



Supplemental Submission to the Inter-Departmental Referendums Committee

Ensuring Constitutional Protection for Non-Marital Families

May 2023

In our initial submission to the Inter-Departmental Referendums Committee, FLAC noted that further detailed legal analysis is required in order to ascertain how amending Article 41 of the Constitution can best enhance constitutional protection of private and family life – while also retaining existing protections. We also recommended that Article 41.3.1 should be amended to ensure that constitutional protections of privacy and family life (in whatever form) are enjoyed equally by non-marital families, and that the provision should specifically reference the rights of non-marital families.

Having consulted further with relevant representative organisations and legal experts, we now wish to provide further details and additional submissions in support of those recommendations.

The role of the State should not involve promoting one idea of the family over others, and supports provided by the State to families (including through taxation and social welfare policy) should not discriminate between marital and non-marital families. The Constitution should ensure this and this supplemental submission is concerned with how this can be achieved.

In particular, FLAC emphasises that the case law of the European Court of Human Rights (ECtHR) and the Irish Courts in interpreting the European Convention on Human Rights (ECHR) underlines the need for both specific reference to the non-marital family in Article 41 of the Constitution *and* non-marital families' right to enjoy supports provided by the State to families.

The Current Provisions of Article 41

Article 41.1 of the Constitution guarantees to “*protect the Family*”. However, Article 41.3.1 provides that “*the Family is founded*” on the “*institution of Marriage*”. The Supreme Court has interpreted these provisions to mean that “*the family’ recognised in Article 41 of the*

constitution is the family which is based on a valid marriage in accordance with the law of the State".¹

In the recent case of *O'Meara v Minister for Social Protection & Ors*², John O'Meara and his children (represented by FLAC) challenged their exclusion from the Widower's (Contributory) Pension Scheme. Mr O'Meara had applied for the payment (on behalf of himself and his children) after the death of his long-term partner (who he had resided with for over two decades). The application was refused on the basis that the couple had not been married. Their case was unsuccessful with the High Court finding that the legislation governing the scheme was not contrary to the Constitution's equality guarantee. The High Court stated that: "*given the special place of marriage in the Constitution (per Article 41.3.1) the 'starting point' is that it is not contrary to Article 40.1 [the equality guarantee] for the State to treat married and non-married persons differently*".³ An appeal in that matter is scheduled for hearing in the Supreme Court in July 2023.

The JCGE Recommendations

The Interim Report of the Joint Committee on Gender Equality (JCGE) suggested deleting Article 41.3.1 or replacing it with the following: "*The State pledges itself to guard with special care the Family, including but not limited to the marital family*". The Committee ultimately opted for the latter option in their final report. They also recommended retaining the existing provisions of Article 41.1.

FLAC's concerns centre around the fact that the approach suggested by the JGCE may not provide sufficient protection for non-marital families.

The experience of the European Convention on Human Rights

Article 8 of the ECHR provides for protection of private and family life. Article 12 provides for a right to marry and Article 14 contains a prohibition of discrimination. The European Court of Human Rights has emphasised that "*the notion of 'family life' in Article 8 (art 8) is not confined solely to families based on marriage and may encompass other de facto relationships*".⁴

However, the ECtHR has rejected cases where non-marital families or couples have complained of discrimination (as compared with marital families) in light of the "special treatment" of marriage under Article 12.

¹ *O'B v. S* [1984] 1 IR 316 (SC).

² *O'Meara v Minister for Social Protection & Ors* [2022] IEHC 552.

³ *ibid* at para. 55.

⁴ *X, Y and Z v United Kingdom* (Application no. 21830/93) at [36].

In *Shackell v. United Kingdom*⁵, the ECtHR considered whether the refusal to grant widow's benefits to the surviving partner in a co-habiting couple breached the ECHR. In declaring the complaint inadmissible, the Court held that the position of unmarried cohabitants was not analogous to that of a married couple, and concluded:

"The Court again notes that marriage remains an institution that is widely accepted as conferring a particular status on those who enter it and, indeed, it is singled out for special treatment under Article 12 of the Convention. The Court considers that the promotion of marriage, by way of limited benefits for surviving spouses, cannot be said to exceed the margin of appreciation afforded to the respondent Government."

A similar conclusion was reached in *Courten v. United Kingdom*⁶, where a same sex couple challenged the refusal of the United Kingdom Inland Revenue to grant them a tax exemption available to married couples. It was argued that as a survivor of a same-sex couple who was unable to marry, the Applicant was denied the tax exemption from inheritance tax available to married couples in violation of Article 14 ECHR. That complaint was also deemed inadmissible and the ECtHR reaffirmed the principle set out in *Shackell*.

The same approach is also evident in the decisions of *Aldeguer Tomas v. Spain*⁷ and *Burden v. United Kingdom*⁸, where the ECtHR stated that a marital relationship is fundamentally different to one based on co-habitation.

This interpretation of the ECHR was accepted by O'Regan J in *McGovern v Chief Appeals Officer and Ors*⁹:

"In *Shackell v. United Kingdom*, the Court... recognised the validity of a difference in treatment of parties to a marriage (or other civil contract), to the treatment of parties without such public contract.

I am satisfied that neither *McLaughlin* nor *Shackell v. United Kingdom* are of any support at all to the applicant in suggesting that his de facto family status must be recognised by the Irish State for the purpose of determining that the applicant is eligible to the claimed pension and grant."¹⁰

⁵ (45851/99).

⁶ (4479/06).

⁷ (35214/09).

⁸ (App. no. 13378/05, 29 April 2008).

⁹ [2021] IEHC 202.

¹⁰ *ibid* at paras 8.5-8.6.

Conclusion & Recommendations

The case law of the ECtHR illustrates the dangers of the approach suggested by the JCGE which involves making no specific reference to the rights of non-marital families in the Constitution. The Irish Courts have accepted the view of the ECtHR to the effect that the ECHR (despite containing protection for private and family life which is not limited to the marital family) allows for differential treatment between marital and non-marital families.

Any amendment to Article 41 of the Constitution should explicitly reference non-marital families *and* their right to enjoy supports provided by the State to families.