) of the Act of 2015 provide that where a relevant Council Decision has been made, displaced persons (apart from certain exceptions not relevant here, such as persons suspected of having committed serious crimes) will be given permission to enter and remain in the State. The permission is valid for the period of one year and may be renewed.

11. The appellants were granted temporary protection in Ireland in April 2022. On foot of that status, they were given temporary permission to remain in the State as provided for in s.60(6) of the Act of 2015. As the Act stood at the time, they were entitled under s.60(10)(a) to seek out and enter employment, or engage in business, or access education and training, in the like manner and to the like extent as Irish citizens. They were also entitled, under s.60(10)(b)

“to receive, upon and subject to the same conditions applicable to Irish citizens, the same medical care and the same social welfare benefits as those to which Irish citizens are entitled”.

12. One effect of this provision is that the beneficiaries of temporary protection automatically fulfil the habitual residence condition applicable to many social welfare payments without having to show any form of past connection with the State or any intention to stay here on a long-term basis. Were it not for this, displaced persons given permission to reside here would not qualify for most forms of social assistance and the State would have to find some other way of providing them with the assistance required by the Directive.

13. On being given leave to remain under temporary protection, the appellants were, like many other (although by no means all) displaced Ukrainians who came to this State, accommodated in State-funded full-board accommodation. It appears that the State block-booked about 200 hotels for this purpose.

14. A.A. suffers from certain serious medical conditions and is wheelchair-bound. From July 2022 she received a disability allowance at a rate of €208 per week. Her husband B.B., who also has medical needs (to an extent that makes it unlikely that he will become fit for work), cares for her and from August 2022 he received a carer’s allowance at a rate of €224 per week. Both were assessed by the social welfare authorities as having no other means. (The provision of State-funded accommodation and board was not a matter to be properly taken into account in the means test.) There is no question but that the couple qualified for the payments under the statutory criteria

applicable at the time and would continue to do so were it not for the current exclusion of residents of designated accommodation introduced in the impugned legislation.

15. The affidavit evidence filed on behalf of the respondents describing the overall accommodation situation as it stood in late 2023 and in 2024 is summarised in the judgment of the High Court. As of December 2023, over 101,200 people had been granted temporary protection in Ireland. Of that number, 74,500 were being provided with accommodation by the State. Of those, 57,700 were being accommodated in serviced full-board accommodation. The average weekly number seeking accommodation between October and December 2023 was 76. By January 2025 the total number of people granted temporary protection reached 110,575. In addition, Ireland received a significant increase in applicants for international protection during 2023.

16. According to the respondents, the level of support being provided to beneficiaries of temporary protection was putting enormous pressure on the accommodation system such that by early 2024 the State was on the verge of not being able to offer any accommodation to newly-arriving beneficiaries of temporary protection. Nonetheless, the respondents deny that the evidence that they have adduced of this pressure, and the need to reduce the numbers in State-funded accommodation, can be taken as evidence that the subsequent changes in legal entitlements were intended to pressurise beneficiaries to move out of the accommodation provided to them.

17. The Social Welfare and Civil Law (Miscellaneous Provisions) Act 2024 (“Act of 2024”) made two significant changes to the entitlements of temporary protection

beneficiaries living in State-funded fully serviced accommodation. Section 11 of that Act amended s.60 by inserting into s.60(10)(b) a disqualification from payment where a person is resident in a “*designated accommodation centre*”. The provision now in force confers an entitlement

*“to receive, upon and subject to the same conditions applicable to Irish citizens, the same medical care and, **other than while he or she is resident in a designated accommodation centre**, the same social welfare benefits as those to which Irish citizens are entitled”*. (Emphasis added. Note that this provision has more recently been re-enacted in s.237(11)(b) of the International Protection Act 2026.)

18. A “*designated accommodation centre*” is defined as a premises designated as appropriate for the accommodation of persons who have been given a permission to reside in the State under s.60 of the International Protection Act 2015. The designation role was initially allotted to the Minister for Children, Equality, Disability, Integration and Youth, but since May 2025 it is the responsibility of the Minister for Justice, Home Affairs and Migration. According to the respondents, all designated centres provide meals as well as bedrooms. Residents in designated centres must pay €10 per day for their accommodation but this cost is met wholly by the State.

19. Section 10 of the Act of 2024 provided that a person will be disqualified from receiving any payment listed in s.139 of the Social Welfare Consolidation Act 2005 (a list that includes disability allowance and carer’s allowance) for any week or part of a week during which they are resident in a designated accommodation centre.

20. The establishment in which the appellants have been residing was designated as a designated accommodation centre in September 2024. As a result, after that date they no longer received either of the allowances previously paid to them but instead got the *ex gratia* sum of €38.80 each per week, under an administrative scheme for beneficiaries of temporary protection. They remained entitled to seek urgent financial assistance in exceptional circumstances.

21. It appears that the Minister designated all of the 200 or so hotels which were already in use to provide serviced full-board accommodation for beneficiaries of temporary protection. This is said by the respondents to have been done in order to promote greater independence and integration of displaced persons who had been in Ireland for an extended period. The number of beneficiaries of temporary protection living in State-provided accommodation in hotels fell from 60,000 in November 2023 to just over 25,000 in March 2025.

22. These judicial review proceedings commenced in November 2024.

The High Court

23. In the High Court, the appellants argued that ss. 10 and 11 of the Act of 2024 were incompatible with both Article 40.1 of the Constitution and the requirements of the Temporary Protection Directive. Although this latter aspect of the claim is no longer being pursued, it is of some relevance to note the analysis of the High Court.

24. Owens J. characterised the claim in relation to the Directive as raising the following question:

“Does Council Directive 2001/55/EC of 20 July 2001 “on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof” (the Directive) prohibit the State from establishing social welfare assistance for recipients of temporary protection who benefit from direct State provision of full-board serviced accommodation in hotels and guest-houses, which differs from that available to other recipients of social welfare assistance?”

25. Owens J. concluded that the appellants had not proved that the level of social welfare assistance being provided to them was inadequate to meet obligations imposed on the State by Article 13 of the Directive. He held that while the State was obliged to provide beneficiaries of temporary protection with “*necessary assistance in terms of social welfare and means of subsistence*”, it was not obliged to do so in the form of, or by reference to, the eligibility conditions attached to the existing statutory allowances.

26. The constitutional issue was seen by Owens J. as raising the following question:

“Does Article 40.1 of the Constitution of Ireland permit the Oireachtas to enact laws which give recipients of temporary protection who benefit from being accommodated by and at the expense of the State on a serviced full-board basis in hotels and guest-houses different entitlements to social welfare assistance to those given to citizens and others who do not receive this benefit?”

27. The judgment refers to the principles discussed in the decision of this Court in *Donnelly v. Minister for Social Protection* [2023] 2 I.R. 415, [2022] IESC 31. The conclusion reached by Owens J. was that the Oireachtas was indeed permitted to enact the legislative measures in question. It could not create social welfare rules which discriminated on sexual, racial or ethnic lines, but it could enact provisions that differentiated between the rights to social welfare assistance of those within the State as of right and those here by permission, provided that the differences were not disproportionately unfavourable. It could differentiate between those here temporarily and those here permanently, and between rights to assistance conferred on those who the State was assisting by other subventions or social supports and rights to assistance conferred on those who did not receive such support.

28. Such laws could, in the judge's view, incentivise those who could work, and could discourage "*welfare tourism*" by ensuring that the level of social welfare assistance offered by this State was comparable with that offered by other Member States of the EU. These were legitimate policy objectives. A policy that disincentivised long-term use by lawful residents in the State of accommodation facilities that were intended to be short-term was not inherently discriminatory.

29. Owens J. considered that the legislature was also entitled to eliminate the social welfare advantages which this cohort of recipients had enjoyed over social welfare recipients who did not get the collateral benefit of State-funded serviced full-board accommodation. In his view, persons who had temporary protection and resided in serviced full-board hotel accommodation paid for by the State, and who also received social welfare assistance, had a "*considerable financial advantage*" over other social

welfare recipients who did not receive that extra subvention. Unlike the latter they did not have to pay for rent, food or utilities.

30. The Court found that there was no factual basis for the assertion, put forward on behalf of the appellants, that the changes were introduced for the purpose of forcing them out of their accommodation, as opposed to encouraging and promoting their integration and greater independence.
31. Owens J. noted that by 2024 the war in Ukraine had gone on for over two years. He considered that the Oireachtas was entitled to take the view that provision of full social welfare assistance entitlements to recipients of temporary protection had the effect of encouraging and embedding their use of free emergency accommodation and the associated supports in hotels as a permanent feature. The Oireachtas was also entitled to take the view that continuation of a policy of providing beneficiaries of temporary protection with both full-board hotel accommodation on a long-term basis and a full range of social welfare allowances was unsustainable.
32. It was held that the measures had not been shown to have any sort of discriminatory purpose or adverse effect such as would justify a finding of breach of Article 40.1 of the Constitution. The couple continued to be provided with “*social welfare and means of subsistence*” under the *ex gratia* scheme. They might also become eligible for supplementary welfare allowance if they could establish an urgent case, or for a single payment of that allowance if necessary to meet exceptional needs.

33. The comparators chosen by the appellants were not found to be appropriate. Owens J. did not accept that the couple's social welfare entitlements should be identical to those of the beneficiaries of declarations of international protection who continued to avail of serviced accommodation in direct provision. There was no evidence before the court that such persons were receiving the same package of fully serviced accommodation and meals benefits in hotels. It might also be that others in need of emergency accommodation were put into this type of accommodation and remained in it while they awaited proper housing from the private or public supply. These were temporary measures.
34. A.A. compared her situation with that of persons with disabilities who live in residential care institutions. Such persons are not disqualified from receipt of disability allowance. Owens J. considered that the situations were not comparable. A.A. and her husband did not enjoy good health, but their health was not such as to oblige them to reside in a hospital or similar institution. If A.A. were to become obliged to move to a hospital or an institution to meet her health needs, she would be entitled to receive disability allowance.
35. Owens J. described the appellants as "*temporary residents in the State who have been displaced from their country of origin by a war*". Indefinite residence in State-funded serviced full-board hotel accommodation was not a sensible solution to their housing needs. If they moved out of it, they would be eligible for social welfare assistance.

The Grant of Leave to Appeal

36. The Court granted leave to appeal in a determination dated 20th March 2026 (see [2026] IESCDT 36). It was observed that the legislative intervention in 2024 had affected many people and was based on a distinction drawn between temporary protection recipients and international protection candidates. The constitutional validity of this distinction was seen as a serious issue that met the constitutional criteria. Eligibility and equality of treatment were described as central issues as to the protection of the vulnerable.

Submissions in the Appeal

The Appellants

37. The appellants do not claim any substantive right to the payment of the allowances in question under the Constitution, the Directive or any legislation. Their claim is, accordingly, a “pure” Article 40.1 claim – that they have been unlawfully denied a benefit to which comparable people are entitled, and that the reasons for their exclusion are impermissible, arbitrary and/or irrational.

38. In the analysis of Article 40.1, the leading authorities, from *Quinns Supermarket v. Attorney General* [1972] I.R. 1 through to *Brophy v. Director of Public Prosecutions* [2026] IESC 7, have been referred to in submissions. The appellants’ central argument is that they were deprived of their social welfare allowances by reference only to their place of residence. This factor, they say, was unrelated to A.A.’s need for full-time care and assistance.

39. The appellants compare the position of A.A. with that of residents of care institutions, who are entitled to receive disability allowance despite being provided with accommodation and maintenance. They refer to a rhetorical question posed by Owens J. – “*Why should those who are obliged, as a result of lack of means or poor health to live in a State-funded hospital or other similar institution, lose their right to receive disability allowance in order to pay for their keep?*” The appellants say that the answer is that of course such persons should not be deprived of their allowance. They say that A.A. is in the same situation.

40. It is accepted that unlike a resident in a care home A.A. is able to leave the designated accommodation provided to her, but she says that the impugned legislation sought to pressurise her into leaving her State-funded accommodation by suspending her disability allowance. The argument here is that there is no rational connection between one’s place of residence and one’s need for the allowance. Making the allowance payable to people living in residential care institutions is seen as an acknowledgement of that fact. A.A. met the criteria for the payment of the allowance and B.B. met the criteria for the carer’s allowance, and that has continued to be the case for each of them.

41. The appellants say that there is no difference in capacity or social function between them and the residents of care institutions, such as would warrant different social welfare treatment. The fact that they were being provided with serviced full-board accommodation is, on their case, irrelevant, since such accommodation is also provided to residents in institutions. On this aspect, the appellants rely, in particular, on *Byrne (A Minor) v. Director of Oberstown School* [2020] 2 I.R. 338, [2013] IEHC 562. They see the point made in that case as being that it was irrelevant, for the purpose of calculating

a release date for a child offender in detention, whether the child was detained in Oberstown or in St. Patrick's Institution.

42. The appellants accept that Ukrainian nationals who arrived in the State since March 2024 have not been given the same social welfare entitlements as those who arrived before that date. Further, full-board accommodation is provided to those later arrivals for a limited three-month period only. The appellants say in this regard that such a cut-off point can be legitimate provided that the Article 13 obligation is fulfilled. Their objection is to the imposition of a cut-off on persons who had already been assessed as entitled to an allowance and as needing it, where that assessment has not been changed.
43. The appellants also compare themselves to beneficiaries of international protection (i.e., recognised refugees and those with subsidiary protection), who can receive the same welfare benefits as Irish citizens. They assert that, if they were to apply for international protection, they would be entitled to at least subsidiary protection. They further say that there is no difference in capacity or social function between recipients of international protection and recipients of temporary protection, such as would warrant a difference between them in social welfare treatment. They have temporary protection because the Directive took the category of displaced persons to which they belong out of the asylum system. (It should be noted here that the appellants did not suggest that they were in any way debarred from applying for international protection, and that as mentioned above they have now done so.) It is said that some recipients of international protection continued to be accommodated in direct provision.

44. It is accepted by the appellants that residence in a designated accommodation centre is a benefit. They do not, however, accept that a beneficiary of temporary protection living in such a centre would, if in receipt of social welfare, necessarily be financially better off than another such beneficiary not living in such a centre. The latter can receive rent supplement or housing assistance payment, a fuel allowance, a household benefits package and a Christmas bonus. The appellants have provided some detail as to the rate of allowances and payments available to social welfare recipients who do not live in designated accommodation, which, they contend, establishes that the High Court erred in finding that they had, prior to March 2024, enjoyed a “*considerable financial advantage*” over other recipients of social welfare who were not provided with serviced full-board accommodation.

45. The appellants agree that in principle they were entitled to join, or apply to join, the categories of persons to whom they compared themselves (as they have now sought to do). They submit, however, that the question is whether the distinction drawn between the different groups is constitutionally permissible, and that it is no answer to their claim to say that they could change their status. In this regard, the appellants refer to *Murphy v. Attorney General* [1982] I.R. 241, *de Búrca v. Attorney General* [1976] I.R. 38, *Burke v. Minister for Education* [2023] 2 I.R. 1, [2022] IESC 1, and *Donnelly v. Minister for Social Protection* [2023] 2 I.R. 415, [2022] IESC 31. They argue that the married couple complaining of their tax treatment in *Murphy* could have remained unmarried, that the persons excluded from jury service at the time of the *de Búrca* case could have become ratepayers, that the home-schooled students involved in *Burke* could have attended a school, and that the parents in *Donnelly* could have taken their child home

from the hospital. In none of those cases was the possibility of a change of status seen by the courts as determinative of the issues.

The Respondents

46. The respondents emphasise the fact that the appellants no longer maintain the claim made in the High Court that the regime applicable to them is inconsistent with the requirements for the treatment of displaced persons set out in the Directive. To repeat, Article 13 requires the State to provide beneficiaries of temporary protection access to suitable accommodation or the means to obtain housing (Article 13.1) and medical and other assistance for persons with special needs (Article 13.4). They must also be given “*necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources*”. Member States have, it was said, a high degree of discretion as to how they would meet these obligations.

47. In those circumstances, it is argued that the appellants must be taken to have now accepted that the Oireachtas had made provision for them to receive the “*necessary assistance in terms of social welfare*” and that the State’s obligations to beneficiaries of temporary protection have been complied with. It is submitted that the constitutional equality argument must be seen in this context, because it means that it is accepted by the appellants that the State continued, after the amendments, to provide them with the level of social welfare assistance to which they were legally entitled under the Directive.

48. As far as the selected comparators are concerned, the respondents point out that residents in care institutions are the only group with legal entitlements to both accommodation and their disability allowance. Applicants for international protection can live in direct provision, funded by the State, but are not entitled to social welfare. Individuals who have been granted international protection status are entitled to social welfare and to apply for housing, but do not have a right to State-funded accommodation. The same applies to the beneficiaries of temporary protection who did not take up, or who left, State-provided accommodation.

49. The respondents do not accept that the only material difference between the appellants' position and that of other persons entitled to receive the allowances in question is their place of residence. As a matter of law, the appellants have different legal entitlements under different legal instruments. Their rights and entitlements cannot necessarily be assumed to be automatically co-extensive with those of persons who have different rights and entitlements under a different legal regime. As a matter of fact, they receive a different form of support and assistance – i.e., State-funded accommodation and meals, plus the weekly gratuity. These differences of treatment do not give rise to a breach of Article 40.1. The Oireachtas is entitled to treat persons in receipt of one significant form of assistance differently to persons not in receipt of that assistance, and it is not irrational to do so.

50. In relation to the comparison drawn with residents of institutions, the respondents say that by definition such an institution is designed to provide care and maintenance for those who require medical treatment and cannot care for themselves. Their disability requires them to reside in, and remain in, the institution. Their disabilities have to be

assessed against the criteria for admission. Further, they may be required to contribute to the cost of their care and maintenance. The appellants, by contrast, reside in a designated centre because they had to flee from a war. They need the protection of the State but are able to care for themselves and are free to source alternative accommodation.

51. It is submitted that the view of the trial judge, that those who received both serviced full-board accommodation and the allowances had a financial advantage over other social welfare recipients, was obviously correct and did not require evidence to support it. The appellants had not adduced evidence to demonstrate that they were in fact at a financial disadvantage as compared to the comparators on whom they relied.

52. The respondents make the point that the basis on which international protection recipients are granted permission to reside in the State is different to the basis on which beneficiaries of temporary protection are permitted to do so. This does not demonstrate discrimination against the latter. The Oireachtas is entitled to make policy decisions and choices when it legislates, and it is not obliged to produce evidence to justify its choices.

53. The appellants' assertion that the amendments were made for an ulterior reason – to pressurise them and others to move out of their accommodation – is said by the respondents to be unfounded. The Oireachtas was entitled to pursue new policy objectives by providing different types and levels of social welfare to beneficiaries of temporary protection residing in State-funded full-board accommodation. The

respondents distinguish between the concepts of “pressure” and “incentives”, and say that what the legislative amendments created was the latter.

54. The respondents make the point that the appellants are entitled to apply to join two of the three categories of comparator identified by them. They can, like other recipients of temporary protection who are not resident in a designated centre, move out of the centre. If they do so they will be treated in the same way as to the persons to whom they compare themselves. It is observed, however, that if the appellants were to be given subsidiary protection, they would have to move out of their full-board accommodation. They would have the right to seek housing on a par with citizens but would not be legally entitled to be provided with accommodation for free.

55. The respondents comment, without pursuing the point to any great extent, that it is unusual for an Article 40.1 claim to be based on comparisons with categories of people to whom the claimants could belong if they choose.

Discussion

56. I agree with the respondents that the acceptance by the appellants that there has not been a breach of their rights under the Temporary Protection Directive is a highly significant feature of the case. It is the Directive (and the implementing legislation) that is the source of their right to enter and reside in the State, and that prescribes the minimum standard of treatment for them and other persons in the cohort of displaced persons who have been forced to flee from their homes. It must therefore be seen as the root source of the legal entitlements attached to beneficiaries of temporary protection in the State.

57. The establishment of compliance by the State with the standards set by the Directive is not, however, necessarily the end of the argument. It would, at least in principle, be possible for the State to meet the minimum standard for all of the cohort but at the same time to act in breach of the constitutional equality guarantee. That would be the case if, for example, the legislature were to unjustifiably discriminate against any group of temporary protection beneficiaries by providing different benefits on the basis of any unjust, capricious or irrational reason. In those circumstances, I will go on to consider the constitutional issue debated in the appeal.

58. At paragraphs 188 and 189 of the judgment in *Donnelly* the principles applicable to Article 40.1 cases were summarised as being:

“(i) Article 40.1° 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 40.1°.

(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.

It is necessary, therefore, to look at the elements of a successful claim. In my view, the formulation adopted by Barrington J. in Brennan and approved a number of times in this Court is consistent with the analysis in Dillane. The statutory classification must be for a legitimate legislative purpose, and it will not be legitimate if it is arbitrary, capricious or irrational. Further, the classification must be relevant to the legislative purpose, and it will not be relevant if it is incapable of supporting that purpose.”

59. As already noted, this is a “pure” equality claim in that the applicants do not assert any substantive legal right to the allowances but argue that they have been unfairly excluded from a benefit extended to people who are similar to them. In *Donnelly*, it was held such a 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'.

In considering whether the legislation offends against the Constitution, the Court will engage in a greater degree of scrutiny where the differentiation involves what may be termed one or more "suspect" grounds..."

60. It must also be emphasised that in a claim of this nature paragraph (iv) of the *Donnelly* principles is particularly engaged, because of the latitude that must be given to the legislature in fiscal matters. There is no claim in this case that the differentiation is based on any form of "suspect" ground. The argument is that it is irrational because it is based only on the place in which they reside. It seems to me that this claim is misconceived.

61. Firstly, the claim depends on comparisons with persons who are not, as a matter of law or fact, in the same situation as the appellants, while disregarding significant aspects of the policy choices behind the legislative treatment of the relevant differences. As far as those with international protection are concerned, the appellants are failing to acknowledge that their legal status in the State not only has a different source but is of a different nature. It is legitimate to formulate policy on the basis that people with recognised refugee status, or subsidiary protection, are likely to reside in the State for relatively longer periods than beneficiaries of temporary protection, even if events beyond the control of this State may ultimately force a change in that perception. It is

also legitimate to alter an initial reception policy in the light of subsequent events and in order to ensure that a particular form of assistance, intended to be temporary, does not become permanent.

62. In considering this latter aspect, I should say that in the circumstances of this case I do not see a great deal of material difference between the word “pressure”, used by the appellants, and the word “disincentive”, used by the trial judge. Despite the position formally adopted in submissions on behalf of the respondents, it seems clear from the evidence relating to the pressure on accommodation facilities that this was a significant factor in the decision of the legislature to adopt a policy that would have the effect of reducing the numbers of beneficiaries of temporary protection in those facilities. That is not, in itself, illegitimate so long as proper alternative assistance is given where necessary and the obligations imposed by the Directive are complied with. Further, it is not necessarily incompatible with the objective of improving integration and independence in the community. One way or another, I think it is not improper to adopt a policy of reserving, insofar as possible, serviced full-board accommodation for new arrivals in the hope or expectation that those here for a longer time may, after a while, be able to find accommodation independently. What is essential is that they be given the appropriate assistance to do this and that compliance with the Directive continues.

63. The appellants also fail to acknowledge that no-one in the international protection comparator groups has an entitlement to serviced, full-board accommodation as well as to social welfare allowances. Beneficiaries of temporary protection who do not currently live in State-provided accommodation have the same legal status as the

appellants, and can claim social welfare payments for which they qualify, but they are not provided with accommodation and meals.

64. Residents in care institutions are simply not an appropriate comparator group at all.

Eligibility for such institutions arises where an assessment of healthcare needs has concluded that the individual is not able to meet those needs in their own home and that they must be cared for in a residential setting. That necessarily entails providing them with board and lodging. This situation is wholly different to that of the appellants, who have a choice. Furthermore, the appellants have given no consideration to the fact that residents of care homes must, at least to some extent, contribute to the cost of providing such accommodation and care, whether from their income or from assets.

65. This leads me to the second fundamental problem with the appellants' claim. It is a claim for financial equality in respect of a financial benefit provided by the State. For the purposes of the constitutional case, it is therefore necessary to identify the financial factors common to and differing from the chosen comparators. It seems to me that the appellants are, in respect of all of their chosen comparators, disregarding the financial value to them of the support that has been provided to them by the State – free accommodation and meals – and the true cost of independent living, in arguing that they were not financially better off than other social welfare recipients when they were paid the allowances.

66. That approach is based, it appears, on the fact that the value of the service being provided to them was disregarded for the purposes of the statutory means test administered to the appellants when they applied for the allowances. That was a correct

approach to the statutory test. It is not, however, appropriate in a constitutional claim that depends on establishing that the State has treated the claimants, for financial purposes, as inferior to persons to whom they are similar. Further, much of the appellants' case appears to stem from a belief that, because a range of different forms of support is provided by the State, recipients of social welfare payments in effect have the benefit of those payments without having to spend them on paying bills.

67. It is, in my view, wholly unrealistic to draw a comparison between the appellants when in receipt of the allowances and, say, a couple receiving disability allowance and carer's allowance living in rented accommodation, and to assert that, because the latter received other financial supports, their financial position was similar. For example, it is common knowledge that food and utility costs generally amount to a very substantial proportion of social welfare income. Certainly, forms of support such as fuel allowance help those on low incomes, but they do not and are not designed to cover all living expenses. There is simply no question of such a couple having the same disposable income at the end of a week as that of couples in receipt of the same gross income who, because of provision made by the State, do not have to pay for heating or food. Further, as far as rent is concerned, a comparator couple living on social welfare would probably be entitled to Housing Assistance Payment but might well have to pay at least some portion of the rent themselves.

68. The value of the accommodation and service provided in a designated accommodation centre is also relevant to the argument that the appellants have been deprived of their allowances purely by reason of the location in which they reside.

69. On this aspect, the reliance placed on the High Court decision in *Byrne (A Minor) v. Director of Oberstown School* seems to me to be misplaced. The difference in entitlement between the two groups of young male offenders did not arise purely because of the location of the institutions in which they were detained, but because different legal regimes applied to the two institutions with the result that there was a significant disparity in the treatment of more or less identically placed children. That disparity continued to apply even when boys were transferred from St. Patrick's Institution to Oberstown – because they had commenced serving their sentences in the former institution, where the Prison Rules applied, they continued to be eligible for remission. The Prison Rules did not apply to Oberstown and there was no provision for remission for children who were sent there at the commencement of their sentences. This discrimination was held to be unjustifiable, since they were all children, of similar ages, serving sentences of detention, and because the arbitrary differentiation depended purely on the regime in the institution where they had started their sentences.

70. For a true analogy with the facts of *Byrne*, it seems to me that the appellants would have to show a difference in treatment, for social welfare purposes, between the residents of different designated accommodation centres. Clearly, no such differences currently exist. The situation is, I think, more nearly comparable to that in *B. v. Director of Oberstown Children Detention Centre* [2023] 2 I.R. 191, [2020] IESC 18. In that case, a child serving a sentence of detention asserted a right to seek enhanced remission, comparing himself for that purpose to adult prisoners. The argument was that he was, fundamentally, in the same situation as an adult prisoner because they were both serving custodial sentences. This Court rejected his claim, holding that the differences in the regimes for adult and child offenders were legitimately based on relevant differences

between adults and children. The regime of short-term incentives for children in Oberstown was designed with those differences in mind.

71. The central issue, therefore, is not the location in which the appellants are residing but the differing forms of services that are made available to people in different types of accommodation. I cannot see that Article 40.1 is engaged by the provision of one service in kind – accommodation and food – and another in cash, where a claimant can make a choice between the two and has not established that there is a disproportionately unfavourable treatment of the people availing of either form.

72. In referring to the element of choice, I do not ignore the difficulties faced by anyone seeking rental accommodation in the current market. Further, I acknowledge that these appellants are in a particularly vulnerable position because of their health needs and that they may find it even more difficult than others to find suitable accommodation. It is essential to bear in mind that they remain entitled to be given access to suitable accommodation or the means to obtain housing, medical and other assistance for persons with special needs and necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources.

Conclusion

73. This is a claim that the appellants have been wrongfully excluded from the social welfare payments for which they would otherwise qualify because they are living in a designated accommodation centre. The appellants contend that this exclusion breaches the Article 40.1 guarantee of equality before the law. They compare themselves with persons who have international protection (either refugee status or subsidiary

protection), other beneficiaries of temporary protection who do not live in designated accommodation and with residents in care institutions such as nursing homes.

74. I have referred above to the observation of the respondents to the effect that it is unusual for a litigant to complain that they have been excluded from a benefit available to a category of persons which the litigant could choose to join. Since this was not really pursued as an argument, there is no need to decide here whether such a consideration is capable of affecting the outcome of an equality claim and I would reserve my position on it. I do not, however, wish to be taken as accepting the analysis of the appellants as summarised in paragraph 45 above.

75. I have concluded that the legislative changes made to the entitlements of persons who benefit from temporary protection have a legitimate objective and are not arbitrary or irrational. Further, they are within the category of fiscal and social legislation in respect of which the Oireachtas has particular latitude.

76. The measures are not based purely on the physical location in which the appellants reside but on the differing forms of assistance made available to residents in designated accommodation, as compared to the forms of assistance provided for those with international protection and to other beneficiaries of temporary protection. The appellants do not have the same legal status as persons with international protection and are not in a factually comparable situation to beneficiaries of temporary protection who are not provided with serviced accommodation and meals free of charge. In any event, the appellants have not demonstrated that they have in fact been financially

disadvantaged as compared to those other persons. Further, the appellants are not, in my view, in a factually or legally comparable situation to residents in nursing homes.

77. The status of the appellants, together with their legal entitlement to minimum standards of care and assistance, derive from the Temporary Protection Directive as implemented in national legislation. It is accepted by the appellants that the State has to date complied with the obligations imposed by those instruments and that it will continue to be bound by them.

78. It follows from the foregoing that I would dismiss the appeal.