

THE HIGH COURT
JUDICIAL REVIEW

BETWEEN:

JACINTA HEALY AND MICHAEL HEALY

Applicants

and

THE EASTERN HEALTH BOARD, THE
MINISTER FOR HEALTH AND THE
ATTORNEY GENERAL

Respondents

JUDGMENT delivered March 11th 1988 by Keane J.

The facts in this case are not in dispute. The applicants are a married couple and have two children, aged twelve and eleven. The husband formerly worked in the VEHA factory in Wicklow. In February 1982 he was injured at work and stopped working for some years. He was certified fit for work in November 1985 and received unemployment benefit under the Social Welfare (Consolidation) Act 1981 for approximately three weeks. From December 31st 1985 he was in receipt of unemployment assistance under the 1981 Act together with an increase in respect of an adult dependent and two child dependents at the standard rate applicable. In November 1986, the total benefit payable to him under the 1981 Act was £79.90 per week.

The wife has been suffering from schizophrenia and a reactive depression for a number of years and on September 30th 1985 applied for and was given a disabled person's maintenance allowance (referred to as a "DPMA") under the provisions of the Health Act 1970 by the first named respondent ("the Board"). In November 1986, the allowance being paid to her was £7.33 per week. Neither of the applicants has any other source of income so that at that time their total income was £87.23 per week.

In November 1986 the applicants' financial position was worsened as a result of the coming into force of the Social Welfare (No.2) Act 1985. That Act was introduced in order to ensure the State's compliance with its obligations under an EEC Directive of 19th December 1978 which required the progressive implementation of the principle of equal treatment for men and women in matters of social security. Under its provisions, the wife ceased to be an adult dependent of her husband for the purposes of the social welfare code and as a result the benefit payable to him was reduced to £44.80. It was subsequently increased, as a result of what were called "transitional payments" and a supplementary welfare allowance, to £76.70. On the 9th June 1987, the applicant's wife was informed that the payment to her of the DPMA would cease as from the 19th June 1987, but that she would then be qualified again as a dependent of her husband. As a result he would be entitled to unemployment assistance in respect of all the members of his family.

On the 12th August 1987 the applicants were given leave by MacKenzie J under the judicial review procedure to apply for inter alia an Order of certiorari quashing the decision of the Board to end the payment of the DPMA. The grounds on which the Order was granted can be summarised as follows:

- (1) The decision was ultra vires the provision of the relevant legislation.
- (2) The decision was in breach of the rights of the wife under the Constitution since it meant that she received a lesser sum because she was a married woman living with her husband.
- (3) The decision was in breach of the EEC Directive of 1978 since it discriminated against the wife in the payment

of social welfare benefits because of her sex and marital status.

- (4) The decision was contrary to principles of constitutional justice and/or natural justice.

The respondents having given notice of their intention to oppose the application for judicial review, the matter came before me for hearing on March 1st. At the outset, I was informed that it was now accepted on behalf of the respondents that the appropriate weekly payment to the applicants was £88.30. Counsel for the Board said that this sum had been computed in the following manner. The husband was entitled to £46.20 in respect of unemployment assistance, made up of the maximum personal rate (£36.60) and half the allowance in respect of the two dependent children (£19.20 divided by 2, i.e. £9.60). The wife was entitled to the DPMA at the maximum personal rate (£44.50) and half of the allowance in respect of two dependent children (£18.50 divided by 2, i.e. £9.25) giving a total of £53.75 per week. This would bring their total joint income to £99.95. The maximum DPMA, however, payable to the wife in respect of herself, husband and two children was £88.30 and since the Board, on the view they took of the relevant legislation, were obliged to have regard to the total income of husband and wife, it was necessary to reduce the amount of DPMA by £11.65 to ensure that the total benefit paid to the husband and wife under both codes did not exceed the maximum amount of DPMA payable, i.e. £88.30. On behalf of the applicants, while it was conceded that this had alleviated the financial position somewhat, it was contended that the Board were still acting in a manner which was ultra vires the legislation, unconstitutional and contrary to the EEC Directive of 1978.

THE LAW

The payment of the DPMA is governed by s 69 of the Health Act 1967 and regulations made under s 72 of that Act, i.e. the Disabled Persons (Maintenance Allowances) Regulations 1984 (SI No. 71 of 1984) as amended by the Disabled Persons (Maintenance Allowances) (Amendment) Regulations 1987 (SI No. 196 of 1987). Section 69 provides that:

"A Health Board shall provide for the payment of maintenance allowances to disabled persons over sixteen years of age where neither the person nor the person's spouse (if any) is able to provide for his maintenance."

Article 3(1) of the 1984 Regulations provides that:

"A Health Board, on application being made to them, shall pay a maintenance allowance to a person being a person specified in s 69 of the (Health) Act (1970) ...who by reason of the specified disability is, in the opinion of a medical officer of the Health Board authorised by that Board to examine persons applying for or in receipt of maintenance allowances, substantially handicapped in undertaking work of a kind which, if he were not suffering from the disability, would be suited to his age, experience and qualifications."

Article 3(4) provides that:

"...a maintenance allowance payable to a person in accordance with this article shall be a weekly allowance not exceeding the personal rate of the allowance specified in Schedule 3 of these regulations, and increases for dependents not exceeding the amounts specified in Schedule 3 of these regulations as may be appropriate."

The relevant amounts set out in the Third Schedule, as amended by the 1987 Regulations, are:

"Personal rate of allowance :	£44.50
<u>Dependents for whom increases may be made</u>	
<u>in a maintenance allowance under Article 3</u>	
Spouse or other dependent over 18 years of age :	£25.30
First dependent under 18 years of age :	£8.60
Second dependent under 18 years of age :	£9.90"

Article 4 of the 1984 Regulations provides that:

"In determining the amount of a maintenance allowance for a particular person, a Health Board shall have regard to the income of that person, the spouse of that person, and of all persons in respect of whom that person claims or is in receipt of an increase specified in the Schedules of these regulations. In this regard full account shall be taken of all income arising by way of benefit or assistance or any increase thereof in respect of a dependent, other than supplementary welfare allowance, which is payable under the Social Welfare Acts, 1981 to 1983."

For the purpose of determining the rate of unemployment assistance payable under the Social Welfare Acts 1981 to 1985, "adult dependent" is defined by s 3 of the Social Welfare (No. 2) Act 1985 as meaning:

"A spouse who is wholly or mainly maintained by that person but does not include...

(iii) a spouse who is entitled to, or is in receipt of, any...disabled person's maintenance allowance under section 69 of the Health Act 1970..."

THE CONTENTIONS OF THE PARTIES

On behalf of the applicants, Mrs. Mary Robinson SC submitted that the determination by the respondents of the benefits to which her clients were entitled was wrongful on three grounds. First, she argued that s 69 of the 1970 Act and the Regulations, properly construed, entitled the wife in this case to be paid the maximum personal rate of DPMA together with half the allowance in respect of two dependent children. Similarly, the husband under the social welfare code was entitled to be paid the maximum personal rate of unemployment assistance together with half the allowance in respect of two dependent children. The total of benefits thus payable to the applicants should not be reduced as exceeding the maximum benefit payable to the wife in respect of DPMA, she said, because all that should be taken into account for the purposes of Article 4 of the 1984 Regulations was any income of the husband which was surplus to his own requirements. In support of this argument, she pointed to the fact that a person could only qualify for the payment of DPMA under s 69 if neither the applicant nor the applicant's spouse was able to provide for his or her maintenance. Viewed in this light, the reference to "income arising by way of benefit or assistance" in Article 4 could only be regarded as a reference to benefit or assistance which was available for the maintenance of the wife and the husband's unemployment assistance in this case clearly did not fall into this category.

Secondly, she submitted that the determination of the Board in any event violated the constitutional rights of the wife. She relied in support of this argument on Article 41.3.1 which provides that:

"The State pledges itself to guard with special care the

"institution of Marriage, on which the Family is founded, and to protect it against attack".

Mrs Robinson said that it was clear that in the case of an unmarried couple living together, the Board would not be entitled to take into account any income, whether by way of social welfare benefit or otherwise, to which an applicant's cohabitee was entitled for the purpose of determining the amount of DPMA payable. To take it into account in the case of a married applicant unfairly discriminated against such applicants because of their married status and was thus inconsistent with the pledge by the State in Article 41.3.1. She relied in support of this submission on the decisions of the Supreme Court in Murphy .v. Attorney General (1982) IR 241 and of Barrington J in Hyland .v. The Minister for Social Welfare and the Attorney General (unreported; judgment delivered 18th January, 1988).

Thirdly, she submitted that the determination of the Board was also in violation of the EEC Directive of 1978 and in particular Article 4 thereof which provides that:

"The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

- The scope of the schemes and the conditions of access thereto,
- The obligation to contribute and the calculation of contribution,
- The calculation of benefits including increases due in respect of a spouse and for dependents and the conditions governing the duration and retention of entitlement to benefit".

In support of this submission, she relied on the decisions in McDermott .v. Cotter (1987) ILRM 324; Johnston .v. Chief Constable of the Royal Ulster Constabulary (1986) 3 CMLR 240 and Drake .v. Chief Adjudication Officer (1986) 3 CMLR 43, (1986) 3 All ER 65.

For the Board, Mr Hugh O'Neill submitted in the first place that the manner in which his clients were obliged to calculate the amount of the DPMA payable to the wife in this case was governed by Article 4 of the 1984 Regulations. This Article made it clear that the Board was obliged to have regard to any income, including benefit or assistance payable under the social welfare code, to which the husband was entitled. Since the maximum benefit payable to the wife, including increases in respect of an adult dependent (i.e. the husband) and two dependent children, was £88.30, the DPMA had to be calculated so as to ensure that the total income which husband and wife as a unit received did not exceed this figure. The imposition of a ceiling on the joint income of husband and wife in this manner necessitated the reduction in the DPMA in the manner already explained.

Mr O'Neill secondly submitted that this determination in no sense constituted a discrimination against the wife on the ground of her sex contrary to Article 4 of the EEC Directive, since the differentiation in treatment was the result of her marital status and not of her sex. The same result would have followed in the case of a husband entitled to DPMA whose wife was in receipt of income from another source.

Mr David Byrne SC on behalf of the Minister for Social Welfare and the Attorney General adopted Mr O'Neill's two submissions and, in support of the latter submission, relied on the decision of the Court of Justice of the EEC in Teuling-Worms .v. Bestwur Van de

Bedrijfsvereniging Wor de Chemische Industrie (judgment delivered, 11th June 1987). He also submitted that there was no evidence that the wife had ever been employed and that accordingly she was a person to whom the EEC Directive of 1978 applied. In addition he submitted that the respondents had not violated the constitutional rights of the wife. (This submission was also adopted by Mr O'Neill on behalf of the Board). He argued that it was legitimate to differentiate between a married person and a single cohabitee, since the former was entitled to a range of social benefits denied to the latter, such as a widow's pension, deserted wife's allowance and prisoner's wife's allowance. He submitted that the decision of the Supreme Court in Murphy .v. Attorney General that the breach of the pledge in Article 41 in that case was not compensated for, or justified by, the existence of such benefits was expressly related to the nature and potentially progressive extent of the burden represented by income tax. He argued that that consideration did not arise in the case of social welfare benefits and that, accordingly, Murphy's case did not support the applicants' contention. Conceding that this submission was at odds with the conclusion reached by Barrington J in Hyland .v. Minister for Social Welfare and Attorney General, he urged that the latter decision should not be followed.

CONCLUSIONS

I am not concerned in this case with the entitlement of a wife to a disabled person's maintenance allowance where her husband has an income from a source other than social welfare benefits. Nor am I concerned, in the circumstances which now exist, with her entitlement in a case where her husband's income consists of, or includes, social welfare payments in respect of his wife's dependency on him. In the present case, the husband has no income

other than the unemployment assistance payable under the social welfare code and, as currently determined, no part of that assistance is attributable to his wife's dependency on him. The primary question for determination, accordingly, is as to whether the Board are entitled to impose a ceiling on the DPMA payable to the wife so as to ensure that the total of that payment and the payments to the husband, made up of his personal rate and the allowances in respect of the two children, do not exceed the total amount which would be payable to the wife as DPMA if both her husband and the children were to be brought into the reckoning as "dependants".

It seems illogical that the amount of the allowance payable to the wife should be reduced by reference to the husband's personal rate of unemployment assistance and the allowances for the children, since it must, as a matter of common sense, be assumed that the latter sums are the minimum sums which, in the view of the legislature, are necessary to enable the husband to support himself and the two children. It is difficult to understand why in any sensible scheme the wife's allowance should be reduced because of a sum to which ex hypothesi she is not expected to have any recourse. It may be, of course, that the Act and the Regulations, properly construed, leave no other option to the Board, considerations of the Constitution and the EEC Directive apart. Accordingly, one must turn in particular to the language of Article 4 of the 1984 Regulations.

These regulations are drafted with the dismal opacity with which we have become all too familiar. Whatever about social welfare assistance or benefits, however, there can be no doubt as to the obligation of the Board to "have regard to" the income of the husband other than social welfare payments when it is determining

the amount of the DPMA. They must also take "full account" of "all income arising by way of benefit or assistance or any increase thereof in respect of a dependent...under the Social Welfare Acts..." This latter provision, literally construed, could of course extend to benefits payable to all the persons mentioned in the first sentence, including in this case the husband, irrespective of whether any part of the benefit in question is attributable to the applicant's being a dependent of the recipient. But it is also open to the interpretation that it is only benefit or assistance payable to the applicant himself, or payable to another but attributable to the applicant's dependency, which is to be taken into account. The latter interpretation seems to me preferable for the reasons already given.

It would seem, moreover that the construction contended for by the respondents would give rise to serious constitutional difficulties. It is clear that, if the applicants in this case were an unmarried couple living together, no account could be taken under Article 4 of any unemployment assistance paid to the man. It would seem to follow that the Regulations are being applied in a manner inconsistent with the pledge by the State in Article 43.1.3, having regard to the decision of the Supreme Court in Murphy .v. Attorney General.

It is, of course, the fact that in the case of an unmarried couple living together no regard could be had to the income of the man arising from any other source, whereas any such income of the husband must unarguably be taken into account, there being no other interpretation possible of the Article. That might at first sight suggest that the Article is invalid having regard to the provisions of the Constitution, a result not contended for on behalf of the applicants. But on closer examination, it appears that this is not so :

it is perfectly legitimate for the Oireachtas to distinguish between the income of a husband (other than social welfare allowances payable for his own support) and the income of a man with whom a woman happens to be cohabiting. In the former case, the husband is obliged both at common law and by statute to devote the appropriate part of that income to the support of his wife. No such obligation exists in the case of the unmarried cohabitee.

It is also true that the wife in this case may at some stage in the future become entitled to one or more of the additional welfare benefits to which Mr Byrne referred, because of her status as a wife or widow. But it seems strangely artificial to abridge her acknowledged rights because of the possibility that she may at some stage become entitled to other benefits. I cannot think that her rights in this context can be less than those of other citizens because of benefits to which she may never become entitled. Moreover, the hardship acknowledged by Kenny J in Murphy .v. Attorney General as arising in the case of income tax, because of the nature and progressive extent of the burden it represents, seems to me to arise far more acutely in the case of social welfare benefits intended to provide the means of livelihood for those at the lowest end of the income scale. I respectfully adopt the reasoning of Barrington J in Hyland .v. Minister for Social Welfare and Attorney General on this aspect of the case and am satisfied that it follows that the interpretation contended for by the respondents cannot be correct. In these circumstances, it is unnecessary and indeed undesirable for me to express any opinion on the third submission advanced on behalf of the applicants, i.e. that the determination is a contravention of the EEC Directive of 1978.

At certain periods in the past, part of the DPMA payable to the wife was also being reduced by reference to payments to the husband

under the Social Welfare Code in respect of her then dependency. That, however, appears to be an application of Article 4 which is at once reasonable and not inconsistent with the constitutional rights of the applicants and I would, accordingly, reject any claim for alleged underpayments under that heading.

Since the respondents now acknowledge that the wife is entitled to a DPMA but calculated in a manner which I have found to be incorrect, it would seem to follow that it is no longer necessary to grant an Order of certiorari quashing the decision of the Board of the 9th June, 1987. It seems to me that the appropriate relief in these circumstances is a declaration

- (a) That the wife is entitled to payment of DPMA at the maximum personal rate with half of the allowance in respect of two dependent children;
- (b) That the husband is entitled to unemployment assistance at the maximum personal rate with half of the allowance in respect of two dependent children; and
- (c) That the Board are not entitled to impose a ceiling on the amount of DPMA payable to the wife by reference to the personal rate of unemployment assistance to which the husband is entitled or the allowances to which he is entitled in respect of two dependent children.

In addition, the applicant's are entitled to damages in respect of any underpayments which appear to arise as a result of the findings I have made.

Ran Kean