In the matter of **Article 26 of the Constitution** and in the matter of the **Health (Amendment) (No. 2) Bill 2004**
[2005] IESC 7, [S.C. No. 524 of 2004]

Supreme Court 16th February, 2005

Constitution – Bill – Validity – Charges for provision of in-patient health services – Retrospective legislation – Separation of powers – Right to life – Right to bodily integrity – Property rights – Delegated powers – Whether cause of action for restitution of monies paid without lawful authority to public authority – Health (Amendment) (No.2) Bill 2004 – Health Act 1970 (No. 1) – Health (Miscellaneous Provisions) Act 2001 (No. 14) – Constitution of Ireland 1937, Articles 15, 40.3 and 43.

Section 53 of the Health Act 1970 provided:-

"(1) Save as provided for under subsection (2) charges shall not be made for in-patient services made available under section 52.

(2) The Minister may, with the consent of the Minister for Finance, make regulations-

(a) providing for the imposition of charges for in-patient services in specified circumstances on persons who are not persons with full eligibility or on specified classes or such persons, and

(b) specifying the amounts of the charges or the limits to the amounts of the charges to be so made."

Having been passed by both Houses of the Oireachtas, the Health (Amendment) (No. 2) Bill 2004 was referred to the Supreme Court by the President of Ireland pursuant to Article 26 of the Constitution of Ireland, 1937.

The Bill made amendments to s. 53 of the Health Act 1970. Its subject matter was the payment of certain charges by certain categories of persons, in most cases elderly persons of limited means, who would benefit in the future, or had benefited in the past, from being maintained in a hospital or home by a health board.

Section 1 of the Bill provided for an amendment to s. 53(2) of the Act of 1970 and, by way of insertion, the addition to that section of nine new subsections.

Section 1(a) of the Bill amended s. 53(2) of the Act of 1970 so as to require the Minister to make regulations for the imposition of charges in certain circumstances for in-patient services provided in the future, insofar as they consisted of the maintenance of a person in a home or hospital by a health board. Section 1(b) of the Bill provided for the insertion after s. 53(2) of certain new subsections with prospective effect – subss. (3),(4),(9),(10) and (11), insofar as it defined "in-patient services" – which governed, *inter alia*, the category of persons on whom such charges might be imposed, the circumstances where such charges might be imposed and their maximum level.

Section 1(b) of the Bill also provided for the insertion after s. 53(2) of the Act of 1970 of certain new subsections with retrospective effect – subss. (5), (6), (7) and (11), insofar as it defined "relevant charge" – for the purpose of declaring as lawful, and as

always having been lawful, the imposition of certain charges for in-patient services which had been imposed, or purported to be imposed, in the past on, and paid by, certain persons pursuant to regulations made (or purporting to be made) under s. 53(2) of the Act of 1970, even though the imposition of such charges was unlawful at the time they were imposed.

Held by the Supreme Court (Murray C.J., Denham, McGuinness, Hardiman, Geoghegan, Fennelly and McCracken JJ.), in finding the retrospective provisions of the Bill to be repugnant to the Constitution, 1, that the prospective provisions of the Bill, those which required the imposition of charges for in-patient services to be provided in future, contained in s. 1(a), amending s. 53 of the Health Act 1970, and the provisions of s. 1(b) of the Bill which inserted subss. (3), (4), (9), (10) and (11) (insofar as the latter subsection defined "in-patient services") in s. 53, were compatible with the Constitution.

2. That the retrospective provisions of the Bill, those which abrogated the right of persons, otherwise entitled to do so, to recover monies for charges unlawfully imposed upon them in the past for the provision of certain in-patient services, contained in s. 1(b), which provided for the insertion of subss.(5), (6) and (7), and subs. (11), (insofar as the latter defined "relevant charge"), in s. 53, were repugnant to the Constitution and, in particular, Articles 43 and 40.3.2° thereof.

3. That it could not be an inherent characteristic of any right to in-patient services that they be provided free of charge, regardless of the means of those receiving them.

Sinnott v. Minister for Education [2001] 2 I.R. 545 distinguished.

4. That it was for the Oireachtas in the first instance to determine the means and policies by which rights should be respected or vindicated. The doctrine of the separation of powers could not in itself be a justification for the failure of the State to protect or vindicate a constitutional right.

5. That a requirement to pay charges of the nature provided for prospectively in the Bill could not be considered as an infringement of the constitutional right to life and the right to bodily integrity as derived from Article 40.3 of the Constitution.

6. That the imposition of charges by the Minister pursuant to s. 53 of the Act of 1970, as amended by the Bill, would be no more than the implementation of the principles and policies contained in the Act and that the power delegated to the Minister to make the regulations concerned was compatible with Article 15 of the Constitution.

Cityview Press Ltd. v. An Chomhairle Oiliúna [1980] I.R. 381 followed.

7. That the discretionary power conferred on chief executive officers of health boards by the Bill to waive or reduce charges in cases of individual hardship did not constitute the exercise of a delegated power to legislate but was rather the exercise of an administrative discretion to address the particular circumstances of an individual case.

8. That the law recognised a cause of action for restitution of money paid without lawful authority to a public authority. Material elements might be whether the money was demanded *colore officii*, whether it was paid under a mistake of law, whether the parties were of equal standing and resources, whether the money was paid under protest and whether it was received in good faith.

Corporation of Dublin v. Building and Allied Trade Union [1996] 1 I.R. 468; *O'Rourke v. The Revenue Commissioners* [1996] 2 I.R.1; *Rogers v. Louth County Council* [1981] I.R. 265 considered.

9. That patients with full eligibility who paid charges for in-patient services were entitled, in the absence of some strong contrary indication, to recover those charges as

of right, subject to any of the defences normally available in civil proceedings. That right was a *chose in action*.

10. That the court should, in observance of the presumption of constitutionality which applied to Acts of the Oireachtas, including Bills referred to the court pursuant to Article 26 of the Constitution, interpret the Bill so far as possible so as to bring it into harmony with the Constitution. It was only on a strained interpretation that this particular Bill could be read as rendering unlawful the failure, in the past, of recipients of in-patient services to pay for them.

11. That the court did not find it possible to discern from United States caselaw any clear principle regarding permissible retrospective legislation which would warrant its adoption in the context of interpretation of the Constitution and that the United States context was quite different. There was no basis for imposing *a priori* limits to the nature of retrospective legislation, other than those which were to be derived from the Constitution itself, as interpreted by the court.

Leontjava v. Director of Public Prosecutions [2004] 1 I.R. 591; *United States v. Heinszen* (1907) 206 U.S. 370.; *Forbes Pioneer Boat Line v. Board of Commissioners* (1922) 258 U.S. 338; *Van Emmerik v. Janklow* (1982) 454 U.S. 1131; *Washington National Arena Ltd. Partnership v. Treasurer Prince Georges County Maryland* (1980) 287 Md. 38 distinguished.

12. That the State was not in this instance in a position to rely on equitable principles relieving defendants from full restitution on the grounds of good faith. That was not to say that monies were necessarily collected in bad faith but, rather, that the Bill permitted no inquiry as to whether there was good or bad faith.

Murphy v. The Attorney General [1982] I.R. 241; *National & Provincial Building Society v. United Kingdom* (1997) 25 E.H.R.R. 127 and *Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 I.R. 64 considered.

13. That, for the purposes of the court's consideration of whether a Bill or any provision thereof was repugnant to the Constitution, the correct approach was, firstly, to examine the nature of the property rights at issue; secondly, to consider whether the Bill consisted of a regulation of those rights in accordance with principles of social justice and whether the Bill was required so as to delimit those rights in accordance with the exigencies of the common good; thirdly, in the light of its conclusions on those issues, to consider whether the Bill constituted an unjust attack on those property rights.

Hamilton v. Hamilton [1982] I.R. 466; *Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 I.R. 64; *The Planning and Development Bill, 1999* [2000] 2 I.R. 321; *Blake v. The Attorney General* [1982] I.R. 117; *Dreher v. Irish Land Commission* [1984] I.L.R.M. 94; *O'Callaghan v. Commissioners of Public Works* [1985] I.L.R.M. 364; *Madigan v. Attorney General* [1986] I.L.R.M. 136; *Tuohy v. Courtney* [1994] 3 I.R. 1; *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321; *White v. Dublin City Council* [2004] 2 I.R. 545; *Electricity Supply Board v. Gormley* [1985] I.R. 129 and *The Housing (Private Rented Dwellings) Bill 1981* [1983] I.R. 181 considered.

14. That the right to the ownership of property had a moral quality which was intimately related to the humanity of each individual and that it was one of the pillars of the free and democratic society established under the Constitution. Under Article 43.2.1° of the Constitution, those rights ought to be regulated by the principles of social justice. The property rights of persons of modest means were necessarily, in accordance with those principles, deserving of particular protection, since any abridgement of the rights of such persons would normally be proportionately more severe in its effects.

Buckley (Sinn Féin) v. Attorney General [1950] I.R. 67 considered.

15. That the right of patients to receive the relevant services free of charge persisted for so long as s. 53(1) of the Act of 1970 remained unchanged; that the services should have been supplied on the express legal basis that they were free of charge; and that the right in question was assignable and would devolve on the estates of deceased persons.

16. That the Bill was not simply a curative or remedial statute insofar as its retrospective provisions were concerned. Curative statutes, in the classical sense, removed unintended flaws in existing legislation and helped to give full effect to the legislative intent behind the initial or original legislation. In deeming the charges imposed contrary to the provisions of s. 53 of the Act of 1970 to be lawful, the Bill was not simply curative since it went directly contrary to the intent of the initial legislation.

17. That the practice which gave rise to the imposition of such charges was not followed simply in the absence of lawful authority but was contrary to the express provisions of s. 53(1) of the Act of 1970, by virtue of which the Oireachtas had decreed that the services in question would be provided without charge. The recovery of such monies thus unlawfully charged by those entitled to do so could not properly be characterised as a windfall.

18. That the right to recover monies for charges unlawfully imposed was a property right of the persons concerned, which was protected by Articles 43 and 40.3.2° of the Constitution from, *inter alia*, unjust attack by the State. It would strain the meaning of the reference in Article 43.2.1° of the Constitution to "the principles of social justice" to extend it to the expropriation of property solely in the financial interests of the State.

Tuohy v. Courtney [1994] 3 I.R. 1; *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321 and *White v. Dublin City Council* [2004] 2 I.R. 545 approved. *The Planning and Development Bill, 1999* [2000] 2 I.R. 321 distinguished.

19. That the Constitution, in protecting property rights, did not encompass only property rights which were of great value. It protected such rights even when they were of modest value and in particular, as in this case, where the persons affected were among the more vulnerable sections of society and might more readily be exposed to the risk of unjust attack.

20. That, in certain cases, the delimitation of property rights might be undertaken in the interests of general public policy. However, the invocation of Article 43 of the Constitution in circumstances where rights enjoyed largely by persons of modest means were to be extinguished in the sole interests of the State's finances would require extraordinary circumstances. The fact that such persons benefited from the services in question was not a rational basis for requiring them to bear the burden of the ultimate cost of the charges which were unlawfully imposed on them.

21. That a statutory measure which sought to abrogate a property right, and which the State sought to justify by reference to the interests of the common good or those of general public policy involving matters of finance alone, could be justified only as an objective imperative for the purpose of avoiding an extreme financial crisis to the State or a fundamental disequilibrium in public finances.

Quaere: the extent to which, in a discrete case in particular circumstances, the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs.

Cases mentioned in this report:-

Air Canada v. British Columbia (1989) 59 D.L.R. (4th) 161 (S.C.C.).
Attorney General v. Hamilton [1993] 2 I.R. 250; [1993] I.L.R.M. 81.
Attorney General v. Southern Industrial Trust (1957) 94 I.L.T.R. 161.
Blake v. The Attorney General [1982] I.R. 117; [1981] I.L.R.M. 34.
Brennan v. Attorney General [1983] I.L.R.M. 449.
Buckley (Sinn Féin) v. Attorney General [1950] I.R. 67.
Byrne v. Dun Laoghaire Corporation [1939] I.R. 585.
Cityview Press Ltd. v. An Chomhairle Oiliúna [1980] I.R. 381.
Corporation of Dublin v. Building and Allied Trade Union [1996] 1 I.R. 468; [1996] 2 I.L.R.M. 542.
The Criminal Law (Jurisdiction) Bill, 1975 [1977] I.R. 129; (1977) 110 I.L.T.R. 69.
T. D. v. Minister for Education [2001] 4 I.R. 259.
Defrenne v. Sabena (Case 43/75) [1976] E.C.R. 455; [1976] 2 C.M.L.R. 98.
Dillane v. Attorney General [1980] I.L.R.M. 167.
Dolan v. Neligan [1967] I.R. 247; (1967) 103 I.L.T.R. 46.
Doyle v. Griffin [1937] I.R. 93.
Dreher v. Irish Land Commission [1984] I.L.R.M. 94.
Electricity Supply Board v. Gormley [1985] I.R. 129; [1985] I.L.R.M. 494..
In re Employment Equality Bill, 1996 [1997] 2 I.R. 321.
Foley v. Irish Land Commission and Another [1952] I.R. 118; (1952) I.L.T.R. 44.
Forbes Pioneer Boat Line v. Board of Commissioners (1922) 258 U.S. 338.
G. v. An Bord Uchtála [1980] I.R. 32; (1979) 113 I.L.T.R. 25.
Georgiadis v. Australian and Overseas Telecommunications Corporation (1994) 179 C.L.R. 297; (1994) 68 A.L.J.R. 272; (1994) 119 A.L.R. 629.
Graham v. Goodcell (1931) 282 U.S. 409.
Hamilton v. Hamilton [1982] I.R. 466; [1982] I.L.R.M. 290.
Health Insurance Commission v. Peverill (1994) 179 C.L.R. 226.
Heaney v. Ireland [1994] 3 I.R. 593; [1994] 2 I.L.R.M. 420.
The Housing (Private Rented Dwellings) Bill, 1981 [1983] I.R. 181; [1983] I.L.R.M. 246.
Howard v. Commissioners of Public Works [1994] 1 I.R. 101; [1993] I.L.R.M. 665.
Iarnród Éireann v. Ireland [1996] 3 I.R. 321; [1996] 2 I.L.R.M. 500.
James v. United Kingdom (1986) 8 E.H.R.R. 123.
Laurentiu v. Minister for Justice [1999] 4 I.R. 26; [2000] 1 I.L.R.M. 1.

Leontjava v. Director of Public Prosecutions [2004] 1 I.R. 591.
Lovett v. Minister for Education [1997] 1 I.L.R.M. 89.
Madigan v. Attorney General [1986] I.L.R.M. 136.
In re Maud McInerney [1976-77] I.L.R.M 229.
MacMathúna v. Attorney General [1995] 1 I.R. 484; [1995] 1 I.L.R.M. 69.
Maher v. Minister for Agriculture [2001] 2 I.R. 139.
Macauley v. Minister for Posts and Telegraphs [1966] I.R. 345.
McGee v. Attorney General [1974] I.R. 284; (1974) 109 I.L.T.R. 29.
McMahon v. Attorney General [1972] I.R. 69; (1972) 106 I.L.T.R. 89.
Minister of Health v. Treatment Action Campaign (2002) 13 B.H.R.C. 1; (2002) (10) B.C.L.R. 1033; (2002) Z.A.C.C. 15; (2002) (5) S.A. 721.
Minister for Social, Community and Family Affairs v. Scanlon [2001] 1 I.R. 64.
Moynihan v. Greensmyth [1977] I.R. 55.
Moynihan v. Waterford Corporation [1942] I.R. 331; (1942) 76 I.L.T.R. 143.
Murphy v. The Attorney General [1982] I.R. 241.
Mutual Pools v. F.C.T. (1992) 173 C.L.R. 450.
F. N. v. Minister for Education [1995] 1 I.R. 409; [1995] 2 I.L.R.M. 297.
National & Provincial Building Society v. United Kingdom (1997) 25 E.H.R.R. 127.
O'B. v. S. [1984] I.R. 316; [1985] I.L.R.M. 86.
O'Brien v. Manufacturing Engineering Co. Ltd [1973] I.R. 334; (1973) I.L.T.R. 105.
O'Brien v. Wicklow U.D.C. (Unreported, High Court, Costello J., 10th June, 1994).
O'Callaghan v. Commissioners of Public Works [1985] I.L.R.M. 364.
O'Donnell v. Dun Laoghaire Corporation [1991] I.L.R.M. 301.
O'Rourke v. The Revenue Commissioners [1996] 2 I.R.1; [1996] I.T.R. 217.
Pavey & Matthews Pty. Ltd. v. Paul (1987) 162 C.L.R. 221.
Pine Valley Developments v. Minister for the Environment [1987] I.R. 23; [1987] I.L.R.M. 747.
The Planning and Development Bill, 1999 [2000] 2 I.R. 321; [2001] 1 I.L.R.M. 81.
Pressos Compania Naviera S.A. v Belgium (1995) 21 E.H.R.R. 301.
Quinn's Supermarket v. Attorney General [1972] I.R. 1.
Rafferty v. Smith, Bell & Company Limited (1921) 257 U.S. 226.
Rogers v. Louth County Council [1981] I.R. 265; [1981] I.L.R.M. 144.

Ryan v. The Attorney General [1965] I.R. 294.
Shelly v. District Justice Mahon [1990] 1 I.R. 36.
Sinnott v. Minister for Education [2001] 2 I.R. 545.
The State (Healy) v. Donoghue [1976] I.R. 325; (1975) 110 I.L.T.R. 9; (1976) 112 I.L.T.R. 37.
Tuohy v. Courtney [1994] 3 I.R. 1; [1994] 2 I.L.R.M. 503.
United States v. Heinszen (1907) 206 U.S. 370.
Van Emmerik v. Janklow (1982) 454 U.S. 1131.
In re a Ward of Court (No.2) [1996] 2 I.R. 79; [1995] 2 I.L.R.M. 401.
Washington National Arena Ltd. Partnership v. Treasurer Prince Georges County Maryland (1980) 287 Md. 38; (1980) 410 A 2d. 1060.
White v. Dublin City Council [2004] 1 I.R. 545; [2004] 2 I.L.R.M. 509.
Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] A.C. 70; [1992] 3 W.L.R. 366; [1992] 3 All E.R. 737.
Zielinski v. France (2001) 31 E.H.R.R. 19.

Reference pursuant to Article 26 of the Constitution

The Health (Amendment) (No. 2) Bill 2004 was passed by the Oireachtas on the 17th December, 2004. On the 22nd December, 2004, the President of Ireland referred the Bill to the Supreme Court pursuant to the provisions of Article 26.1.1° of the Constitution of Ireland 1937, for a decision as to whether the provisions of the Bill, or any of them, were repugnant to the provisions of the Constitution, or any provision thereof.

On the 24th, 25th and 26th January, 2005, the Supreme Court (Murray C.J., Denham, McGuinness, Hardiman, Geoghegan, Fennelly and McCracken JJ.) heard argument from counsel assigned by the court to oppose the Bill and from the Attorney General.

Hearing

Eoghan Fitzsimons S.C. (with him Brian *Murray S.C.*, *Eileen Barrington* and *Bríd O'Flaherty*) counsel assigned by the court to oppose the Bill.

The unenumerated rights provided for by Article 40.3.1° of the Constitution include the right to life, the right to bodily integrity and the right to human dignity of the person. We are asserting those rights on behalf of elderly geriatric patients who are unable to care for themselves and are compelled to live in institutions. They have a constitutional right to be maintained by the State in those institutions until they die.

Hardiman J.: Regardless of means?

Eoghan Fitzsimons S.C.: Yes. If they are not maintained as a matter of right, they are incapable of looking after themselves and will die.

Murray C.J.: Some of them might continue to live on their own but with difficulty.

Eoghan Fitzsimons S.C.: Yes, but people do not tend to go into these institutions voluntarily.

Fennelly J.: Does the statute not impose an obligation in that regard on the State?

Eoghan Fitzsimons S.C.: Yes, but that could be repealed in the morning. The question is whether there is a constitutional right to be maintained without charge.

Fennelly J.: That question has not been referred to the court.

Hardiman J.: Is that right possessed by every person, regardless of means?

Eoghan Fitzsimons S.C.: That is my starting point but, in the alternative, I say that people without means possess that right – either will suffice for the purpose of this argument. Elderly people have a right to life.

Murray C.J.: Everybody has a right to life.

Geoghegan J.: Does that right to life go beyond prohibiting euthanasia?

Eoghan Fitzsimons S.C.: Yes. I would refer the court to *Ryan v. Attorney General* at p. 314, *McGee v. Attorney General* at p. 315, where Walsh J. reiterated the principle, and *G. v. An Bord Uchtála* at p. 69. The State has a positive constitutional duty to assist people to survive who cannot fend for themselves without such assistance.

Hardiman J.: Cannot fend for themselves physically or financially?

Eoghan Fitzsimons S.C.: Both, but primarily physically.

McCracken J.: How is that to be limited? Turning off a life support machine would offend that principle.

Eoghan Fitzsimons S.C.: What relevance does the Constitution have for these old people except for the right to life provision?

Murray C.J.: The Constitution is relevant in many ways to elderly people as citizens.

Eoghan Fitzsimons S.C.: I am talking about people in institutions – the Constitution has no practical relevance for such people, other than the right to life, bodily integrity and human dignity. Those are the only rights that afford them any protection.

Fennelly J.: There is nothing in the Bill that challenges the provision of any of those rights.

Eoghan Fitzsimons S.C.: I was seeking first to satisfy the court that a comprehensive right to life exists for these people, not just one that saves them from euthanasia. The right to life includes the right to assistance to survive, which can only be done by maintaining them in institutions.

Hardiman J.: Are you saying that any form of charge is a breach of that right, however modest the charge or however wealthy the person?

Eoghan Fitzsimons S.C.: That is my starting point.

Geoghegan J.: That is quite a dramatic proposition.

Eoghan Fitzsimons S.C.: The fact that it involves expenditure by the State is irrelevant. The case is made by the Attorney General that the court should not assume a policy-making role in respect of socio-economic rights. However, we say that constitutional socio-economic rights must be protected by the court.

Geoghegan J.: That is a somewhat circular argument – if the implementation of an alleged constitutional right would involve huge expense, it is unlikely to have been intended as a right. The financial aspect might be a relevant factor in that regard.

Eoghan Fitzsimons S.C.: We say not. The question is whether the constitutional right to life extends to the State assisting people not to die.

Hardiman J.: Article 40.3.1° provides that the State shall by its laws vindicate those rights. The State is doing that. Where does it say there is a right to free provision, regardless of means?

Eoghan Fitzsimons S.C.: That right cannot be restricted or qualified by a right to impose charges – there is either a right or there is not.

Hardiman J.: It is the statute that imposes the charges.

Eoghan Fitzsimons S.C.: We submit that there is no entitlement to impose charges.

Murray C.J.: Does the phrase "as far as practicable" in Article 40.3.1° have any bearing on this?

Eoghan Fitzsimons S.C.: It would make a nonsense of the right to life if the proportionality test was applied to it. The State would have to satisfy the court that the imposition of a charge was the only practicable way to vindicate that right. The right to life should not be qualified by the imposition of any charge but, in the alternative, needy or indigent persons should not be charged.

Murray C.J.: The Bill envisages charges which do not impose undue hardship – up to 80% of the non-contributory old age pension. The people concerned are not indigent, in that they have a pension, and the chief executive officers of health boards have discretion to waive the charge.

Eoghan Fitzsimons S.C.: That uncontrolled discretion gives no guarantee and is not sufficient to protect the right.

Murray C.J.: The Bill seeks that people with some means would make some contribution to their maintenance.

Eoghan Fitzsimons S.C.: Persons at the end of their days whose means are very small should be able to keep those means.

Murray C.J.: What criteria would you use under the second leg of your argument – *i.e.* that needy persons should not be charged – for determining who should be charged?

Eoghan Fitzsimons S.C.: It should be set at the level fixed by the Act, *i.e.* the non-contributory old age pension.

Murray C.J.: Why?

Eoghan Fitzsimons S.C.: That was the level fixed by the Oireachtas as representing the appropriate level of maintenance.

Fennelly J.: The non-contributory old age pension is means tested and any other income of the person is deducted from it. Is this not the same?

Eoghan Fitzsimons S.C.: I would submit not.

Hardiman J.: Are you saying that this should be regarded as a minimum sum to which everyone is entitled and that, therefore, any deduction to take account of private means would be unconstitutional?

Eoghan Fitzsimons S.C.: No. Is there a constitutional right to a pension?

Hardiman J.: It seems that you must go that far if you are making that argument.

McCracken J.: You are laying the boundaries of the second leg of your argument on what the State considers to be the proper provision, but the State could halve that amount next year.

Eoghan Fitzsimons S.C.: Yes. In *Lovett v. Minister for Education*, Kelly J. held that a teacher's pension was a constitutional property right.

Hardiman J.: We are talking here about the non-contributory old age pension.

Eoghan Fitzsimons S.C.: The State could amend the Bill and raise the contribution to €1,000.

Hardiman J.: Was that not addressed by Finlay J. in *MacMathúna v. Attorney General*, where he emphasised the principles and policy nature of it?

Eoghan Fitzsimons S.C.: Yes. We have no difficulty with that line of argument. We accept the *dicta* of the court in those cases but they are not relevant to the issues that arise here.

Article 10 of the South African constitution expressly recognises the right to human dignity, article 11 recognises the right to life and article 27

recognises the right to access to health care, qualified by a rule similar to that in *Sinnott v. Minister for Education* and *T.D. v. Minister for Education*, *i.e.* the proportionality principle. It was held in *Minister of Health v. Treatment Action Campaign* that although the separation between the roles of the legislature, executive and courts should be respected, that did not mean that courts could not or should not make orders which have an impact on policy. The cases of *Sinnott v. Minister for Education* and *T.D. v. Minister for Education*, which are so relied on by the Attorney General, suggest that the only issue at stake is money.

Hardiman J.: The right to be maintained has been provided for in statute for over 200 years, under the Poor Law, the provision of county homes and so on. There is power under the modern Health Acts to levy a charge on those who could afford to pay.

Eoghan Fitzsimons S.C.: That was indeed the policy until 1970. It is inconceivable that those who enacted the Constitution would not have envisaged people being maintained in accordance with that 200 year old tradition. We say that that right must be unqualified.

The wide discretion afforded by the new s. 53(2) to the Minister contravenes Article 15.2.1° of the Constitution, in that it constitutes an impermissible delegation of law making power by the Oireachtas to the Minister. There is no indication or guidance in the Bill as to how the Minister's discretion is to be exercised nor is there a definition of maintenance.

Hardiman J.: Must one not look to the Acts as a whole?

Fennelly J.: Does the Bill not give a basis for the charge, subject to the limit of 80% of the non-contributory pension?

Eoghan Fitzsimons S.C.: Yes, but there is no direction to the Minister in regard to the meaning of maintenance. The Bill does not contain sufficient detail to satisfy the principles and policies test.

Hardiman J.: Might the Minister distinguish between different types of institution?

Eoghan Fitzsimons S.C.: That could arise. The new s. 53(4) confers a discretion on the chief executive officers of health boards to waive payment on hardship grounds, which also offends Article 15.2.1° of the Constitution. The scope of the power is not properly defined, nor is

"financial hardship". The chief executive officers' powers are untrammelled.

Murray C.J.: A residual discretion is given under the Social Welfare Acts to the local authorities who administer those Acts. Is this not just an ordinary administrative discretion?

Eoghan Fitzsimons S.C.: We do not object to the discretion in principle, but the chief executive officers should be given some guidance in the Bill as to the definition of hardship, *etc.*

Geoghegan J.: Would guidelines not carry the danger of putting limits on the discretion?

Eoghan Fitzsimons S.C.: Yes.

Geoghegan J.: If a chief executive officer acted wholly irrationally his actions could be judicially reviewed.

Eoghan Fitzsimons S.C.: It is difficult to say that something is irrational if there are no guidelines.

McGuinness J.: But there are no standards for the granting of medical cards.

Eoghan Fitzsimons S.C.: That is a fair point.

The Bill violates the provisions of Article 40.1 of the Constitution in several respects. The persons affected by the Bill are a single class, *i.e.* aged and infirm persons in institutions, yet the Bill creates two categories of discrimination within that class – between those who paid the charge and those who did not and between those who sued to recover the charges before the 14th December, 2004, and those who did not.

The Attorney General refers in his written submissions to *Pine Valley Developments Ltd. v. Minister for the Environment* but does not argue that there are two categories of persons who are to be treated differently; instead, he says that the discrimination is for a legitimate legislative purpose. However, each class has not been treated fairly and this is a clear example of invidious discrimination; its only intended legislative purpose is to save the State from having to pay back money.

The new s. 53(6) ousts the jurisdiction of the courts in violation of Article 34.3 of the Constitution. It acts to exclude applications by citizens for any declaratory relief – if the charges are and always have been lawful, it is

impossible to see how the court could ever grant a declaration that they were unlawful.

Hardiman J.: Would that not be a moot?

Eoghan Fitzsimons S.C.: That is for the court to decide. It is a very strong interference with the administration of justice. Denham J. stated in *White v. Dublin City Council* at p. 573:-

> "It is inherent in the principle of respect for the rule of law that citizens should have the right to challenge the legality of decisions made under public law by administrative bodies."

The Attorney General says that the section does not have that effect as persons who were not in a home when the charge was levied could bring a challenge. However, that misses the point – persons in a home cannot now bring declaratory proceedings.

Murray C.J.: Does that not apply to all curative legislation?

Eoghan Fitzsimons S.C.: No, it depends on the wording.

Murray C.J.: What would be the object of any such proceedings?

Eoghan Fitzsimons S.C.: Such an application might be unusual but it could be brought by citizens seeking to establish their rights.

Murray C.J.: What right?

Eoghan Fitzsimons S.C.: The use of the word "lawful" means that not only can persons not sue for the recovery of the relevant charges, but they also cannot bring simple declaratory proceedings seeking a declaration that what happened was unlawful.

Murray C.J.: What would be the purpose of such proceedings?

Eoghan Fitzsimons S.C.: People have a right of access to the courts. While they might be seen as eccentric, it might be enough for some people to obtain a declaration from the court that something was unlawful.

Hardiman J.: Can you give an example of this from the past? Has such an application ever been made in relation to a curative statute?

Eoghan Fitzsimons S.C.: I cannot give an example. However, Article 34 of the Constitution is precious and the courts must have the jurisdiction to determine all matters and questions of law or fact. That cannot be set aside just because the proceedings which are brought might not make much sense.

Hardiman J.: Are proceedings that are without point fairly described as the administration of justice?

Eoghan Fitzsimons S.C.: The point is that the person obtains satisfaction.

Murray C.J.: Are you talking here about a person who accepts they cannot receive a refund but is just seeking a declaration from the court?

Eoghan Fitzsimons S.C.: A declaration that the person was wronged by the State could give rise to tremendous satisfaction.

McCracken J.: This court refuses to hear cases which come before it which have become moot. What is the difference here?

Eoghan Fitzsimons S.C.: The difference is that the section ousts the jurisdiction of the court. The basis for the Attorney General saying it is moot is a speech given by the Minister to the Dáil, not the statute. That speech does not of itself make it moot – the State must say it is not defending the action.

Hardiman J.: I would like to return to the question of maintenance. Are you saying that maintenance is indistinguishable from paramedical services?

Eoghan Fitzsimons S.C.: It could be. I am pointing out a defect in the Bill which would apply in the case of the vast majority of such patients.

Hardiman J.: Finlay J. made the point in *In re Maud McInerney* that the ward in question was receiving paramedical services above and beyond "mere shelter and maintenance". That suggests that the court distinguished plainly between shelter and maintenance and institutional care above and beyond that.

Eoghan Fitzsimons S.C.: It is important to look at the facts of that case. The ward in question was not sent to St. Brigid's for medical care.

Hardiman J.: The last sentence of Henchy J.'s judgment says that she was receiving "nursing, supervision, activation and other paramedical services".

Eoghan Fitzsimons S.C.: The doctor who recommended that she be transferred to St. Brigid's just said that she needed geriatric care. In my submission, nobody goes to live in such institutions unless they have to.

Murray C.J.: Some people might go to live there for reasons of prudence, such as a wish for safety or companionship.

Eoghan Fitzsimons S.C.: I accept that that class of person could be excluded but the vast majority of people in such institutions need care.

Hardiman J.: You said that maintenance was not seriously distinguishable from the provision of paramedical services, for which there could be no charge. Could maintenance be fairly described as shelter and nourishment?

Eoghan Fitzsimons S.C.: Yes.

Murray C.J.: In what sense is it indistinguishable? Do you mean from an accountancy point of view or objectively?

Eoghan Fitzsimons S.C.: I mean people who cannot fend for themselves and would not survive without assistance. It goes beyond the concept of simple board and lodging.

Murray C.J.: Surely it is not beyond human intellect to distinguish different costs of medical care, paramedical care, food and so on.

Eoghan Fitzsimons S.C.: I do not rule out the possibility of distinguishing costs from an accountancy point of view.

Fennelly J.: The Health Acts must be construed as a whole and the term "maintenance" is used throughout. The definition of in-patient services in the Act of 1970 was considered by Finlay J. in *In re Maud McInerney*, where the ward in question was receiving other services, such as diagnosis. The definition of "in-patient services" in the new s. 53(11) is broken down into maintenance and other elements.

Eoghan Fitzsimons S.C.: But that does not define "maintenance". The maintenance of a person in an institution where they are obliged to stay for medical reasons has, by necessity, a medical component.

Hardiman J.: Would it be fair to regard maintenance as that which a person needs, whether they are inside or outside an institution?

Eoghan Fitzsimons S.C.: No. Maintenance of a person in an institution where they are obliged to stay for medical reasons must have a medical component. It is not comparing like with like.

Hardiman J.: People do not cease to need the necessities of life just because they have other needs.

Murray C.J.: Would you agree that maintenance has a non-medical component?

Eoghan Fitzsimons S.C.: Yes, shelter and nourishment.

Murray C.J.: You said they were indistinguishable but the Act makes that distinction.

Eoghan Fitzsimons S.C.: Yes, but the intention is to make in-patient services a subdivision of institutional care.

Those are my submissions.

Murray C.J.: What defences would be open to the State if the Bill were found to be unconstitutional and it was sued for the recovery of charges levied since 1976?

Brian Murray S.C.: Some claims would be statute barred under s. 11 of the Statute of Limitations 1957. The defence of *laches* would also be open to the State. Henchy J. identified the common law defence of change of position in *Murphy v. Attorney General*.

The Attorney General has said in his written submissions that there was no legal basis for imposing charges on persons of full eligibility and that this practice ceased on the 9th December, 2004, following advice from the Attorney General that the imposition of such charges was *ultra vires* the health boards. This Bill differs from other curative legislation as it goes further than remedying a technical defect but purports to validate a substantial illegality.

Geoghegan J.: Is there any precedent for that?

Brian Murray S.C.: I am unaware of one.

Murray C.J.: Is any illegality, even a technical one, unconstitutional?

Brian Murray S.C.: Not necessarily. There was a deliberate failure on the part of the State to comply with the legislation, especially since 2001.

Hardiman J.: The defect which is sought to be remedied might be radical, but *Murphy v. Attorney General* concerned something which was unconstitutional – would that not be more radical still? The good faith receipt of monies is possible until a statute is challenged. Is what occurred in this case to be regarded as a deliberate breach of statute?

Brian Murray S.C.: Actions undertaken in breach of express provisions of an Act cannot be subsequently validated in a way which impairs the rights of third parties.

Fennelly J.: Is it going too far to say that the breach was deliberate?

Brian Murray S.C.: The Bill draws no distinction between deliberate and non-deliberate breaches. There is no *proviso* in the Bill to protect constitutional rights. The Attorney General says that such a *proviso* would thwart the purpose of the Bill. However, this distinguishes the Bill from previous curative Acts.

I refer the court to the U.S. cases of *Forbes Pioneer Boat Line v. Board of Commissioners*, which prohibited retroactive legislation, and *United States v. Heinszen*, which permitted curative legislation. The distinction between these two lines of authority was analysed in *Washington National Arena Ltd. Partnership v. Treasurer Prince Georges County Maryland*, where the court stated:-

> "There is, on the other hand, one major area of difference between *Heinszen* and *Forbes*. The unauthorized action of the tax collectors in *Heinszen* did not violate a controlling statute setting forth the applicable policy, whereas in *Forbes*, there were legislative enactments setting forth the authority of the Commissioners which, as interpreted by the courts, the Commissioners were violating. In other words, in *Heinszen* there never was an expression of legislative policy contrary to the unauthorized action of the administrative officials."

In this case, the Bill attempts to validate charges which were imposed in circumstances which go beyond a technical defect. The equity of citizens

in recovering these funds is substantial as the State failed to observe its own statute.

Hardiman J.: Do you say there is a prohibition against retrospection?

Brian Murray S.C.: The equity of citizens seeking to recover is far greater where the charge was levied in violation of legislation rather than a technical breach. It is difficult to say that this is rectifying a mistake and it cannot be done in breach of the rights of third parties. There is also a policy consideration, in that citizens are entitled to expect that the State will comply with Acts of the Oireachtas and if it fails to do so they are entitled to enforce the rights conferred upon them.

Hardiman J.: Has the State the power, in principle, to take away rights retrospectively?

Brian Murray S.C.: The broad power to legislate is constrained by the constitutional rights of citizens. In this case, persons who paid these charges have a common law right to recover them. That is a *chose in action* which is a property right.

Murray C.J.: That is a different argument to saying the State cannot retrospectively take an administrative action which is in conflict with statute.

Brian Murray S.C.: It is constitutionally wrong to validate something which was done in breach of statute. The character of the actions which are sought to be validated is relevant.

Hardiman J.: Is the claim that you are making a legal or constitutional one or is it of a more general nature?

Brian Murray S.C.: It is legal and constitutional.

Hardiman J.: How does that affect the *vires*?

Brian Murray S.C.: If the act was done deliberately, there would be a serious question over whether the court could give effect to it.

Geoghegan J.: If the executive does something in breach of statute but no damage is caused to any person, could that be criticised?

Brian Murray S.C.: In regard to this Bill, the court need go no further than appraise the effect on people who paid the charges.

Fennelly J.: What is the specific vested right here?

Brian Murray S.C.: It is the right to recover money which was unlawfully extracted. The State must pay compensation if it is to abolish a property right. It must also establish that the taking of that property right is justified by constitutionally proper exigencies of the common good and that it is proportional. The jurisprudence of this court is, almost without exception, that compensation must be paid where a property right is taken away.

Murray C.J.: Does that mean that this can never be done retrospectively?

Brian Murray S.C.: Here the right is to recover monies levied unlawfully or in breach of an Act of the Oireachtas. There might be no right to compensation if what was abrogated was of a very technical nature because the citizen's equity in that case might be very slight. However, this case falls within the ordinary rules of compensation.

Geoghegan J.: The court held in *O'Callaghan v. Commissioners of Public Works* that if compensation had to be paid in every case it would have meant the end of preservation orders.

Brian Murray S.C.: The plaintiff in *O'Callaghan v. Commissioners of Public Works* was aware of the limitations on his use of the land when he bought it. However, in *Dreher v. Irish Land Commission* compensation was paid because the bonds fluctuated in value.

Murray C.J.: Could there be retrospective validation where the citizen's equity in recovery is very slight?

Brian Murray S.C.: Yes, where the breach was of a highly technical nature.

Hardiman J.: The use of the word "equity" might introduce a difficulty into this analysis. We must look at the equities of both sides.

Brian Murray S.C.: The equity is defined by what the Oireachtas has set it at.

Geoghegan J.: Is the point not whether it is an unjust attack on their property rights?

Brian Murray S.C.: Yes. The Attorney General relies on *Murphy v. Attorney General* as an example of the court applying the exigencies of the common good and considerations of economics in a way which enabled the court to extinguish claims and says that, therefore, the legislature should be entitled to do the same. If the Bill is enacted, no one will be able to recover the charges, even if they were imposed in bad faith, as a result of the legislature's blanket declaration.

Fennelly J.: Who would have the burden of establishing whether it was done in good faith?

Brian Murray S.C.: The party relying on that defence – the State. It was open to the State to limit its defence to monies which were obtained in good faith. However, the Attorney General appears to contend that the financial consequences of reimbursement are, in and of themselves, sufficient to justify barring recovery of the charges, irrespective of the state of mind of the State when it imposed the charges.

Hardiman J.: That is central to your argument and how you distinguish *Murphy v. Attorney General*.

Brian Murray S.C.: Yes. The Attorney General states in his written submissions that the public interest is served by avoiding immense financial problems by not seeking to turn back the hands of the financial clock. He further states that the amount of payments in respect of maintenance charges received by the State over the past six years is €500 million. However, that figure does not distinguish between charges which were imposed unlawfully on fully eligible patients and those which were imposed lawfully on patients of limited eligibility. It does not take account of the fact that a substantial part of that would be barred for reasons of delay or *laches* and that not everyone would seek to recover charges which were unlawfully levied.

Hardiman J.: But that is the aspect of the public interest relied upon by the State. Can the court do more than note that, the amount being so, the Oireachtas took a view in enacting the Bill?

Brian Murray S.C.: The court is entitled to look at the figures and calculate if the State is putting forward a legitimate public interest, but is that sufficient ground to abrogate rights?

Fennelly J.: How do we know that the State regarded this as a potential financial crisis?

Brian Murray S.C.: From the Minister's speech to the Dáil.

Hardiman J.: Is the court to calculate the amount?

Brian Murray S.C.: No. That would put the State in a position that no other litigant could enjoy and would violate the tenets of *Macauley v Minister for Posts and Telegraphs*.

Hardiman J.: The number of people affected and the sum involved might have formed part of the rationale behind the Bill.

Brian Murray S.C.: That is not inconsistent with my case. The court in *Murphy v. Attorney General* was adjudicating on the basis of particular facts. Here, the State seems to be relying on a bald principle that it can give itself immunity from suit in any case.

Geoghegan J.: Is there not a pragmatic aspect to this? Might the enormity of the claims not be a factor?

Brian Murray S.C.: Is the State entitled to introduce laws barring the claims of citizens who have suffered damage as a result of its unlawful conduct simply because the costs are too high?

Hardiman J.: We have seen cases in various countries of the legitimation of the retention of monies. Did Henchy J. not indicate in *Murphy v. Attorney General* the principles on which the legislature might act?

Brian Murray S.C.: They are of a uniquely judicial nature developed by the courts.

Hardiman J.: Might those principles not also be considered by the legislature?

Brian Murray S.C.: Those are general *obiter* statements. Henchy J. applied far narrower principles in the judgment itself. It would have been

inequitable to compel the State to return the monies in the circumstances of that case.

The Attorney General does not rely on any authorities to support his proposition that the financial cost alone of reimbursement provides a justification for barring claims. In *Air Canada v. British Columbia* the court specifically said that that would not extend to the situation where a taxing statute was unconstitutional. Lord Goff also arrived at a different conclusion in *Woolwich Equitable Building Society v. Inland Revenue Commissioners*, which was adopted by Keane J. in *O'Rourke v. Revenue Commissioners.* The point is reinforced by the judgment of the European Court of Human Rights in *National & Provincial Building Society v. United Kingdom*, where the court upheld regulations which had a retroactive effect on the basis that they were consistent with parliament's original intention. The Attorney General has not cited any case in which the cost to the State alone has been a sufficient ground.

Murray C.J.: The Attorney General says that the policy was consistent and that services were *de facto* provided in return for the charges.

Brian Murray S.C.: A number of justifications have been made for aspects of the charges – that something was received in return, that the persons who paid the charges did not object; that the monies were social welfare benefits and can be treated differently to other claims and that the only illegality was the *ultra vires* – but we say that those are all misplaced.

This is not a simple case where goods and services were provided by the State which is entitled to charge for them after the event. The State provided in its legislation – s. 53(1) and (2) of the Act of 1970 – that these services were to be provided free to persons of full eligibility. To say otherwise is a distortion of the true constitutional order and diminishes an Act of the Oireachtas. If the breach had been a technical invalidity, it might be justified to contend that it was merely *ultra vires*, but that is not the case here. The people on whom these charges were levied were the least likely constituency in society to know and articulate their rights.

The new s. 53(5) posits the curiously broad proposition that the imposition and payment of the charge is and always has been lawful. This differs from other curative statutes, in that it does not specify the illegality being cured. On its face, it applies to any regulations made under s. 53(2) and to any charge imposed or purportedly imposed. Therefore, charges made under s. 53(2) would also be lawful.

McGuinness J.: Are you saying that persons of limited eligibility could have been overcharged?

Brian Murray S.C.: There are two issues. First, the category of charges captured by the Bill appears to capture any charge levied under subs. (2). Secondly, the declaration of lawfulness says, on its face, that a charge imposed under subs. (2) is lawful. If, for example, a challenge were brought to the charges on the grounds that they were unreasonable, disproportionate, applied in a discriminatory way and so on, the court would be met with that declaration that the charges are and always have been lawful. The State's response is that the meaning of the Bill is that the only ground of invalidity which citizens will not be able to rely on, because of subs. (5), is the absence of regulations. The State says the court should look at the context and the mischief which is intended to be addressed. We say that that interpretation is not necessarily obvious. The Attorney General also says that subs. (5) must be construed in conjunction with subs. (7). However, subs. (7) was required in any event because subs. (5) does not, of itself, prevent a claimant from suing.

The Bill is disproportionate because of the breadth of the immunity from challenge which it purports to grant. There is no reason why those who paid recently, when the illegality was evident, should be precluded from challenging it. The Attorney General says that is to confuse fault with legislative competence, but fault is relevant to the equity of the persons who have had a charge unlawfully imposed on them.

Hardiman J.: There was an agreement to repay in the Australian case of *Mutual Pools v. F.C.T.*

Brian Murray S.C.: The court must be very careful when looking at the commonwealth constitution, which is not a bill of rights. The court was not concerned with the justice of the expropriation, which was outside the scope of the court's competence in *Mutual Pools v. F.C.T.*

This court is entitled to ask why the State has not formulated a defence based merely on its *bona fides*, which would have brought it inside the decision in *Murphy v. Attorney General*. The court is also entitled to ask why the State did not seek to impose a justifiable cut-off point after July, 2001, when the legal position changed. It is disproportionate that people who paid on the 30th November, 2004, after the State had received the Attorney General's advice, have no right of recovery.

Murray C.J.: Is the point about cost relevant to the proportionality argument?

Brian Murray S.C.: If the objective is found to be constitutionally permissible, the State must still endeavour to do that in a manner which

impairs the right concerned as little as possible, as was held in *Heaney v. Ireland.*

Denham J.: Such as your example of the position of those who paid after the 30th November, 2004.

Brian Murray S.C.: It is possible that citizens paid charges at a time when the health boards knew this was not legally permissible.

Murray C.J.: Should one distinguish on the basis of a fortuitous discovery by the health boards?

Brian Murray S.C.: The common law distinguishes between an unknowing *ultra vires* act, which does not give rise to compensation, and a knowing one.

Murray C.J.: You say that the absence of compensation is fatal. What compensation should be made?

Brian Murray S.C.: A rational and fair scheme of compensation might be sufficient, as suggested in *Dreher v. Irish Land Commission*.

There is an admitted extinction in the Bill of a property right, which is an unjust interference for the following reasons – the right has been extinguished without compensation; the only objective prayed in aid of this by the Attorney General is the State's finances; the validation provision fails to distinguish between cases in which the State might plead a good faith reliance and those in which it cannot; the class of persons affected is a particularly vulnerable one; the Bill is invidious, rewarding those who did not pay and penalising those who did not sue; it is excessively broad, extending to all charges and precluding any grounds of legal challenge. Also, the failure to provide a saver for constitutional rights is a reason in and of itself for condemning the Bill.

Those are my submissions.

Dermot Gleeson S.C. (with him *Paul Gallagher S.C., Gerard Hogan S.C.* and *Douglas Clarke*) for the Attorney General:

The allocation of State resources is a matter for the Oireachtas, as was held in *MacMathúna v. Attorney General*. It is within the scope of the Oireachtas to determine the different levels of care which should apply at the different phases of economic development of our society. It would be novel to identify an unenumerated constitutional right which does not sit with Article 45.4 of the Constitution, which states:-

"The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan and the aged."

Counsel appointed by the court did not identify any sources for a right to free maintenance for long-stay patients, which sits ill with Article 45.4. It is a very indistinct unenumerated right and extraordinarily difficult to satisfy. Primary education is the only thing that is free under the Constitution; there would be a similar sentence in the Constitution in relation to maintenance if it had been intended that it should be free.

Hardiman J.: Counsel appointed by the court said that if it were not to be free there should, in the alternative, be a contribution made.

Dermot Gleeson S.C.: That would be extraordinarily difficult to enforce. What should the level be? It seems to be a singularly inappropriate formulation of an unenumerated constitutional right.

In relation to the submissions of counsel appointed by the court in regard to the right to seek a pure declaratory order, the original jurisdiction of the High Court invoked in Article 34 of the Constitution is an enabling provision. There is no obligation on the court to determine matters, even if they come within that category. There is a whole range of matters of fact which are important to people but which would not be entertained by the courts. There is a range of Irish authorities that a declaration which is of no practical benefit will not be granted – *Moynihan v. Waterford Corporation*, *Doyle v. Griffin* and *Byrne v. Dun Laoghaire Corporation*.

Article 15.5 of the Constitution prohibits retroactive legislation. However, this Bill does something different by assuring the lawfulness of something over which there was a question in the past. The firearms and tax amnesties did a similar thing by recharacterising a past activity.

Hardiman J.: Were any of those statutory?

Dermot Gleeson S.C.: The tax amnesty was.

McGuinness J.: Those amnesties forgave faults of the past, but are you saying that they made those faults lawful?

Dermot Gleeson S.C.: I take the larger rubric that they were recharacterising actions in the past.

Hardiman J.: The tax amnesty was a waiver. Did it legalise those actions?

Dermot Gleeson S.C.: From a contemporary viewpoint, the action is now legal – there is a commonality.

McCracken J.: Those concerned unlawful acts by individual citizens. Are there any examples concerning unlawful acts by the State?

Dermot Gleeson S.C.: In *Pine Valley Developments Ltd. v. Minister for the Environment* the validating statute allowed the retrospective granting of planning permission. The terms of Article 15.5.1° are very important.

Fennelly J.: Is this not beside the point? Counsel appointed by the court did not argue that the Bill was within the scope of Article 15. O'Higgins C.J. held in *Hamilton v. Hamilton* that the courts will interpret legislation in a way which protects vested rights. The ambit of the argument is whether it is unjust.

Dermot Gleeson S.C.: The framers of the Constitution in 1937 chose to continue from the Constitution of 1922 this formulation which prohibits this one form of retroactivity.

Fennelly J.: Nobody is saying the Oireachtas does not have competence to enact any type of legislation, subject to the Constitution. It has unlimited scope in relation to the subject matter of legislation, unlike under a federal constitution.

Dermot Gleeson S.C.: Counsel appointed by the court has no basis for contending that there is an implied rule that there is another category of prohibited retroactive legislation.

What was the conscientious legislator to do when faced in December, 2004 with the Attorney General's advice that the charges were *ultra vires*? Some 275,000 people have made payments since the 1970s. In the majority of these cases, the restitutionary remedy would be for their descendants. The conscientious legislator might see his choice as being between the allocation of money for the currently sick and transferring those resources largely to the descendants of those who paid the charges.

McGuinness J.: A proportionate remedy might be to allow restitution to those who are still alive. We have no real evidence in that regard.

Dermot Gleeson S.C.: About 20,000 are still alive.

Geoghegan J.: Is that not an unprincipled distinction? No distinction has ever been made between living and dead property owners.

Dermot Gleeson S.C.: I do not accept that it is unprincipled.

Geoghegan J.: It is a sentimental distinction.

McCracken J.: The descendants might have contributed to the payments. There cannot be a general rule.

Dermot Gleeson S.C.: The European Court of Human Rights stated in *James v. United Kingdom* that legislatures sometimes need to adopt a one-size-fits-all solution. Finlay J. adverted in *MacMathúna v. Attorney General* to the fact that children's allowance was only part of a set of legislative and executive measures.

Fennelly J.: Would it not have been open to the State to distinguish in the Bill between living and dead claimants?

Dermot Gleeson S.C.: We could always speculate on the different versions the Bill could have taken.

Hardiman J.: Are you drawing attention to the high degree of complexity involved?

Dermot Gleeson S.C.: Yes.

McGuinness J.: We should avoid the appalling vista argument.

Dermot Gleeson S.C.: There is an appalling vista in relation to claims on behalf of deceased persons.

McCracken J.: Those cases are very precise. We know the amounts involved; they do not require an assessment of damages.

Dermot Gleeson S.C.: There could be issues in relation to distribution where the person died intestate. These are legitimate considerations for the conscientious legislator.

Murray C.J.: They had other choices.

Dermot Gleeson S.C.: If the restitutionary remedy is unleashed, a significant number of beneficiaries will receive it as a windfall. It was held in *Air Canada v. British Columbia* that the legislature could pass legislation to fix "sloppy legislative housekeeping". Can the Oireachtas pass legislation to fix sloppy administrative housekeeping, or should it throw up its hands? Should those monies be spent on the currently sick or given to the descendants?

McGuinness J.: Some of the people concerned are the currently sick.

Dermot Gleeson S.C.: Are those legitimate choices to be made by elected representatives or should they be restricted by the courts? Is the apparent constitutional freedom enjoyed by the legislature circumscribed, in fact, by unstated rules?

The rule against retrospective legislation is not accepted and derives from two U.S. cases – *Forbes Pioneer Boat Line v. Board of Commissioners* and *Washington National Arena Ltd. Partnership v. Treasurer Prince Georges County Maryland*. It is not even a consistent part of United States jurisprudence. In Ireland, all legislative power is given to the legislature; the United States have a federal constitution which provides a list of matters in respect of which the United States legislature can enact laws. That weakens the analogy drawn by counsel appointed by the court with the United States cases. The correct approaches to take to the Irish Constitution are the historical, harmonious, broad, literal or purposive ones.

Hardiman J.: One test is whether the legislature would have had power to order it this way in the first place. Counsel appointed by the court says that question is academic because the charges were in contravention of statute.

Dermot Gleeson S.C.: We have not looked yet at the definition of full eligibility.

Hardiman J.: Counsel appointed by the court argued trenchantly that there was no need to explore that because of the concessions made by you.

Dermot Gleeson S.C.: Under s. 45 of the Act of 1970, the definition of full eligibility can be refined by ministerial regulation. The legislature might have envisaged that it would be a narrow class. "Undue hardship" is extraordinarily elastic.

Hardiman J.: Counsel appointed by the court referred to the statement in the Attorney General's submissions that there was no legal basis for imposing the charges on persons with full eligibility and that they ceased on the 9th December, 2004, following advice from the Attorney General to that effect.

Dermot Gleeson S.C.: That is fair, but I am looking at it from a slightly different position. That seems to assume a rigidity in the definition of full eligibility.

McGuinness J.: The definition is clear in so far as the people concerned were issued with medical cards.

Hardiman J.: Does the elasticity or otherwise of the definition matter, given the concession in the Attorney General's written submissions that there was no legal basis for imposing the charges on persons of full eligibility?

Fennelly J.: The point is that a directly contrary provision was enacted. The purpose of subs. (5) is to render lawful what was unlawful.

McGuinness J.: It would have been open to the Oireachtas after the decision in *In re Maud McInerney* to amend the Act.

Dermot Gleeson S.C.: There can be no gainsaying that.

Hardiman J.: Is there anything in the caselaw where something was done contrary to statute?

Dermot Gleeson S.C.: In *Rafferty v. Smith, Bell & Company Limited* taxes on exports from the Philippines were collected under a Philippine Act in breach of an act of the United States Congress which prohibited such export duties. Congress, by an act of 1920, legalised and ratified the collection of the taxes, which was upheld by the court. This case post-dates *Forbes Pioneer Boat Line v. Board of Commissioners* and suggests that the rule contended for by counsel assigned by the court is not as entrenched in United States jurisprudence as suggested. This was confirmed by the United States Supreme Court in *Graham v. Goodcell*. There is no rule in the Irish Constitution against retrospective enactment.

Murray C.J.: Is your thesis that Article 15 of the Constitution prohibits only a narrow class of retrospection?

Dermot Gleeson S.C.: Yes. Denham J. emphasised in *Laurentiu v. Minister for Justice* the powers of the legislature and that they should not be cut down.

Hardiman J.: Counsel assigned by the court might turn your reference to *Laurentiu v. Minister for Justice* against you, in that citizens can expect that the executive will behave in accordance with the law of the land; one simply cannot ignore what the legislature said in 1970.

Dermot Gleeson S.C.: The ban in the Constitution could have been written in a range of ways in 1937. It might be positively dangerous for future contingencies to cut down the power of the legislature to legislate retroactively, for example, if the country were to experience serious financial difficulties. There are no perfect solutions.

McGuinness J.: It might be argued that it is not proportionate to say merely that what was unlawful is lawful.

Dermot Gleeson S.C.: People who are acquitted are not compensated for the time they spent incarcerated. Otherwise, the logic of the decision in *McMahon v. Attorney General*, which concerned the secrecy of the ballot, would have been that there had never been a valid general election or a valid Dáil.

Hardiman J.: There are all sorts of matters at the extremes which must be adapted to, but which do not apply to the general situation.

Dermot Gleeson S.C.: The decision in *Pine Valley Developments Ltd. v. Minister for the Environment* is another example of where a subsequent enactment deliberately controverted a previous one. The Bill is the expression of a political judgment on the balancing of rights and resources and the requirements of social justice and the common good. It addresses taxpayers and those who have benefited from the provision of services. The Bill retrospectively alters the terms upon which a valuable benefit was provided – a benefit which was provided on the basis that it was 100% free will now be 90% free. It is the retrospective adjustment of a benefit. An analogous question was addressed by the High Court of Australia in *Health Insurance Commission v. Peverill*, which related to the retrospective reduction of payments received by doctors.

McGuinness J.: It was accepted as a *chose in action*.

Dermot Gleeson S.C.: The language of the Bill describes the dilemma faced by a legislator who has inherited a problem. Sometimes a speedy solution may be preferable to a legally pure but lengthy and costly one, *e.g.* the two month time limit for seeking judicial review of a planning decision. It is not unusual to adopt solutions which are not legally perfect, for example, the treatment of creditors.

McGuinness J.: But those people know that that is the regime which applies.

Dermot Gleeson S.C.: That is a fair comment. It could also be said that people who went to live in nursing homes thought that paying a contribution was part of that regime. What is sought to be cured here is a lower level of maladministration than occurred in *Murphy v. Attorney General*, which was always *ultra vires* and prohibited by the Constitution.

Geoghegan J.: To what extent would you accept that the fact that *Murphy v. Attorney General* dealt with tax was a unique feature of that case?

Dermot Gleeson S.C.: The principle dealt with by Henchy J. in that case transcends mere tax. He refers to the fact that this is a very large constitutional question. If "absolution" could be granted in the circumstances of *Murphy v. Attorney General*, it could be applied to the marginally lesser dysfunction here. If the rule in that case was competent to the Supreme Court, so too was it competent to the legislature.

Hardiman J.: It was suggested by counsel appointed by the court that the defect was more latent in *Murphy v. Attorney General*. There was no reason until the provision in question was challenged for it to occur to anyone that the statute was unconstitutional. Counsel also said that it was a peculiarly judicial function and that the list of circumstances at p. 314 in the judgment of Henchy J., where the law might recognise that what has happened cannot or should not be undone, was more appropriate to the court than the legislature.

Dermot Gleeson S.C.: But it was not said that the list was not appropriate to the legislature or only appropriate to the court.

Geoghegan J.: That is a very wide proposition.

Dermot Gleeson S.C.: I accept it is necessary to be careful about how it is stated, but the power of the legislature can echo the power of the courts in *Murphy v. Attorney General*. It would be difficult to say that a solution open to the courts was not open to the legislature.

Hardiman J.: Some of the circumstances listed in the judgment seem peculiarly judicial, for example, inveteracy.

Dermot Gleeson S.C.: It is possible to deconstruct the components but they are a bridge between two institutions of state in regard to the remedial power open to one to make orders and the other to make laws. If similar ground rules do not apply, there is potential for considerable constitutional dissonance. There are slight points of distinction: it is not possible to address any hardship suffered by the now deceased and the fact that the people concerned received benefits as a *quid pro quo* for the charges is not irrelevant in terms of justice.

Fennelly J.: But it is the general rule that there should be a remedy.

Dermot Gleeson S.C.: Yes, but one of the qualifications is that there should be categories of restitution. As Henchy J. quoted at p. 315 in *Murphy v. Attorney General*, "The statue has taken its shape and can never go back to the quarry".

Geoghegan J.: How relevant is the passage at p. 319 of Henchy J.'s judgment, where he states:-

> "The circumstance that tax payments are liable to be quickly absorbed into the financial system of the State, and not to be amenable to extraction and repayment without considerable disruption and unfairness, has led United States authorities to treat such payments as being so unique in character that repayments have been legislatively held to be barred by *laches* of periods as short as thirty days."

That passage seems to place a heavy emphasis on the taxation factor in the case.

Dermot Gleeson S.C.: That passage should not be limited by something as mundane as tax.

McCracken J.: Do you say that the Act of 1970 was bad legislation?

Dermot Gleeson S.C.: No.

McCracken J.: So the Bill is not seeking to put right bad legislation, as was the case in *Murphy v. Attorney General*?

Dermot Gleeson S.C.: It is addressing maladministration.

McCracken J.: That is a huge distinction.

Dermot Gleeson S.C.: They are both emanations of the State and both need to be fixed.

McCracken J.: The legislation in question in *Murphy v. Attorney General* had to be fixed because it was constitutionally impermissible.

Dermot Gleeson S.C.: In regard to whether the Bill constitutes an unjust attack on constitutional rights, unjust does not mean illegal.

Geoghegan J.: Does it mean immoral? Just and unjust are not exactly cognate; just is not necessarily the opposite of unjust.

Dermot Gleeson S.C.: There is no definition of "just" in the caselaw, but it clearly partakes of a moral quality and a sense of fairness. An unjust attack offends notions of fairness and propriety. However, what might appear fair to one person might smack of injustice to another.

It is appropriate here to look at the context. The charge was a partial contribution – typically 10% of the total cost – and services were provided to the persons from whom the contribution was levied. Persons who moved into residential care moved from having to self-finance all of their food, shelter, light, laundry, *etc.*, to having all their needs provided out of State resources, for which they were asked to pay a contribution. The contributions were not taken from everybody and general taxation paid provided 90% of the cost.

Hardiman J.: In the context of this reference, who bears the onus of proving whether it was just or unjust?

Dermot Gleeson S.C.: I believe the Bill enjoys the presumption of constitutionality.

Murray C.J.: That might shift.

Geoghegan J.: The issue is not whether it was right or not to levy a charge.

McCracken J.: The State provides a non-contributory pension to persons to allow them maintain themselves. If the State then provides such persons with maintenance, they are receiving a double benefit and there is an injustice on the other side.

Dermot Gleeson S.C.: Precisely. It is not possible to prise apart the money given and the benefit received in assessing the justice.

Hardiman J.: Would that be available as a set-off or counterclaim in a case for restitution?

Dermot Gleeson S.C.: I am not sure, but they are closely connected in terms of the moral appraisal of what happened.

Fennelly J.: But the statutory policy clearly changed in 2001.

Dermot Gleeson S.C.: I must acknowledge that.

Geoghegan J.: In regard to a possible counterclaim, the people concerned were entitled to free services.

Dermot Gleeson S.C.: I can see difficulties in that regard.
Those are my submissions.

Paul Gallagher S.C.: Fennelly J. earlier drew attention to the reference at p. 319 of the judgment of Henchy J. in *Murphy v. Attorney General* to the position in the United States in relation to restitution. However, Henchy J. was looking at the general defences to any private law action for restitution. Change of position has always been a fundamental defence to a claim for restitution. In this case, the fundamental change is that the monies received were used by the health boards for a wide range of functions and were taken into account by the Oireachtas annually when it was making appropriations to health boards.

Murray C.J.: What evidence is there for that?

Paul Gallagher S.C.: Under the Act of 1970, the health boards take account of their resources and the Minister makes a grant. The monies collected were used by the health boards for health board purposes and were taken into account by the Minister. That represents a significant change in position.

Tax cases are in a special category. There is a good analysis of the issue in *Air Canada v. British Columbia*. The reason is that the State is sovereign and its affairs must be conducted in the best interests of the welfare of its people.

Fennelly J.: There is an obligation to pay tax but the people who objected to paying these charges did not have to pay.

Paul Gallagher S.C.: There was no examination of the individual equities in *Murphy v. Attorney General*; all claims were barred. The court corrected the mistake of the legislature, which had enacted an unconstitutional statute, and provided a solution. The analogy holds. The excusing of an unconstitutional demand for money requires a higher degree of "absolution" than would be required by the *ultra vires* action in this case. *Murphy v. Attorney General, Howard v. Commissioners of Public Works* and *Pine Valley Developments Ltd. v. Minister for the Environment* all involved the extinguishing of *choses in action*, which is an inherent part of validating legislation.

Geoghegan J.: The main point in the judgment of Henchy J. in *Murphy v. Attorney General* was that it was void *ab initio*.

Paul Gallagher S.C.: Henchy and Griffin JJ. were of the view that there was an overriding public policy element in excluding claims without individually examining them. Chapter 3 of the Act of 1970 provides for the financing of health boards. Their accounts are certified and laid before the Houses of the Oireachtas by the Minister. Over the years, the monies obtained in charges were taken into account by the health boards and expended for statutory purposes. There has been a substantial change in the range and quality of benefits conferred on patients over the years, with a substantial increase in cost.

McCracken J.: Those charges were supposed to be for maintenance. Maintenance costs have not increased greatly.

Paul Gallagher S.C.: The level of maintenance has improved. People with full eligibility also have the benefit of free medical care, which has increased in cost. It would be extremely difficult, if not impossible, to "unscramble the egg" at this stage. It would also have adverse effects on the health care system, which has been premised over the years on the use of those monies.

Murray C.J.: The most you can say is that it will have an effect on future allocations. I am not certain that it would be difficult to ascertain the amounts.

Paul Gallagher S.C.: It would involve significant extra administrative costs, given the lack of records and so on. Many cases could go back further than the six-year limitation period under the Statute of Limitations 1957 where, for example, people were under a disability.

Murray C.J.: We do not know if there is a significant number of such people.

Paul Gallagher S.C.: It is reasonable to assume there are some.

McCracken J.: The onus is on the claimant to prove his case and not on the State to disprove it.

Paul Gallagher S.C.: But the claims will have to be examined. There is a serious onus on the State to ensure the claims are valid. That cannot be quantified in the abstract but there are real issues which need to be wrestled with.

Hardiman J.: Would those claims be a windfall?

Paul Gallagher S.C.: Yes.

Fennelly J.: How could it be a windfall when the charge was prohibited?

Paul Gallagher S.C.: It would be a windfall in the sense that the persons had no expectation of receiving it.

Geoghegan J.: Would that level of expectation not apply in numerous instances where persons take actions against health boards?

Paul Gallagher S.C.: Independent wrongs done by the State raise different issues. Any statutory benefit is susceptible to change over the years. That point was made in *Health Insurance Commission v. Peverill* and in *Maher v. Minister for Agriculture*, where Denham J. analysed whether a milk quota was a property right.

Geoghegan J.: But that property right is not in issue; here, it is the *chose in action* to recover the money.

Paul Gallagher S.C.: That is not different to the *chose in action* in *Health Insurance Commission v. Peverill*, which derives from statute and is inherently susceptible to change.

McCracken J.: The persons concerned paid the charges out of their non-contributory pensions. Are you saying that that was only tentatively their own money and that the State could reclaim it at any time?

Paul Gallagher S.C.: No, but the Oireachtas was entitled to take into account the nature of the benefit.

McCracken J.: But the *chose in action* arises from the prohibition in the Act.

Paul Gallagher S.C.: The prohibition conferred a benefit. The Oireachtas is entitled to have regard to a number of factors when examining the exigencies of the common good. The Act was a complex piece of legislation which provided a wide range of benefits. In *MacMathúna v. Attorney General*, which analysed the provision of benefits to unmarried mothers, Finlay J. held that the court could take into account the whole range of provision that the State made for the people affected. In *The Planning and Development Bill, 1999* Keane C.J. referred at pp. 357 and 358 to *Ryan v. The Attorney General* and stated:-

> "… The presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to legislation dealing with controversial social and economic matters. It is peculiarly the province of the Oireachtas to seek to reconcile in this area the conflicting rights of different sections of society and that clearly places a heavy onus on those who assert that the manner in which they have sought to reconcile those conflicting rights is in breach of the guarantee of equality."

Geoghegan J.: Is there any relevant caselaw on whether the onus can shift?

Paul Gallagher S.C.: It does not shift. Keane C.J. stated at p. 348:-

> "It is no doubt the case that the individual citizen who challenges the constitutional validity of legislation which purports to delimit or regulate the property rights undertakes the burden of establishing that

the legislation in question constitutes an unjust attack on those rights within the meaning of Article 40."

Geoghegan J.: Regardless of the secret knowledge of the State, the plaintiff must show there was an injustice.

Paul Gallagher S.C.: Yes, that is part of the presumption of constitutionality.

Fennelly J.: You introduced the notion of a stronger presumption of constitutionality where the Oireachtas is balancing rights between citizens, as in *Tuohy v. Courtney*. However, this case is not really about balancing rights between citizens but is about balancing citizens' rights against the State's interest.

Paul Gallagher S.C.: Here, the balancing is between competing demands on the State's resources for the provision of benefits. It is in that context that Henchy J. said a "heightened presumption" applies.

Fennelly J.: You accept there is an encroachment on a property right.

Paul Gallagher S.C.: If it is a property right, it was originally conferred by the State in conjunction with a range of benefits under the Act of 1970.

Murray C.J.: You are not putting in issue that there is an interference in a property right but you are relying on the common good. What are the criteria?

Paul Gallagher S.C.: Who is to pay for this? The competing rights of citizens must be balanced. The money has been paid and the State has conferred a very significant benefit on the people concerned. The health boards utilised monies for these benefits, the substance of which has improved substantially over the years. The test is that this is the only permissible remedy. We say that this is in the range of permissible remedies.

Hardiman J.: One of the criticisms advanced is that the Bill does not contain a saver for constitutional rights and that its general indiscriminate nature means that it is manifestly not one that interferes as little as possible.

Paul Gallagher S.C.: All that is remedied by the Bill is the *ultra vires* nature of the charge.

Fennelly J.: I find it impossible to see how you can say that.

Paul Gallagher S.C.: The new subs. (7), which states:-

> "Subsection (5) is in addition to, and not in derogation of, any ground (whether under an enactment or rule of law) which may be raised in any civil proceedings (including civil proceedings referred to in subsection (6)) to debar the recovery of a relevant charge."

Fennelly J.: But subs. (7) just shows that subs. (5) is only one remedy. The term "relevant charge" also applies to persons of limited eligibility.

Paul Gallagher S.C.: Subsection (7) envisages issues other than the *vires* one and makes clear that subs. (5) is only a defence to the *vires* issue.

Fennelly J.: I find this a troubling point. What would be the public interest if it debarred persons of limited eligibility from raising a legitimate complaint?

Paul Gallagher S.C.: We are not putting it forward on that basis.

Fennelly J.: And so it is indefensible.

Hardiman J.: You say that subs. (5) deals purely with the *vires* of imposing a charge at all and is not to be read as meaning any charge.

Paul Gallagher S.C.: The phrase "imposition and payment" is clearly directed towards the *vires* and is designed to remedy the mischief of the imposition of the payment of a charge by persons of full eligibility. The court would dismiss out of hand any claim by the State that this was a catch-all provision to cover all charges. That could never have been meant by the Oireachtas.

Murray C.J.: You say that the choice made by the legislature was rational and that the court should refer to the role of the Oireachtas in making those choices. Does the court not have to look at other choices and their proportionality?

Paul Gallagher S.C.: The question is not whether the choice was the preferable one but whether it was rational and within the permissible range. The illegality arises out of an *ultra vires* act and not an independent wrong.

Geoghegan J.: It was not just *ultra vires*, it was prohibited.

Paul Gallagher S.C.: As was the case in *The Planning and Development Bill, 1999.*

Murray C.J.: But it was a wrong committed by the State. What is the rationale for visiting it on one narrow sector rather than on the general budget?

Paul Gallagher S.C.: The context of the wrong is that it is not unfair to expect people to contribute a proportion of the cost of a benefit conferred on them by the State.

Geoghegan J.: The State deliberately misapplied its own law.

Paul Gallagher S.C.: That is the case in all *ultra vires* cases. The Oireachtas was aware when it introduced this ratifying legislation that that should not have happened. However, the State is not normally held liable for damages in *ultra vires* cases, even where great damage was done.

McGuinness J.: The Oireachtas has decided on a narrow solution. Are you saying the proportionality of that solution is not open to scrutiny by this court?

Paul Gallagher S.C.: No, but it meets the proportionality test and is within the range of permissible solutions.

Hardiman J.: The point has been strongly made that this is different from the simple *ultra vires* cases. Are cases such as *United States v. Heinszen* different to ones which concern an express prohibition?

Paul Gallagher S.C.: No. There is no suggestion that the Oireachtas did not realise that this should not have been done. Whether an *ultra vires* act is of a technical nature or is more fundamental, the consequences are the same. However, this case differs from *Murphy v. Attorney General*, in that the people who paid the charge received a direct benefit.

Subsection (5) does not apply to civil proceedings instituted on or before the 14th December, 2004. This is to prevent interference with the

administration of justice. A date had to be fixed to prevent a flood of claims being instituted in the intervening period.

McCracken J.: A person who issued proceedings on the 14th December, 2004, is not affected by the Bill. However, a person who properly thought on the 14th December, 2004, that they had years to issue proceedings now has nothing. Is that not inequality?

Paul Gallagher S.C.: It would not be possible to cut out claims which are already in existence. In curing the problem, some date has to be fixed. It is a proportionate interference.

Hardiman J.: The alternative would be to adopt the line in *Buckley (Sinn Féin) v. Attorney General*.

Paul Gallagher S.C.: That is the problem.

McCracken J.: If the Oireachtas had picked a date in the future, the inequality would have been lessened.

Paul Gallagher S.C.: It is a recognised and permissible mechanism.

McGuinness J.: What about the knowledge of those who administered the scheme? They must have had doubts about it when people objected to paying the charge.

Murray C.J.: The implication is that they were conning people.

Paul Gallagher S.C.: That is being investigated.

Hardiman J.: This might have implications for the Statute of Limitations.

McCracken J.: It might also have implications for actions for fraud, which the Bill also bans.

Paul Gallagher S.C.: The Bill says that any challenge based on *vires* could not succeed. Anything else is open on the interpretation of the Bill.

Fennelly J.: It was absolutely clear to the health boards that they had no right to levy these charges on people over the age of 70 from 2001 and yet they were levied.

Paul Gallagher S.C.: I agree that the period from 2001 is a different matter.

Murray C.J.: Was the Oireachtas in a position to make the decision it did in the absence of any information on whether the health board knowingly concealed people's rights from them?

Paul Gallagher S.C.: The Oireachtas knew it did not know the full facts but took the view that this was a very serious problem which could not wait.

Hardiman J.: Is a narrow construction of subs. (5) mandated by the tenets of constitutional construction?

Paul Gallagher S.C.: Yes. There is no substance to the contention by counsel assigned by the court that the Bill constitutes an impermissible delegation of law-making power by the Oireachtas to the Minister for Health and Children and to the chief executives of the health boards. The delegation does not infringe the principles and policies test set out in *Cityview Press Ltd. v. An Chomhairle Oiliuna*.

Hardiman J.: Is it fair to say that your fundamental position must be that no possible answer to the not yet fully known details could affect the State's ability to provide a remedy?

Paul Gallagher S.C.: Yes. According to *Air Canada v. British Columbia*, the State cannot be prevented by the bad faith of its servants from providing a remedy.

Hardiman J.: Why is that limited to the *vires*? Why can it not extend to fraud?

Paul Gallagher S.C.: The right to legislate cannot be dependent on some fact finding exercise.

Geoghegan J.: It does not depend on the degree of turpitude of an organ of the State.

Paul Gallagher S.C.: Yes, there are other ways of dealing with that. Even if there is an assumption of bad faith, it is not the only matter to be taken into account. The State does not say this is a perfect solution and that

there will not be injustice, as was the case in *James v. United Kingdom*. That is an inevitable part of the legislative function.

Hardiman J.: Would it be possible to distinguish between claims by those who are still alive and claims by people's estates?

Paul Gallagher S.C.: It would be possible to have different solutions but the State has decided it should not make that distinction. It would not solve the problem to pay just those who are still alive.

McGuinness J.: Do you say that misrepresentation claims would not be excluded by the Bill?

Paul Gallagher S.C.: Fraudulent misfeasance claims would not be excluded as they are independent of the *vires* issue.

McCracken J.: Was the taking of person's pension books not an implied representation that this was lawful?

Paul Gallagher S.C.: We do not know what representations were made.

Those are my submissions.

Eoghan Fitzsimons S.C. in reply:

The fact that there is no source in caselaw for the right to free maintenance does not mean that such a right does not exist. The pledge in Article 45.4 of the Constitution that the State will, where necessary, "contribute to the support" of the aged does not mean there is not an independent right to life. Counsel for the Attorney General said that there was a reference to free primary education in Article 40.2.4° and that the word "free" was not used elsewhere in the Constitution. However, that did not cause a problem for the court in *Healy v. Donoghue*, which concerned the provision of free legal aid. The court should not attach significance to the language of Article 40.2.4°. Counsel also said that such a right was vague and difficult to enforce. However, the Oireachtas is in charge of the allocation of resources and that issue would arise only after the decision was taken on whether the right exists.

Counsel for the Attorney General cited the cases of *Moynihan v. Waterford Corporation*, *Doyle v. Griffin* and *Byrne v. Dun Laoghaire Corporation* in support of his contention that the courts will make declaratory orders which are of practical effect only. However, those authorities to not appear to justify the principle. The statement made by Black J. in *Byrne v.*

Dun Laoghaire Corporation was made after the plaintiff had lost the case and so was effectively meaningless. An overall reading of *Moynihan v. Waterford Corporation* indicates that the question of a declaration would not have arisen. These are all old cases and predate O. 19, r. 29 of the Rules of the Superior Courts, which states:-

> "No action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may, if it thinks fit, make binding declarations of right whether any consequential relief is claimed or not."

A more modern decision is *O'Donnell v. Dun Laoghaire Corporation*, which is cited at p. 177 of Ó Floinn & Cannon's *Practice and Procedure in the Superior Courts*.

Murray C.J.: What about declaratory orders with no practical benefit?

Eoghan Fitzsimons S.C.: The Order recognises mere declaratory orders.

Murray C.J.: A declaratory order can have immense practical effects.

Geoghegan J.: It was akin to a judicial review in *O'Donnell v. Dun Laoghaire Corporation* and very real.

Eoghan Fitzsimons S.C.: I accept there was a reality to that case.

The new s. 53(5) now deems charges which were not lawful when they were imposed to have been lawful at the time. The necessary implication of that is that those who did not pay acted unlawfully, which is a departure from Article 15.5.1° of the Constitution.

Counsel for the Attorney General said there was a legislative choice between providing money for the currently sick and money for the descendants of those who paid these charges. The figure of €500 million was referred to in the written submissions but there was no reference to the current budget provision of €11 billion. There is no reliable evidence before the court which would allow the court consider a proportionality agreement. This will not cause a serious financial crisis for the State – the problem could be solved by a supplementary estimate. The proportionality argument could not carry the day on the basis of the evidence before the court. It may be a side effect of the Article 26 procedure that the court cannot consider the proportionality argument and may have to look instead at the question of "unjust attack".

Hardiman J.: If the Bill falls and the ordinary restitution processes proceed, people who paid these charges will be entitled to €40,000 but people on ordinary pensions who maintain themselves will be entitled to nothing. Is that just?

Eoghan Fitzsimons S.C.: Yes. Money was taken from these people which should not have been taken. A person who maintains himself has a quality of life which a person in a nursing home does not.

In regard to legislative competence, counsel for the Attorney General referred to United States caselaw. He argued that *Rafferty v. Smith, Bell & Company Limited* followed *United States v. Heinszen* and restated *Forbes Pioneer Boat Line v. Board of Commissioners*. In fact, *Rafferty v. Smith, Bell & Company Limited* was decided on the 5th December, 1921, before *Forbes Pioneer Boat Line v. Board of Commissioners*, which was decided on the 10th April, 1922, and in which Holmes J. referred to *Rafferty v. Smith, Bell & Company Limited*. The more recent case of *Van Emmerik v. Janklow* in 1982 confirmed the *Forbes Pioneer Boat Line v. Board of Commissioners* principle.

Counsel for the Attorney General argued for a societal interest in finding a clean solution. However, *Murphy v. Attorney General* was a unique case and intended to be so. It has been used as a wide-ranging authority but it was a particular case intended to solve a very particular problem. Tax rates were extremely high in 1980 and the State potentially faced a vast liability as a result of that decision.

Hardiman J.: That is not mentioned in the judgment. The effect of the case was simply to prevent married couples being less favourably treated than unmarried couples. It did not affect the tax rates.

Eoghan Fitzsimons S.C.: Yes, but it involved every married couple in the State. That case was not really decided on principle.

Murray C.J.: The principle was the equilibrium of the socio-economic structure.

Eoghan Fitzsimons S.C.: To a point. One is talking about the courts taking a pragmatic approach.

Murray C.J.: An argument in favour of the Bill is that the courts and the legislature can seek pragmatic solutions to particular problems in certain cases.

Eoghan Fitzsimons S.C.: That is for the court to decide. Counsel for the Attorney General is saying that because the Supreme Court could do this in *Murphy v. Attorney General*, the State can do it in legislation. I say that that was a particular case which solved a particular problem and is confined to the area of taxation.

Geoghegan J.: You used the expression "solving a particular problem". Does this case create a problem within the normal meaning of the expression?

Eoghan Fitzsimons S.C.: The remedy cannot be viewed from only one perspective. Individuals from whom money was taken have a right to consider their remedy. Section 53(5) provides only a remedy for the State's problem, as it sees it.

Geoghegan J.: In common law jurisdictions the State is sued in the same way as any other person. If the State is found liable, it is obliged to pay, which may create unusual societal problems which have to be solved. However, the question here is whether the alleged problems are of that degree.

Eoghan Fitzsimons S.C.: We would submit they are not but there is no evidence before the court.

Murray C.J.: The sum of €500 million was mentioned. The resources of the State are finite and €500 million could make a difference to the allocation of resources and the common good.

Eoghan Fitzsimons S.C.: Is it in the common good that the State should be seen to take money from people? There are other factors to be considered.

Murray C.J.: There is a multitude of factors to be considered, including the benefits which were conferred.

Eoghan Fitzsimons S.C.: The common good is not to be the budget. It will involve additional expenditure, but the money which was taken is the property of these people. Counsel for the Attorney General submitted that injustices occur which must be lived with. The danger is that the court could find itself tolerating injustice as a matter of principle. The court would need very persuasive evidence to justify setting aside basic common law principles. There is no such evidence before the court. The sum of

€500 million is not large in the context of this year's overall health budget of €11 billion.

Murray C.J.: We know that there is huge pressure on resources.

Eoghan Fitzsimons S.C.: Taxation can always be raised to pay for services. That is a decision for the Oireachtas, motivated by the interests of the common good.

Hardiman J.: Do you agree that two principles which flow from the decision in *Murphy v. Attorney General* are that the ordinary path of restitution may be transcended and that the right to complain of unjust enrichment is triggered by the complaint?

Eoghan Fitzsimons S.C.: I am troubled by the use of the term "principles". The first is not a principle but the court takes a policy view on it.

Murray C.J.: The principle is whether the court can apply pragmatic solutions to particular problems. There are then questions of circumstances and criteria.

Eoghan Fitzsimons S.C.: The State is, of course, bound by the Constitution.

Geoghegan J.: Henchy J., at p. 319 of his judgment in *Murphy v. Attorney General* uses the expression "unique" in relation to the United States tax cases.

Eoghan Fitzsimons S.C.: I would suggest that if there had been no problem about everybody affected by that judgment being compensated, Henchy J. would not have gone so far to protect the State.

Hardiman J.: Was it unique because it was a tax case?

Eoghan Fitzsimons S.C.: The fact that it was a tax case and its significant financial implications give the rationale for the decision.

Fennelly J.: An element in the judgment of Henchy J. is the presumption of constitutionality and the fact that the State was not on notice of the claim. The state was also not on notice in *Defrenne v. Sabena*. However, it is clear in this case what the law was, at least from 2001.

Eoghan Fitzsimons S.C.: I accept that is part of the reason. However, if the court accepts that *Murphy v. Attorney General* is a valid authority which should be accepted across the board, a significant portion of the judgment of Henchy J. is based on the proposition that the State acted in good faith and in the legitimate belief in its entitlement so to act. The problem here is that the court is not in a position to explore whether there was good faith or whether objections were raised. There is no evidence before the court in relation to the issues which are relevant to a consideration of that decision. For that reason, it cannot be availed of as an authority to justify the State's defence. If it could be relied on, the State would have *carte blanche* in every future case where similar circumstances arose. Phrases such as "clear solution" and "societal interest" are very pleasant but people have rights under the Constitution.

Counsel for the Attorney General referred to windfall gains. The case of *National & Provincial Building Society v. United Kingdom* involved a sum of £15 billion, which parliament had intended to charge and, so, was a true windfall. Here, the Oireachtas had expressly forbidden these charges, so the term "windfall" is not appropriate. Counsel for the Attorney General also said that the Bill is a permissible remedy. It is a remedy for the State but not for the individuals concerned.

Counsel for the State said that the scope of the Bill is limited to the *vires* issue. However, the new s. 53(11) defines "relevant charge" as a charge "imposed (or purporting to be imposed)", which would include persons of limited eligibility. I do not accept the construction advanced by counsel.

Fennelly J.: Counsel for the Attorney General seemed to concede that your construction was correct but that it was mandated by the Constitution.

Eoghan Fitzsimons S.C.: Yes, under the double construction rule, but there is only one construction here. Counsel for the Attorney General submitted that individuals could not be stopped from suing for misfeasance, but the State has said the opposite in its written submissions.

Those are my submissions in reply.

Cur. adv. vult.

In accordance with the provisions of Article 26 of the Constitution, the judgment of the Supreme Court was delivered by a single member.

Murray C.J. 16th February, 2005

1 This is the decision of the Supreme Court on the reference to it by the President of the Health (Amendment) (No. 2) Bill 2004, referred pursuant to Article 26.2.1° of the Constitution.

The reference

2 By order given under her hand and seal on the 22nd December, 2004, the President, after consultation with the Council of State, referred, in pursuance of the provisions of Article 26 of the Constitution, the said Bill to the Supreme Court for a decision on the question as to whether any provision of the Bill is repugnant to the Constitution or any provision thereof.

Proceedings on the reference

3 Counsel were assigned by the court to present arguments on the question referred to the court by the President. Prior to the oral hearing counsel assigned by the court presented written submissions to the court, including submissions that certain provisions of the Bill were repugnant to the Constitution. Submissions in writing by and on behalf of the Attorney General were presented to the court submitting that none of the provisions of the Bill was repugnant to the Constitution.

4 The oral hearing then took place before the court on the 24th, 25th and 26th January, 2005. During the course of the hearing the court heard oral submissions by counsel assigned by the court and by counsel for the Attorney General.

The legislation

5 The Bill in question is a short Bill and, since the entire Bill is the subject of the question referred to the court pursuant to Article 26 of the Constitution, it is appropriate to set out its terms in full:-

"*HEALTH (AMENDMENT) (NO. 2) BILL 2004*

AN ACT TO AMEND SECTION 53 OF THE HEALTH ACT 1970.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.– Section 53 of the Health Act 1970 is amended –

(a) in subsection (2) –

(i) by substituting 'Notwithstanding anything in the *Health Acts 1947* to *2004* but subject to subsections (3), (4) and (9), the Minister shall' for 'The Minister may', and

(ii) in paragraph (*a*), by substituting 'to whom the in-patient services are provided' for 'who are not persons with full eligibility', and

(b) by inserting the following after subsection (2):

'(3) A charge imposed under regulations made under subsection (2) on or after the enactment of this subsection is not payable where the in-patient services concerned are provided to –

(a) a person under 18 years of age,

(b) a woman in respect of motherhood,

(c) a person detained involuntarily under the Mental Health Acts 1945 to 2001,

(d) a person who –

(i) is in a hospital for the care and treatment of patients with acute ailments (including any psychiatric ailment), and

(ii) requires medically acute care and treatment in respect of any such ailment,

or

(e) a person who pursuant to section 2 of the Health (Amendment) Act 1996, in the opinion of the chief executive officer of a health board, has contracted Hepatitis C directly or indirectly from the use of Human Immunoglobulin Anti-D or the receipt within the State of another blood product or a blood transfusion.

(4) The chief executive officer of a health board may reduce or waive a charge imposed on a person under regulations made on or after the enactment of this subsection if the chief executive officer is of the opinion that, having regard to the financial circumstances of that person (including whether or not that person has dependants), it is necessary to do so in order to avoid undue financial hardship in relation to that person.

(5) Subject to subsection (6), it is hereby declared that the imposition and payment of a relevant charge is, and always has been, lawful.

(6) Subsection (5) shall not apply in the case of a relevant charge which is the subject of civil proceedings –

(a) instituted on or before 14 December 2004, and

(b) for the recovery of the relevant charge.

(7) Subsection (5) is in addition to, and not in derogation of, any other ground (whether under an enactment or rule of

law) which may be raised in any civil proceedings (including civil proceedings referred to in sub-section (6)) to debar the recovery of a relevant charge.

(8) For the avoidance of doubt, it is hereby declared that –

(a) regulations made under subsection (2) and in force immediately before the enactment of this subsection –

(i) shall continue in force on and after that commencement and may be amended or revoked, and

(ii) subject to paragraph (b), do not apply to persons with full eligibility,

and

(b) such regulations may be amended on or after that commencement to apply, in whole or in part, to persons with full eligibility.

(9) Where in-patient services have been provided to a person for –

(a) a period of not less than 30 days, or

(b) periods aggregating not less than 30 days within the previous 12 months,

then –

(c) a charge imposed under regulations made under subsection (2) on or after the enactment of this subsection for the further provision of any in-patient services to that person shall be charged at a weekly rate, and

(d) such weekly rate shall not exceed 80 per cent of the maximum of the weekly rate of the old age (non-contributory) pension within the meaning of the Social Welfare Acts.

(10) A period of 30 days referred to in subsection (9) begins to run immediately the person concerned is provided with in-patient services, and irrespective of whether during all or any part of that period the charge referred to in that subsection is not payable by virtue of the operation of subsection (3) or (4).

(11) Notwithstanding section 51, in this section –

'in-patient services', in relation to any regulations made under subsection (2) on or after the enactment of this subsection, means the institutional services referred to in the definition of 'in-patient services' in section 51 only insofar as those institutional services consist of the maintenance of a person;

'relevant charge' means a charge –

(a) imposed (or purporting to be imposed) under regulations made (or purporting to be made) under subsection (2), and
(b) paid at any time before the enactment of this subsection.'

2. - (1) This Act may be cited as the Health (Amendment) (No. 2) Act 2004.
(2) The collective citation 'the Health Acts 1947 to 2004' shall include this Act."

Section 53 of the Act of 1970

6 As can be seen, the Bill is limited to amending s. 53 of the Act of 1970. Section 53 of that Act provides as follows:-

"(1) Save as provided for under subsection (2) charges shall not be made for in-patient services made available under section 52.
(2) The Minister may, with the consent of the Minister for Finance, make regulations –
(a) providing for the imposition of charges for in-patient services in specified circumstances on persons who are not persons with full eligibility or on specified classes of such persons, and
(b) specifying the amounts of the charges or the limits to the amounts of the charges to be so made."

Section 53(2) to (11) in consolidated form

7 The terms of the provisions of the Bill, since it is confined to amending and adding to s. 53 of the Act of 1970, can be more readily appreciated if s. 53(2) and the ensuing subsections are read in an amended and consolidated form which, at the risk of some repetition, would provide as follows:-

"(2) Notwithstanding anything in the *Health Acts 1947 to 2004* but subject to subsections (3), (4) and (9) the Minister shall, with the consent of the Minister for Finance, make regulations –
(a) providing for the imposition of charges for in-patient services in specified circumstances on persons to whom the in-patient services are provided or on specified classes of such persons, and
(b) specifying the amounts of the charges or the limits to the amounts of the charges to be so made.
(3) A charge imposed under regulations made under subsection (2) on or after the enactment of this subsection is not payable where the in-patient services concerned are provided to –
(a) a person under 18 years of age,

(b) a woman in respect of motherhood,
(c) a person detained involuntarily under the Mental Health Acts 1945 to 2001,
(d) a person who –
(i) is in a hospital for the care and treatment of patients with acute ailments (including any psychiatric ailment), and
(ii) requires medically acute care and treatment in respect of any such ailment,
or
(e) a person who pursuant to section 2 of the Health (Amendment) Act 1996, in the opinion of the chief executive officer of a health board, has contracted Hepatitis C directly or indirectly from the use of Human Immunoglobulin Anti-D or the receipt within the State of another blood product or a blood transfusion.

(4) The chief executive officer of a health board may reduce or waive a charge imposed on a person under regulations made on or after the enactment of this subsection if the chief executive officer is of the opinion that, having regard to the financial circumstances of that person (including whether or not that person has dependants), it is necessary to do so in order to avoid undue financial hardship in relation to that person.

(5) Subject to subsection (6), it is hereby declared that the imposition and payment of a relevant charge is, and always has been, lawful.

(6) Subsection (5) shall not apply in the case of a relevant charge which is the subject of civil proceedings –
(a) instituted on or before 14 December 2004, and
(b) for the recovery of the relevant charge.

(7) Subsection (5) is in addition to, and not in derogation of, any other ground (whether under an enactment or rule of law) which may be raised in any civil proceedings (including civil proceedings referred to in sub-section (6)) to debar the recovery of a relevant charge.

(8) For the avoidance of doubt, it is hereby declared that –
(a) regulations made under subsection (2) and in force immediately before the enactment of this subsection –
(i) shall continue in force on and after that commencement and may be amended or revoked, and
(ii) subject to paragraph (b), do not apply to persons with full eligibility,
and

(b) such regulations may be amended on or after that commencement to apply, in whole or in part, to persons with full eligibility.

(9) Where in-patient services have been provided to a person for –
(a) a period of not less than 30 days, or
(b) periods aggregating not less than 30 days within the previous 12 months,
then –
(c) a charge imposed under regulations made under subsection (2) on or after the enactment of this subsection for the further provision of any in-patient services to that person shall be charged at a weekly rate, and
(d) such weekly rate shall not exceed 80 per cent of the maximum of the weekly rate of the old age (non-contributory) pension within the meaning of the Social Welfare Acts.

(10) A period of 30 days referred to in subsection (9) begins to run immediately the person concerned is provided with in-patient services, and irrespective of whether during all or any part of that period the charge referred to in that subsection is not payable by virtue of the operation of subsection (3) or (4).

(11) Notwithstanding section 51, in this section –
'in-patient services', in relation to any regulations made under subsection (2) on or after the enactment of this subsection, means the institutional services referred to in the definition of 'in-patient services' in section 51 only insofar as those institutional services consist of the maintenance of a person;
'relevant charge' means a charge –
(a) imposed (or purporting to be imposed) under regulations made (or purporting to be made) under subsection (2), and
(b) paid at any time before the enactment of this subsection."

The Bill in general terms

8 By way of introduction it may be said that the Bill is confined to the making of amendments to s. 53 of the Health Act 1970. The subject matter of the Bill is, in turn, confined to the payment of certain charges by certain categories of persons, in most cases elderly persons of limited means, who will benefit in the future or have benefited in the past from being maintained in a hospital or home by a health board. In the former instance the relevant provisions operate prospectively and in the latter retrospectively.

9 There are two sections in the Bill. Section 1 contains the essence of the Bill and provides for an amendment to s. 53(2) of the Health Act 1970 and,

by way of insertion, the addition to that section of nine new subsections. Section 2 of the Bill simply provides for the short title and the inclusion of the Bill in the collective citation "*the Health Acts, 1947 to 2004"* in respect of which no issue arises. Accordingly, only the constitutionality of the amending provisions contained in s. 1 are in issue. The context and full implications of these provisions are fully examined subsequently in this judgment.

Prospective effect

10 Section 1(a) of the Bill amends s. 53(2) of the Act of 1970 so as to require the Minister to make regulations for the imposition of charges in certain circumstances for in-patient services provided in the future in so far as they consist of the maintenance of a person in a home or hospital by a health board. Section 1(b) provides for the insertion after s. 53(2) of the Act of 1970 of certain new subsections which govern, *inter alia*, the category of persons on whom such charges may be imposed, the circumstances where such charges may be imposed and their maximum level, namely, 80% of the maximum of the weekly rate of the old age (non-contributory) pension.

11 The new power given to the Minister to impose charges and the provisions governing the use of that power concern only the imposition of a charge for the provision of the service in question in the future. In addition to these provisions there is a provision which confers on the chief executive officer of a health board a discretion to reduce or waive a charge payable pursuant to such regulations where the full imposition of the charge would give rise to undue hardship in an individual case.

12 The provisions which would have prospective effect only, taking account of the amendments of the Bill, are s. 53(2) of the Act of 1970, as amended by the Bill, and subss. (3), (4), (9), (10) and (11) (insofar as the latter subsection defines "in-patient services") of that section as inserted by the Bill.

Retrospective effect

13 The second object of the Bill is to declare as lawful, and as always having been lawful, certain charges for in-patient services which had been imposed, or purported to be imposed in the past on, and paid by, certain persons pursuant to regulations made (or purporting to be made) under s. 53(2) of the Act of 1970, even though there has been admittedly no lawful authority for the imposition of such charges. This is the retrospective aspect of the Bill. It is a special feature of the retrospective provisions of the Bill that they seek to validate not only charges imposed without lawful

authority but charges that were imposed for an in-patient service which the Oireachtas, in s. 53(1), had decreed should be provided free of any charge to those concerned.

14 The retrospective provisions of the Bill are subss. (5), (6), (7) and (11) (insofar as the last mentioned subsection defines "relevant charge") of s. 53 of the Health Act 1970, as inserted by s. 1(b) of the Bill.

15 Full consideration is given to the statutory context and effect of these retrospective provisions subsequently in this judgment where it addresses the constitutional issues to which those provisions give rise.

16 Since the terms of the Bill are best appreciated by reference to s. 53 of the Act of 1970 in its amended and consolidated form, for ease of reference the provisions of the Bill are generally referred to in this judgment, unless the context indicates otherwise, by reference to the particular subsection of s. 53 as amended or inserted by the Bill.

Presumption

17 The court in considering this Bill applies the presumption of constitutionality in accordance with its decision under Article 26 in *The Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129.

Constitutionality of provisions with prospective effect

18 The court will first of all consider the constitutional issues which have arisen in relation to those provisions of the Bill which have prospective effect only. For this purpose the prospective provisions of the Bill are referred to in more detail.

19 The primary prospective provision is to be found in s. 1(a) of the Bill, which amends the provisions of s. 53(2) of the Health Act 1970. As can be more readily seen from s. 53(2) of the Act of 1970 in its consolidated form, the Bill amends that subsection so as to require the Minister, with the consent of the Minister for Finance, to make regulations "providing for the imposition of charges for in-patient services" on persons who receive such services or unspecified classes of such persons. The Bill is mandatory in this regard in that it says the Minister "shall make" regulations. The Minister is also required to specify in the regulations the amounts of such charges or the limits to such amounts.

20 For these purposes "in-patient services" is defined in s. 53(11) of the Health Act 1970, as inserted by the Bill, as meaning, "the institutional services referred to in the definition of 'in-patient services' in section 51 only insofar as those institutional services consist of the maintenance of a person."

21 "The institutional services" referred to in s. 51 of the Health Act 1970 are those provided for persons while maintained in a hospital, convalescent home or home for persons suffering from physical or mental disability or in accommodation ancillary thereto. "Institutional services" are defined, for this purpose, in s. 2 of the Health Act 1947, as including:-

(a) maintenance in an institution;
(b) diagnosis, advice and treatment at an institution;
(c) appliances and medicines and other preparations;
(d) the use of special apparatus at an institution.

As can be seen, the charges which the Minister may impose under the provisions of the Bill (which counsel for the Attorney General conveniently described as "maintenance charges") are payable by all persons in receipt of "in-patient services" insofar as the service received consists of the maintenance of the person.

22 While the Act of 1970 draws a distinction, for the purpose of enjoying such services and in particular as to their liability for the payment of any charges, between persons having respectively "full eligibility" and "limited eligibility", no such distinction is drawn for the purpose of liability to pay any charges imposed by virtue of regulations made by the Minister under this provision of the Bill, and it is not necessary to consider the distinction between these two categories in this context. (The distinction between "full eligibility" and "limited eligibility" is particularly pertinent to the retrospective effects of the Bill and this is fully considered later in the judgment.)

23 The Bill does, however, exclude certain categories of persons from liability to pay charges imposed under regulations made by the Minister under subs. (2). These are set out in s. 53(3), as inserted by s. 1(b) of the Bill, and include such categories of persons who avail of such services as a woman in respect of motherhood, a person detained involuntarily under the Mental Health Acts and persons with acute ailments or requiring acute care and treatment. Section 53(9), as inserted by s. 1(b) of the Bill, provides for a minimum period of stay before a person becomes liable to pay maintenance charges under the regulations and then goes on to provide that the charge imposed shall be charged at a weekly rate and that it shall not exceed 80% of the maximum weekly rate of the old age (non-contributory) pension within the meaning of the Social Welfare Acts.

24 The final relevant prospective provision of the Bill is to be found in s. 53(4), as inserted by s. 1(b) of the Bill, whereby a chief executive officer of a health board may reduce or waive a charge imposed under the regulations after the enactment of the Bill, if he or she "is of the opinion that, having regard to the financial circumstances of that person (including whether or not that person has dependants), it is necessary to do so in order to avoid

undue financial hardship in relation to that person". In short, the prospective provisions provide for the payment of maintenance charges by persons who are maintained in a hospital or home by a health board as long-stay patients, subject to the specified excepted categories. This liability may be alleviated by the discretionary power of the chief executive officer in individual cases of undue hardship.

Submissions of counsel assigned by the court

25 Counsel assigned by the court made a number of submissions impugning the compatibility with the Constitution of the foregoing provisions. The first issue concerned the imposition of any charges *per se* for maintenance on persons who receive such a service.

26 Counsel assigned by the court firstly contended that if their arguments as to the existence of a constitutional right to care and maintenance by a health board of persons who are unable to look after themselves independently prevails, then it would be unconstitutional to require those persons to pay any charge for the provision of that service, irrespective of the means of those persons or their ability to pay for their maintenance. This argument was followed by the alternative proposition relied upon by counsel, namely, that in any event the provisions requiring the imposition of charges for such services should be considered repugnant to the Constitution in that they would unduly restrict a constitutional right of access to them by virtue of causing undue hardship to persons of limited means.

27 In their general argument on constitutionality, counsel submitted that the provisions of the Bill which require the making of regulations to ensure the future imposition of charges on persons for in-patient services consisting of maintenance are repugnant to Article 40.3.1° and 40.3.2° of the Constitution. Although the Minister would be precluded by s. 53(3), as inserted by s. 1 of the Bill, from imposing charges on certain categories of persons, the Bill requires him to impose charges for maintenance on all other persons receiving such services pursuant to s. 52 of the Health Act 1970. These, it was submitted are, by definition, largely persons facing very considerable financial hardship and invariably include the elderly and persons who suffer from physical or mental disability. It was submitted that the Constitution, and specifically the right to life and the right to bodily integrity of such persons as derived from Article 40.3.1° and 2°, imposes an obligation upon the State to provide at least a basic level of in-patient facilities to persons in need of care and maintenance who cannot provide it for themselves. It was also submitted that any charge on persons who are of such modest means as to qualify for the old age (non-contributory) pension, or to come within the definition of full eligibility pursuant to the Health Acts, would of itself be unconstitutional. In short, it was submitted,

the class of persons thus affected evidently embraces the elderly and those disabled by physical or mental conditions such as to require residential care. Any charge would be an undue financial burden on such persons and, therefore, would constitute a failure to vindicate their right to life and also their constitutional rights to bodily integrity on the one hand and their dignity as human persons on the other. Alternatively, it was argued that the charges actually provided for in s. 53(9), as inserted by s. 1(b) of the Bill, would, in any event, cause undue hardship on the persons concerned so as to be in breach of their constitutional rights of the kind referred to.

28 In their submissions, counsel assigned by the court sought to derive from the right to life or the right to personal dignity, as protected by Article 40.3.1° and 2° of the Constitution, a constitutional right for those who are entitled to the services provided pursuant to s. 52 of the Act of 1970 to maintenance in a home without the imposition of any charge or alternatively any unreasonable charge.

Article 40.3. states:-

> "1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
> 2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

29 In addition, counsel assigned by the court relied in their submissions on a range of judicial *dicta* in a number of cases and in particular that of Kenny J., in his judgment in the High Court in *Ryan v. Attorney General* [1965] I.R. 294, at p. 314, where he quoted as follows from a passage in the Papal encyclical, *Peace on Earth*:-

> "Every man has the right to life, to bodily integrity and to the means which are necessary and suitable for the proper development of life; these are primarily food, clothing, shelter, rest, medical care, and finally the necessary social services."

Other case law relied upon included *McGee v. Attorney General* [1974] I.R. 284, *O'Brien v. Wicklow UDC*, (Unreported, High Court, Costello J., 10th June, 1994), *F. N. v. Minister for Education* [1995] 1 I.R. 409 and *In re a Ward of Court (No. 2)* [1996] 2 I.R. 79.

30 Counsel assigned by the court also submitted that the doctrine of the separation of powers, according to which it was an exclusive function of the Oireachtas to determine the allocation of budgetary resources according to public policy priorities rather than the courts, should not be considered as inhibiting the court from finding the proposed imposition of charges unconstitutional. It was submitted that the duty of the State to respect constitutional rights, as enforced by the courts, will often have, as a

consequence, the expenditure of necessary funds to fulfil that obligation. The State cannot be spared from its duty to respect the rights in question on financial grounds alone.

Submissions of counsel for the Attorney General

31 Counsel for the Attorney General submitted that the extent of the State's constitutional obligations did not go so far as to involve a constitutional obligation to maintain elderly or other long-stay patients. This was a matter to be dealt with by statute in accordance with public social policy. In support of their submissions counsel for the Attorney General also relied on judicial *dicta* in a range of cases including that of Keane C.J. in *T.D. v. Minister for Education* [2001] 4 I.R. 259, where he called into question the formulation adopted by Kenny J. in *Ryan v. Attorney General* [1965] I.R. 294 as to whether it was "an altogether satisfactory guide to the identification of such rights". Counsel for the Attorney General also cited statements by the late Professor John Kelly to the same effect in *Fundamental Rights in Irish Law and Constitution* (1967), pp. 44 and 45. Counsel for the Attorney General also made reference to judicial *dicta* in *T.D. v. Minister for Education*, *Attorney General v. Hamilton* [1993] 2 I.R. 250 and *Sinnott v. Minister for Education* [2001] 2 I.R. 545.

32 In the alternative, it was argued on behalf of the Attorney General that even if the persons concerned enjoyed the rights asserted by counsel assigned by the court, there can be no constitutional objection to a charge which is subject to an upper limit and which represents only a portion of the actual costs to the State of maintaining such patients. In addition, it was submitted that the doctrine of the separation of powers, as accepted in the jurisprudence of this court, recognised the constitutional competence of the Oireachtas to determine the allocation of resources in accordance with social and economic policies and that the exercise of its competence in this instance was not such as to infringe or subject to unjust attack any constitutional rights of those affected by these provisions of the Bill.

Conclusion on this issue

33 The extent to which care and maintenance is provided to persons affected by the Bill has not been put in issue. This is inevitable since the Bill does not purport to address that subject matter. What the Bill seeks to do is to lay down the terms, by way of the imposition of charges, upon which the services in question can be availed of. That is why the constitutional challenge presented by counsel assigned by the court focuses, as they put it, on the "principle of charging".

34 In a discrete case, in particular circumstances, an issue may well arise as to the extent to which the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs. The court does not consider it necessary to examine such an issue in the circumstances which arise from an examination of the Bill referred to it. Even assuming there is such a constitutional right to maintenance as advanced by counsel, the question actually raised is whether the charges for which the Bill provides could be considered an impermissible restriction of any such right.

35 Section 53(9) of the Act of 1970, as inserted by s. 1(b) of the Bill, provides for the imposition of a charge at a weekly rate which shall not exceed 80% of the maximum of the weekly rate of the old age (non-contributory) pension within the meaning of the Social Welfare Acts.

36 Furthermore, s. 53(4), as inserted by the Bill, provides that the chief executive officer of a health board may reduce or waive a charge imposed on a person under the regulations if he or she is of the opinion that, having regard to the financial circumstances of that person (including whether or not that person has dependants), it is necessary to do so in order to avoid undue financial hardship in relation to that person.

37 The first argument of counsel assigned by the court was that persons entitled to in-patient services pursuant to s. 52(1) of the Act of 1970 had a constitutional right to receive such services, including any maintenance elements involved, free of charges, irrespective of the means of such persons. In *Sinnott v. Minister for Education* [2001] 2 I.R. 545, the court had occasion to point out the unique feature of Article 42 in requiring the State to "provide for free primary education". In using those terms the Constitution made free education an express characteristic of the right to primary education so that no charges could be imposed for it. It is not contended that there is any equivalent provision of the Constitution applying to the rights asserted by counsel. Persons who avail of in-patient services pursuant to s. 52 of the Act of 1970 and who have the means to pay for maintenance charges related to those services are not denied access to them. The court does not consider that it could be an inherent characteristic of any right to such services that they be provided free, regardless of the means of those receiving them.

38 The alternative argument of counsel assigned by the court was that the charges actually provided for in the Bill would cause undue hardship to persons of limited means who have, for a range of reasons, a special need for maintenance by a health board in receiving in-patient services.

39 It is not in contention that the maximum proposed charge would be but a fraction of the total cost of maintenance of a person concerned. However,

the real question is whether the charges as envisaged could be said to infringe or unduly restrict the constitutional rights asserted.

40 Although the Bill makes it mandatory for the Minister to impose charges, his discretion would appear to extend from a nominal charge to the maximum charge of 80% of the maximum old age (non-contributory) pension. It was clearly the intent of the Oireachtas that the power to impose such charges should not result *generally* in undue hardship to the classes of persons to whom they applied. That is reflected in the provision which grants a chief executive officer the power to remit a charge in a case of individual undue hardship. Such a provision is only consistent with an intent that the charges themselves should not cause undue hardship as a general consequence for those persons who have to pay them. That is a policy aspect of the Bill.

41 It seems to the court that it cannot be gainsaid, having regard to its well established jurisprudence, that it is for the Oireachtas at first instance to determine the means and policies by which rights should be respected or vindicated. Counsel assigned by the court are correct in submitting that the doctrine of the separation of powers, involving as it does respect for the powers of the various organs of State and specifically the power of the Oireachtas to make decisions on the allocation of resources, cannot in itself be a justification for the failure of the State to protect or vindicate a constitutional right. This, of course, begs the question as to whether the provisions in question involve such a failure.

42 In this instance the Oireachtas has been careful to insert into the Bill a cap on the maximum charge which the Minister can impose, as referred to above. In doing so it is clear that it sought to avoid causing undue hardship generally to persons who avail of the in-patient services. No doubt it could be said that the State could or should have been more generous, or less so with regard to persons of significant means, but that is the kind of debate which lies classically within the policy arena and is not a question of law. All the court is concerned with is whether the charges are such that they would so restrict access to the services in question by persons of limited means as to constitute an infringement or denial of the rights asserted by counsel. In reaching its conclusion on this question the court must also take into account the fact that such persons who avail of in-patient services involving maintenance as referred to in the Bill would otherwise have had to maintain themselves out of their own means when living outside the care of the health board. Furthermore, there is nothing before the court from which it could conclude that the judgment of the Oireachtas that a charge capped at the level of 80% of the maximum of the weekly old age (non-contributory) pension would generally cause undue hardship or be an undue denial of access to the services in question. Certainly there may be

individual cases where, due to personal circumstances, the charge concerned would involve undue hardship. But, as previously outlined, the Oireachtas has put in place a provision in the Bill (subs. (4) as inserted in s. 53) expressly providing for an administrative mechanism for the remission in whole or in part of such a charge by a chief executive officer in order to avoid undue hardship.

Conclusion

43 Accordingly, the court concludes that a requirement to pay charges of the nature provided for in the Bill could not be considered as an infringement of the rights asserted by counsel.

Delegated legislation

44 Counsel assigned by the court raised two matters which they submitted constituted the delegation of law-making powers in a manner impermissible under the Constitution. These are the extent of the power conferred on the Minister to make regulations and the ambit of the discretion conferred on the chief executive officer of a health board to mitigate charges payable under the regulations in individual cases. This judgment will summarise the respective submissions of counsel on each point before setting out the court's conclusions.

The power to make regulations

45 Counsel assigned by the court submitted that s. 53(2) of the Act of 1970, as amended by the Bill, is repugnant to the Constitution because the Oireachtas failed to ensure that there were sufficient statutory guidelines, by way of principles and policies, contained in the Bill which could authorise the Minister to impose charges by way of delegated legislation. The subsection conferred too broad a discretion on the Minister and, in the absence of such principles and policies, constituted an impermissible delegation of law-making powers which are reserved, under the Constitution, to the Oireachtas. Counsel principally relied on Article 15.2.1° of the Constitution and the interpretation given to that provision by this court in *Cityview Press Ltd. v. An Chomhairle Oiliúna* [1980] I.R. 381.

Article 15.2.1° provides:-

> "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

In *Cityview Press Ltd. v. An Chomhairle Oiliúna* [1980] I.R. 381, O'Higgins C.J. observed as follows at pp. 398 and 399:-

> "The giving of powers to a designated Minister or subordinate body to make regulations or orders under a particular statute has been a feature of legislation for many years. The practice has obvious attractions in view of the complex, intricate and ever-changing situations which confront both the Legislature and the Executive in a modern State … Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution. In discharging that responsibility, the Courts will have regard to where and by what authority the law in question purports to have been made. In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits - if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power."

46 Counsel also referred to the decisions of this court in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 and *Leontjava v. Director of Public Prosecutions* [2004] 1 I.R. 591. It was submitted that s. 53(2) of the Act of 1970, as amended by the Bill, patently fails to provide any form of guidance to the Minister as to the circumstances in which the charges should be imposed, or what the level of those charges should be. It was acknowledged that the Minister's power was circumscribed by the exclusion from such charges of certain categories of persons referred to in s. 53(3), as inserted by the Bill and the imposition of a maximum level of charge as prescribed by the new s. 53(9). It was submitted that, subject to these limitations, the Minister is nonetheless completely at large as to the circumstances in which the charges are imposed.

47 Counsel for the Attorney General also relied on the same caselaw and submitted that the Bill clearly articulated detailed principles and policies which amply satisfied the requirements of Article 15.2.1° in accordance with the test laid down in *Cityview Press Ltd. v. An Chomhairle Oiliúna* [1980] I.R. 381. Counsel for the Attorney General pointed out that s. 53, as amended by the Bill, sets out the circumstances in which the charge can be levied, the nature of the charge, the maximum amount of the charge and the persons who are entirely exempt from the charge.

The discretion of a chief executive officer

48 Counsel assigned by the court also relied upon Article 15.2.1° and the judgment of this court in *Cityview Press Ltd. v. An Chomhairle Oiliúna* [1980] I.R. 381 as the basis for impugning the discretion conferred on a chief executive officer of a health board pursuant to s. 53(4) of the Act of 1970, as inserted by the Bill, whereby such an officer may reduce or waive a charge imposed on a person if he is of the opinion that, having regard to the financial circumstances of that person, it is necessary to do so in order to avoid undue financial hardship. It was submitted that the Oireachtas had failed to define properly in the Bill the scope of this power delegated to the chief executive officer and failed to define the financial hardship situations which might warrant the exercise of his discretion to waive a charge. Accordingly, the power delegated to the chief executive officer was impermissible and contrary to Article 15.2.1° of the Constitution.

49 In this regard counsel for the Attorney General submitted that the power conferred on the chief executive officer was not a law making power and, therefore, Article 15.2.1° had no bearing on the matter. The power conferred on the chief executive officer was not one which required him to make decisions regarding the level of charges generally but simply to exercise a discretion in individual cases in order to avoid undue financial hardship. In any event, it was submitted that the criterion "undue financial hardship" was sufficient to meet the test laid down in *Cityview Press Ltd. v. An Chomhairle Oiliúna* [1980] I.R. 381.

Conclusion on these issues

50 The court does not find that the foregoing submissions of counsel assigned by the court are well-founded. First, as regards the power delegated to the Minister to make regulations imposing charges, it should be noted that the Oireachtas has limited the imposition of the charges to "in-patient services" only insofar as they consist of the maintenance of a person (s. 53(11)), which only becomes payable under s. 53(9) when the in-patient service has been provided to a person for "(a) a period of not less than 30 days, or (b) periods aggregating not less than 30 days within the previous 12 months". This is further complemented by s. 53(10), as inserted by the Bill, which provides that, "a period of 30 days referred to in subsection (9) begins to run immediately the person concerned is provided with in-patient services, and irrespective of whether during all or any part of that period the charge referred to in that subsection is not payable by virtue of the operation of subsections (3) or (4)". Moreover, the Oireachtas expressly excluded certain categories of persons in receipt of such services in the future from any liability for the payment of charges (s. 53(3), as

inserted by the Bill). The Bill also specifies the manner in which the charge is to become payable, namely, as a weekly charge. More significantly, s. 53(9)(d), as inserted by the Bill, limits the maximum weekly charge to 80% of the maximum of the weekly rate of the old age (non-contributory) pension. This in turn must be considered in the context that the Bill also provides for any such charge to be reduced or waived by the chief executive officer should the imposition of a charge cause undue hardship in an individual case.

51 It is evident that one of the underlying policies of the charging provisions is that persons who are provided with maintenance in a home under the Health Acts are expected to make a contribution towards that maintenance from their own means, even if those means are of a limited nature, such as the old age (non-contributory) pension. Persons being provided with long-stay maintenance in a hospital or a home would otherwise have been responsible for their day-to-day maintenance when living elsewhere on their own means. In authorising the Minister to impose charges on the specified category of persons, the Oireachtas clearly intended that the resources of health boards would benefit so as to better enable them to provide the services in question while at the same time seeking to avoid doing so in a manner which would cause undue hardship. The discretion left to the Minister is limited, as indicated by the matters referred to above, but, in particular, by the maximum level of weekly charge which he can impose and by the policy that the charges should not in general cause undue hardship.

52 The level at which charges can be fixed by the Minister is narrow in scope, ranging from a nominal charge to 80% of the pension referred to. It was clearly the intention of the Oireachtas that any charges would not cause undue hardship *generally* or in individual cases and, no doubt, this is why it fixed the maximum charge at 80% of the pension on a judgment that this in itself should not cause undue hardship. On the other hand, if, hypothetically, the real value of the said pension was to fall over time because, for example, its level failed to keep pace with the rate of inflation, the Minister would be bound to avoid imposing charges, even within the scope open to him, that caused undue hardship *generally*. That is, at least implicitly, the intention of the Bill. The Minister in fixing charges within the limited scope granted to him must take into account the twin policies of the Act of making resources available to the health board from those who can pay the charges for the service provided without undue hardship and avoiding any general effect of undue hardship (as distinct from undue hardship that may arise because of the special circumstances of an individual).

53 In these circumstances, the court is satisfied that the imposition of charges by the Minister pursuant to the section in question would be no more than the implementation of the principles and policies contained in the Act and the power delegated to him to make the regulations is compatible with the Constitution.

54 As regards the criticism made of the discretionary power conferred on the chief executive officer to waive or reduce a charge in a case of individual hardship, the court considers that counsel for the Attorney General were correct in pointing out that that does not constitute the exercise of a delegated power to legislate but rather is the exercise of an administrative discretion to address the particular circumstances of an individual case. When public officials are charged with administering a statutory scheme it may be difficult, if not impossible, for the Oireachtas to prescribe in legislation for every special circumstance of individuals who find themselves on the margins of such a scheme. In this instance the task of the administrator is to avoid undue hardship in individual cases in the general application of the scheme. That is simply an administrative function. A subsidiary argument of counsel assigned by the court was that judicial review of the decision of a chief executive officer in the exercise of such a discretion would not be an adequate remedy to a person who felt they had been wrongly refused a waiver or reduction of a charge. The court does not accept this argument. The criterion (undue hardship) according to which the chief executive officer should exercise his or her discretion is adequately set out in the Act and there is no reason to consider that an arbitrary decision or other unlawful misuse of his or her powers by a chief executive officer could not be subject to judicial review in the ordinary way.

55 Accordingly, the court is satisfied that s. 1(a) of the Bill, amending s. 53(2) of the Health Act 1970, and the provisions of s. 1(b) of the Bill, which insert subss. (3), (4), (9), (10) and (11) (insofar as the latter subsection defines "in-patient services") in s. 53 of the Act of 1970, are compatible with the Constitution.

Constitutional issues concerning the retrospective provisions' legislative background

56 The provisions of the Bill which the court now proposes to consider are those which have retrospective effect on the rights of certain persons under the provisions of the Health Act 1970. For the purpose of considering the issues which arise concerning these provisions, the Bill has to be seen against the background of certain key provisions of the Health Act 1970, especially Part IV. As already noted, the amendments it proposes relate exclusively to s. 53. That section concerns only "in-patient services". It is, therefore, relevant to recall, in the context of these retrospective

provisions, the nature of those services, the obligations of the health boards to provide them, the persons to whom they are to be provided and the provisions regarding charging for their provision.

57 Section 51 of the Act of 1970 defines "in-patient services" as meaning:-

> "institutional services provided for persons while maintained in a hospital, convalescent home or home for persons suffering from physical or mental disability or in accommodation ancillary thereto".
>
> "Institutional services" refers to that term as defined in s. 2 of the Health Act 1947, as including:-
>
> "(a) maintenance in an institution,
> (b) diagnosis, advice and treatment at an institution,
> (c) appliances and medicines and other preparations,
> (d) the use of special apparatus at an institution."

58 The Act of 1970 draws a distinction, for the purpose of enjoying such services, between persons having respectively "full eligibility" and "limited eligibility". Persons in the former category are commonly described under the non-statutory name of medical-card holders. According to s. 45(1) of the Act of 1970, they are "adult persons unable without undue hardship to arrange general practitioner medical and surgical services for themselves and their dependants" and the dependants of such persons. Section 46 defines persons with limited eligibility by reference to means and is not relevant to the issues referred to the court. The court has been informed that no regulations have been made pursuant to s. 45(3) of the Act of 1970 and that the determination of who is entitled to "full eligibility" – a medical card – is administered by a system of departmental circulars, with the relevant chief executive officer of each health board making the decisions.

59 These are the persons in respect of whom Part IV of the Act of 1970 imposed upon health boards obligations to provide services. Health boards are obliged, pursuant to s. 52 of the Act of 1970, to "make available in-patient services for persons with full eligibility and persons with limited eligibility".

60 However, s. 53(1) of the Act states that, subject to subs. (2), which permits such charges in respect of persons with limited eligibility, "charges shall not be made for in-patient services made available under section 52". Regulations have been made from time to time pursuant to s. 53(2). Clearly, they were not made and could not have been made in respect of persons having full eligibility.

61 The interpretation of these and related provisions came before Finlay P. in 1975 in *In re Maud McInerney* [1976-77] I.L.R.M 229. It appears clear from the context of this case that, as was suggested by counsel during

the hearing, between the passing of the Act of 1970 and the decision in *In re Maud McInerney*, the practice had been to charge patients in most institutions on the basis that they were in receipt of "institutional assistance", within the meaning of s. 54 of the Health Act 1953, a term which meant "shelter and maintenance in a county home or a similar institution". The nub of the *In re Maud McInerney* was that the ward was in receipt of more than mere shelter and maintenance and that there was an element of medical care involved. Relying on both the fact that the place of the provision of the services, as envisaged by s. 51 of the Act of 1970, was a hospital or one of the other essentially health-care institutions mentioned in that definition and that the ward would not come within the alternative section (s. 54 of the Health Act 1953 regarding "institutional assistance") unless she was in receipt of shelter and maintenance and nothing else, Finlay P. interpreted s. 53 of the Act of 1970 as applying wherever the patient is in receipt of any medical care over and above pure maintenance. That decision was upheld by this court on the 20th December, 1976.

62 It was common case in the submissions on the reference that the relevant provisions of the Act of 1970, as interpreted in *In re Maud McInerney* [1976-77] I.L.R.M. 229, considerably narrowed the grounds on which a charge could be raised for institutional assistance. In reality, geriatric or severely disabled patients are in need of both maintenance and medical services.

63 The sum total of these provisions is that, by the legislation of 1970, at least following its interpretation in *In re Maud McInerney* [1976-77] I.L.R.M. 229, the Oireachtas required and has continued to require health boards, at all times prior to the passing of the Bill, to make in-patient services available without charge to all persons "suffering from physical or mental disability". While the individual circumstances of patients will vary enormously in terms of age and physical and mental capacity, it is obvious that by enacting the Act of 1970, the Oireachtas was concerned to ensure the provision of humane care for a category of persons who are in all, or almost all cases, those members of our society who, by reason of age, or of physical or mental infirmity, are unable to live independently. They are people who need care. Even without the benefit of statistical or other evidence, the court can say that the great majority of these persons are likely to be advanced in years. Many will be sufferers from mental disability. While some will have the support of family and friends, many will be alone and without social or family support. Most materially, in a great number of cases, the patients will have been entitled to and in receipt of the non-contributory social welfare pension.

64 This was the position in law and in fact following the enactment of the Act of 1970. The court has been informed that on the 6th August, 1976, a

date later than the High Court decision and earlier than the Supreme Court decision in *In re Maud McInerney* [1976-77] I.L.R.M. 229, the Department of Health sent a circular letter to all health boards. The circular informed the boards of the terms of the Health (Charges for In-Patient Services) Regulations 1976. It pointed out that, by virtue of s. 53(2)(a) of the Act of 1970, these regulations did not relate to persons with full eligibility. It went on to state:-

> "However, in this respect, the precise definition of a person with full eligibility in s. 45(1)(a) of the Act should be carefully noted. A person who, while he was providing for himself in his own home, was deemed to have full eligibility could be regarded as not coming within that definition when he is being maintained in an institution where the services being provided include medical and surgical services of a general practitioner kind, with consequential liability for charges under the regulations."

It is accepted that, following circular 7/76, health boards generally continued to charge patients with full eligibility for in-patient services. This may have involved the withdrawal of the relevant medical cards. The court has been informed that the State was advised in 2004 that charges were imposed on a flawed legal basis, going back as far as 1976, on persons with full eligibility. The Attorney General has expressly accepted in his written submissions that since 1976, "there was no legal basis for imposing such charges on persons with full eligibility". The court must assume, therefore, given the purpose of the Bill, that charges were made in contravention of the terms of s. 53(1) of the Act of 1970.

65 At all events, s.1 of the Health (Miscellaneous Provisions) Act 2001 amended s. 45 of the Act of 1970 with the effect of placing beyond doubt any question of the legality of charging for the relevant services. That section inserted the following subsection into s. 45:-

> "(5A) A person who is not less than 70 years of age and is ordinarily resident in the State shall have full eligibility for the services under this Part and, notwithstanding subsection (6), references in this Part to persons with full eligibility shall be construed as including references to such persons."

As was accepted by the Attorney General, from the date on which that section came into effect on the 1st July, 2001 (see the Health (Miscellaneous Provisions) Act 2001, (Commencement) Order 2001), there was no possible room for doubt that health boards were not entitled to impose any charges for in-patient services on persons aged 70 or over. While many in that category would not previously have qualified for full eligibility, a significant number obviously would. Thus, from the entry into force of that provision, all persons aged 70 or more were automatically and by that fact

alone deemed to be fully eligible. Thereafter, any charge imposed on such a person was indisputably imposed in direct contravention of s. 53(1) of the Act of 1970. Yet it has been confirmed to the court that the practice continued. It is, of course, the admitted purpose of the Bill to render lawful what was thus unlawful.

Patients' claims for restitution

66 While the unlawful or *ultra vires* collection of charges from patients with full eligibility thus falls into two periods, it is not necessary for the court, in dealing with this reference, to maintain any distinction between them. It will assume, as is implicit in the Bill, that charges were unlawfully imposed and paid for a period as far back as 1976. The charges will, for ease of reference, be described as "unlawful charges".

67 Counsel assigned by the court have submitted that, pursuant to the modern law of restitution, patients are entitled to recover charges for in-patient services imposed by health boards without lawful authority and contrary to the express provisions of the Health Acts. Reference was made, in particular, to *Corporation of Dublin v. Building and Allied Trade Union* [1996] 1 I.R. 468 and *O'Rourke v. The Revenue Commissioners* [1996] 2 I.R. 1.

68 Although it is not seriously disputed by the Attorney General that such payments are normally recoverable, it is necessary to consider the nature of any such claim before examining the effect upon them of the Bill and the applicable provisions of the Constitution.

69 In *Corporation of Dublin v. Building and Allied Trade Union* [1996] 1 I.R. 468, compensation had been paid to the defendants for property compulsorily acquired by the plaintiff pursuant to statutory powers. Because compensation had been assessed at a figure relating to reinstatement cost rather than market value and the defendants had not spent the compensation monies on reinstatement, the plaintiff sought to recover those sums, claiming that the defendants had been unjustly enriched. Keane J., on behalf of a unanimous Supreme Court, while rejecting the plaintiff's claim, accepted at p. 483 that:-

> "Under our law, a person can in certain circumstances be obliged to effect restitution of money or other property to another where it would be unjust for him to retain the property."

He continued at p. 483:-

> "The modern authorities in this and other common law jurisdictions, of which *Murphy v. The Attorney General* [1982] I.R. 241 is a leading Irish example have demonstrated that unjust enrichment exists as a distinctive legal concept, separate from both contract and tort,

which in the words of Deane J. in the High Court of Australia in *Pavey & Matthews Pty. Ltd. v. Paul* (1987) 162 C.L.R. 221:-

> '… explains why the law recognises, in a variety of distinct categories of cases, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary process of legal reasoning, of the question of whether the law should, in justice, recognise the obligation in a new and developing category of case.'"

70 In the same year, in *O'Rourke v. The Revenue Commissioners* [1996] 2 I.R. 1, the same judge, sitting as a judge of the High Court on an appeal from the Circuit Court, dealt with a claim by a public servant for interest on monies repaid to him by the Revenue Commissioners, which, as had been discovered, were incorrectly deducted from his salary.

71 Keane J. distinguished between a case where similar payments were exacted from a taxpayer who paid under protest and the case before him, where the taxpayer acquiesced without protest. Accordingly, he did not consider that the payments had been required from him *colore officii* as in the case of *Dolan v. Neligan* [1967] I.R. 247, which applied to the first situation. He reiterated at p.10 that, in the instant case:-

> "The money was clearly paid under a mistake of law, without any protest by the plaintiff and in circumstances where there was no specific element of compulsion or duress."

Having reviewed the law on the issue, he concluded at p. 13:-

> "The tax overpaid by the plaintiff was recoverable as a matter of right."

72 This court is satisfied that our law recognises a cause of action for restitution of money paid without lawful authority to a public authority. Material elements may be whether the money was demanded *colore officii*, whether it was paid under a mistake of law, whether the parties were of equal standing and resources, whether the money was paid under protest and whether it was received in good faith. The decision of this court in *Rogers v. Louth County Council* [1981] I.R. 265 may be relevant. It is not appropriate, in the context of the present reference, to expound the precise contours of that cause of action, in the absence of evidence of particular cases. It will be apparent that a large number of patients who paid unlawful charges enjoy such a cause of action.

73 For the purposes of applying these principles to the cases of the patients concerned with the effects of the Bill, the court naturally does not have the benefit of evidence regarding the actual circumstances in which individual patients paid charges levied by health boards without lawful authority. It is in a position, nonetheless, to draw sufficient inferences from

the legislative history and the common experience of all members of our society. While we were informed that some patients protested at having to pay charges, it seems highly unlikely that, having regard to the category of persons involved, this happened to any significant extent. The patients in question necessarily belong to the most vulnerable section of society. They are, for the most part old or very old; they are, in many cases, mentally or physically disabled; they are also, very largely, in poor financial circumstances. They are most unlikely to have been aware of the provisions of the Health Acts or their rights to services or the terms on which they are provided.

74 Both the relevant organs of State and the health boards, on the other hand, were fully informed of the terms of the Health Acts, including the applicable provisions for charging for services. The charges must be regarded as having been imposed as a result of considered decisions of responsible public officials in full consciousness of those provisions.

75 In any event, it is clear that the Oireachtas has acknowledged the existence of such claims, since the avowed purpose of the Bill is to deem the charges in question lawful so as to save the exchequer the cost of having to meet legitimate claims for their recovery. In short, the retrospective provisions of the Bill are premised on the existence of a quantity of such valid claims.

76 The court considers that patients with full eligibility from whom charges for in-patient services were demanded and who paid them were entitled, in the absence of some strong contrary indication, to recover those charges as of right, subject, of course, to any of the defences normally available in civil proceedings. That right was that species of personal property known as a *chose in action.*

The retrospective provisions

77 Against this background, it is necessary to recall the essence of the retrospective provisions of the Bill. The key provision of s. 1(b) of the Bill is the amendment of s. 53 of the Act of 1970 by the insertion of a new subs. (5) whereby "it is declared that the imposition of a relevant charge is, and always has been lawful". This provision applies only to charges paid prior to the enactment of the Bill, since subs. (11) defines "relevant charge" as a charge:-

> "(a) imposed (or purporting to be imposed) under regulations made (or purporting to be made) under subsection (2), and
>
> (b) paid at any time before the enactment of this subsection."

It will be recalled that the subsection of the Act of 1970, there referred to, empowered the Minister to make regulations providing for the imposition of charges only in respect of persons with limited eligibility. Two points

need to be made about the drafting objective of these provisions. Firstly, it would not have made any sense to say that charges imposed in the past on persons with full eligibility were, at the time, lawful. That would have been inconsistent with the direct prohibition in s. 53(1) of the Act of 1970 and, in effect, an attempt to rewrite the past. Secondly, therefore, subs. (5) (which by virtue of subs. (6) does not apply to proceedings commenced before the 14th December, 2004) read with subs. (11), proceeds on the basis that such charges as were imposed on such persons were received under the guise of regulations adopted under s. 53(2), *i.e.*, on persons with limited eligibility. This was based on the apparent rationale of circular 7/76, namely, that patients with full eligibility somehow ceased to belong to that category once they were resident in an institution and in receipt of in-patient services. But, as has already been observed in this judgment, counsel for the Attorney General has accepted that charges were imposed unlawfully from and after 1976. Moreover, the Bill purports to apply to charges imposed on persons aged 70 and over, who became automatically persons with full eligibility following the entry into force of the Act of 2001.

78 In effect, what subs. (5), in conjunction with subss. (6) and (11), purports to do, as and from the entry into force of the Bill, is to *deem* the combined imposition and payment of the unlawful charges concerned to be lawful and always to have been lawful, for the purpose of enabling the State successfully to resist any claim brought after the 14th December, 2004, insofar as such a claim is for the recovery of the charges in question on the grounds that they had, at least from 1976, been unlawfully imposed.

79 It is, in any event, not contested by the Attorney General that the effect of the subsection is to prevent recovery of such charges paid by any persons who had full eligibility and from whom they were demanded without lawful authority at any time since the passing of the Act of 1970.

80 Subsection (5), being subject to subs. (6), does not:-

> "apply in the case of a relevant charge which is the subject of civil proceedings –
>
> (a) instituted on or before 14 December 2004, and
>
> (b) for the recovery of the relevant charge."

The 14th December, 2004 was the date of publication of the Bill. The Bill does not, therefore, claim to apply to any proceedings commenced before that date. The obvious purpose of the provision is to avoid any unconstitutionality which would arise from legislative interference with existing litigation, on the principle laid down by the judgment of the former Supreme Court in *Buckley (Sinn Féin) v. Attorney General* [1950] I.R. 67. It is also important to note that, although subs. (5) purports to declare all prior imposition of relevant charges to be lawful, it has that

result only in respect of charges which were also actually paid. It does not apply to charges purportedly imposed on persons with full eligibility but not yet paid.

81 Subsection (7) provides that subs. (5) is "in addition to and not in derogation of, any other ground (whether under an enactment or rule of law) which may be raised in any civil proceedings (including civil proceedings referred to in subsection (6)) to debar the recovery of a relevant charge". This provision refers principally to the possible reliance on a defence based on the Statute of Limitations. Insofar as subs. (5) has the effect of entirely barring the recovery of a relevant charge, there is little if any room for subs. (7) to have effect. Nonetheless, it appears to declare that any defence at law may be raised in the case of proceedings which are exempted from subs. (5) by subs. (6). For these reasons, no argument has been advanced suggesting that subs. (7) is repugnant to the Constitution.

82 The principal combined effect of the provisions of subss. (5), (6) and (11) is to debar the recovery of charges demanded of and paid by persons with full eligibility, without lawful authority. It extinguishes the property right of those persons, consisting of a *chose in action*. It also does so by means of what is accepted as being retrospective legislation.

Submissions

83 Counsel assigned by the court have, in dealing with subs. (5) and its related provisions, concentrated principally on its retrospective character.

Article 15.5

84 Article 15.5 of the Constitution provides that the Oireachtas shall not "declare acts to be infringements of the law which were not so at the date of their commission". Counsel assigned by the court accepted that, in principle, the Oireachtas has the competence to adopt legislation which validates actions which were unlawful at the time they were committed. It may not, however, make unlawful any act which was, when committed, lawful. Counsel assigned by the court submitted that subs. (5) implicitly renders it retrospectively unlawful to have failed to pay charges whose payment is declared always to have been lawful. Non-payment of these charges was, at all relevant times after 1976 lawful but has now been rendered retrospectively unlawful. The Attorney General stressed that subs. (5) is worded so as to apply only to the "imposition and payment" of a charge and, thus, does not apply where, for any reason, a charge was not paid.

Article 15.2.1°

85 Under Article 15.2.1°, the "sole and exclusive power of making laws for the State is hereby vested in the Oireachtas". The Oireachtas, by s. 53(1) of the Act of 1970, laid down a legislative policy that health boards could not impose charges for in-patient services on persons with full eligibility. Counsel assigned by the court submitted that the Oireachtas does not have the power retrospectively to validate actions which, when they were committed, were in contravention of the law. Where the Minister had power, pursuant to s. 53(2), to adopt regulations imposing charges in relation to persons with limited eligibility, but this was expressly prohibited by s. 53(1) in the case of persons with full eligibility, he would be acting *ultra vires* and unconstitutionally, if he purported to adopt regulations of the latter type. He would have been performing a legislative function. This distinguishes the Bill from other types of curative or validating legislation. This was not a case of a mere technical deficiency or want of power but entailed a violation of a provision of an Act of the Oireachtas. Reliance was placed on the *dictum* of Walsh J. in *Shelly v. District Justice Mahon* [1990] 1 I.R. 36 at p. 45 that, "an unconstitutional procedure cannot subsequently be declared by the Oireachtas to have been constitutional". Counsel for the Attorney General pointed to a number of express restrictions in the constitutional text on the legislative power of the Oireachtas but said that there was no basis for saying that there can be some additional unidentified but implied restriction of the type alleged. The Bill is a type of curative legislation of which many examples had been enacted by the Oireachtas of Saorstát Éireann and the framers of the Constitution must have been conscious of the possibility of that type of legislation at the time of the adoption of the Constitution. Counsel relied on the statement of Keane C.J. at p. 636 in *Leontjava v. Director of Public Prosecutions* [2004] 1 I.R. 591, that, "the Constitution affords a strikingly wide latitude to the Oireachtas in adopting whatever form of legislation it considers appropriate in particular cases". Counsel also cited *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23. This part of the argument led to extensive citation of United States authorities. Counsel assigned by the court relied upon: *Forbes Pioneer Boat Line v. Board of Commissioners* (1922) 258 U.S. 338; *Graham v. Goodcell* (1931) 282 U.S. 409 and *Washington National Arena Limited Partnership v. Treasurer Prince George's County Maryland* (1980) 410 A.2d 1060. The Attorney General relied principally on *United States v. Heinszen* (1907) 206 U.S. 370.

Article 43

86 Counsel assigned by the court submitted that, assuming that the Oireachtas had power to enact retrospective legislation in contradiction of its existing declared legislative policy, the Bill, nonetheless, infringes Article 43 read together with Article 40.3.2° of the Constitution, because it adversely affects vested interests. The persons who wrongly paid charges have a legal right to recover the charges exacted from them. This constitutes a claim in debt which is, for example, assignable. It constitutes a constitutionally protected property right (*O'Brien v. Manufacturing Engineering Co. Ltd.* [1973] I.R. 334) as well as a right to litigate, though this distinction may not be material. Reference was also made to *Moynihan v. Greensmyth* [1977] I.R. 55, *Foley v. Irish Land Commission and Another* [1952] I.R. 118, *O'Callaghan v. Commissioners of Public Works* [1985] I.L.R.M. 364, *Dreher v. Irish Land Commission* [1984] I.L.R.M. 94 and *Attorney General v. Southern Industrial Trust* (1960) 94 I.L.T.R. 161. The effect of the Bill is to abolish the right in its entirety and without any compensation. Reference was made to *Hamilton v. Hamilton* [1982] I.R. 466. It was pointed out that in *The Planning and Development Bill, 1999* [2000] 2 I.R. 321, Keane C.J. said at p. 352:-

> "There can be no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property."

87 The effect of the Bill is to abolish the property rights in question in their entirety without compensation. This is an "unjust attack" on those rights for the purposes of Article 40.3.2° of the Constitution. This Bill does not merely delimit such rights by law in the interests of the common good, as envisaged by Article 43.2.2° of the Constitution. There is no balancing of competing constitutional rights, as claimed by the Attorney General. The only justification advanced is the financial interest of the State. This is not a case such as *Tuohy v. Courtney* [1994] 3 I.R. 1. The Attorney General argues that the Bill is justified in the interests of the common good and that, in particular, it is concerned to cure a lacuna in legislation. There was never a substantive constitutional right to receive in-patient services free of charge. At most, there was a statutory right to receive a benefit. In correcting the problem that arose, when the illegality was discovered, the State was concerned to balance social and economic considerations. These are matters peculiarly within the competence of the Oireachtas, rather than the courts, and the Bill enjoys a heightened presumption of constitutionality.

Proportionality

88 Counsel assigned by the court drew attention to the test of proportionality as explained in *Heaney v. Ireland* [1994] 3 I.R. 593 and approved in *The Employment Equality Bill, 1996* [1997] 2 I.R. 321. The elements necessary, where a restriction of a right is involved, as explained by Costello J. in the former case at p. 607, are that the restrictions must:-

> "(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> (b) impair the right as little as possible, and
> (c) be such that their effects on rights are proportional to the objective"

The Bill does not merely interfere with the right, it proposes to abolish it in its entirety. It was submitted on the authority, *inter alia*, of the Australian case *Georgiadis v. Australian and Overseas Telecommunications Corporation* (1994) 179 C.L.R. 297, that the abrogation of a cause of action without compensation was unconstitutional. There is no pressing justification for the Bill such as could be examined for proportionality in the exigencies of the common good. The sole justification is the need of the State not to have to make restitution of charges unlawfully exacted. It was submitted that, in the caselaw of the European Court of Human Rights, financial considerations of a respondent government have only in very exceptional circumstances been considered to justify interference with protected rights. Reliance was placed on *Pressos Compania Naviera S.A. v. Belgium* (1995) 21 E.H.R.R. 301, where a Belgian law exempting the state and providers of pilot services from liability for negligence, including liability for claims in being, was held to interfere with property rights guaranteed by article 1 of protocol 1 of the European Convention on Human Rights and Fundamental Freedoms. While the court held the legislation to be justified prospectively by the very large expense to the Belgian state, it was not justified insofar as it deprived the applicants in existing cases of their claims. Reference was also made to *Zielinski v. France* (2001) 31 E.H.R.R. 19 and to *National & Provincial Building Society v. United Kingdom* (1997) 25 E.H.R.R. 127. The Attorney General places particular reliance on the last mentioned case. These cases will be discussed more fully at a later stage in this judgment.

Article 40.1

89 Counsel assigned by the court submitted that the Bill would give effect in three respects to invidious discrimination which would be repugnant to Article 40.1 of the Constitution. Firstly, s. 53(5), by validating retrospectively the imposition of charges on those who had paid but not on those

who, in identical circumstances, had not paid, the Bill would discriminate, without any rational basis, between persons in identical legal situations. Secondly, s. 53(6) would discriminate between those who had and had not instituted legal proceedings prior to the 14th December, 2004. Thirdly, the same subsection would discriminate between persons who had instituted proceedings for the recovery of the charge and those who had instituted proceedings by way of judicial review or otherwise merely for a declaration that a charge had been invalidly imposed. It was submitted that there was no justifiable rational difference or distinction, legal or moral, between these categories of persons, who comprised a single class. Reference was made to the *dictum* of Barrington J. in *Brennan v. Attorney General* [1983] I.L.R.M. 449 at p. 480, and approved at p. 346 in the judgment of the court in *The Employment Equality Bill, 1996* [1997] 2 I.R. 321, that "the classification [adopted by the Oireachtas] must be for a legitimate legislative purpose … it must be relevant to that purpose, and that each class must be treated fairly". Counsel also referred to *Dillane v. Attorney General* [1980] I.L.R.M. 167 at p. 169, *O'B. v. S.* [1984] I.R. 316 at p. 335 and *Quinn's Supermarket v. Attorney General* [1972] I.R. 1. Counsel assigned by the court submits that it constitutes invidious discrimination to provide that those who paid are disadvantaged by not having their money back, whereas those who did not pay are privileged by being allowed to keep the money. Furthermore, s. 53(4), while empowering the chief executive officer of a health board to reduce or waive a charge imposed for the future, does not apply to those who paid in the past. Counsel for the Attorney General submits that, in each of these cases, the distinction was such as the Oireachtas was entitled to adopt. The court in *The Employment Equality Bill, 1996* held at p. 346 that Article 40.1 of the Constitution, recognises the "legitimacy of measures which place individuals in different categories for the purposes of the relevant legislation". In *The Planning and Development Bill, 1999* [2000] 2 I.R. 321, Keane C.J., delivering the judgment of the court, said at p. 357:-

> "Where classifications are made by the Oireachtas for a legitimate legislative purpose, are relevant to that purpose and treat each class fairly, they are not constitutionally invalid."

The Oireachtas was entitled to consider that the retrospective levying of charges not already paid might infringe Article 15.5 of the Constitution and to take the view that to seek recoupment of charges from such persons at this stage could cause unnecessary hardship. Equally, the legislature was entitled to distinguish between those who had instituted proceedings for recovery of charges before the 14th December, 2004, and those who had not done so. Legislative interference with the former would have amounted to an interference "with the operations of the courts in a purely judicial

domain", deemed to be incompatible with the Constitution in *Buckley (Sinn Féin) v. Attorney General* [1950] I.R. 67. Not to have included a provision such as s. 53(6) would manifestly have defeated the purpose of the Bill as a large number of claims would inevitably have been launched after the publication of the Bill, if some cut-off date had not been provided. Reliance was again placed on *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23. Finally, it was stated that there were not in existence on the 14th December, 2004, any proceedings other than of the type specified in subs. (6)(a).

Article 34

90 Counsel assigned by the court submitted that the combined effect of subss. (5) and (6) is to enable proceedings commenced before the 14th December, 2004, seeking recovery of a relevant charge to survive, but not proceedings for judicial review or declaratory relief, such as have been mentioned in the immediately preceding paragraph under the heading of alleged discrimination. Counsel for the Attorney General submitted that any such claims would be entirely moot and would not, if they existed, be entertained by any court. If they were not designed to recover any charge, they would not serve any purpose. Thus the subsection would not interfere in any meaningful way with the administration of justice.

Submissions of Attorney General
re Murphy v. The Attorney General

91 The Attorney General, in his defence of the Bill, relied in particular on the decision of this court in *Murphy v. The Attorney General* [1982] I.R. 241. While it would not be true to characterise it as the sole basis put forward to justify interference with the constitutional property rights of patients affected by unlawful charges, it undoubtedly loomed large both in written submissions and at the hearing. In that case, the court held to be unconstitutional certain provisions of the Income Tax Act 1967, which provided that the income of married couples be aggregated, resulting in the imposition of tax on a married couple at a higher rate than would be imposed on two single persons in identical circumstances. Following the delivery of its judgment, the court agreed to an exceptional procedure whereby it would pronounce on the future effects of the declaration. Although there were differences between the judgments and one dissenting judgment, it is accepted that the majority judgment was that of Henchy J., who posed, at p. 306, the specific question:-

> "Where the plaintiffs have paid, or have had deducted from their earnings, income tax collected under statutory provisions which were

> subsequently declared unconstitutional, can they recover back such income tax. If so, to what extent? It is a question of profound importance, not only for the plaintiffs and similar taxpayers, and not only in terms of the fiscal arrangements and requirements of the State, but also in a wider context, for its resolution involves a consideration of the further question whether, and to what extent, what has been done pursuant to, or what has happened on foot of, an unconstitutional enactment may be revoked, annulled, rectified, or made the subject of a claim for damages or for some other form of legal redress."

Full consideration of this important judgment will be necessary at a later point of this judgment. In essence, counsel for the Attorney General explained how Henchy J. had expounded at p. 314 the modern law of restitution as showing that, while persons are normally entitled to repayment of monies, "there may be transcendent considerations which make such a course undesirable, impractical, or impossible". These considerations could, he continued, include "factors such as prescription (negative or positive), waiver, estoppel, *laches*, a statute of limitation, *res judicata*, or other matters (most of which may be grouped under the heading of public policy)".

92 Following a detailed review of authorities, Henchy J. concluded that, other than the plaintiffs in the very action who had mounted the constitutional challenge, and in their case only for a limited period, no other taxpayers should be held entitled to recover taxes collected from them in reliance on the unconstitutional provisions. Counsel for the Attorney General accepted that *Murphy v. The Attorney General* [1982] I.R. 241 related purely to the exercise of judicial power, but submitted that, in the constitutional order, it was equally logical for the legislature to have such a power. Counsel submitted that *Murphy v. The Attorney General* applied to the collection of taxes from married couples pursuant to a statute which had been held to be repugnant to the Constitution and, hence, deemed to have been void *ab initio*, whereas the unlawful charges were collected under the Health Acts on an *ultra vires*, but not an unconstitutional, basis. Furthermore, the persons concerned had received benefits from the State. It was submitted that the Bill is rooted in almost identical policy considerations. It was submitted strongly that the Bill represented the policy determination of the executive and the two Houses of the Oireachtas, organs of government directly accountable to the people, in relation to the finances of the State. Counsel for the Attorney General relied on the decision of the European Court of Human Rights in *National & Provincial Building Society v. United Kingdom* (1997) 25 E.H.R.R. 127 in support of their submissions based on *Murphy v. The Attorney General*.

93 Counsel assigned by the court distinguished *Murphy v. The Attorney General* [1982] I.R. 241. They pointed out, firstly, that Henchy J. at p. 318 attached importance to the presumption of constitutionality which prevailed at all times when the relevant taxes were paid and that the State was entitled to rely upon it. In *Murphy v. The Attorney General,* the court accepted that the taxes in question had been received *bona fide* by the State, whereas in the case of patients wrongly charged for in-patient services, there was no such presumption. The charges were imposed in circumstances of clear illegality and the Bill precludes any inquiry as to whether the charges were imposed in good faith.

Conclusions on several issues raised by counsel

94 Before dealing with what the court sees as the core issue concerning the constitutionality of the Bill, there are a number of questions which arise from the submissions of counsel on both sides which the court considers convenient to address at this stage.

Article 15.5

95 The first of these issues is that raised by counsel assigned by the court as to the meaning and the effect of Article 15.5 of the Constitution which restricts the Oireachtas from adopting legislation with a certain kind of retrospective effect.

Article 15.5 of the Constitution provides:-

> "The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission."

The court is satisfied that no provision of the Bill offends this provision. Subsection (5) merely purports to render lawful the payment of charges, the payment of which was required and which were paid without lawful authority in the past. It does not now seek to render unlawful the failure of any person to pay charges in the past. If it did so, it would infringe Article 15. Accordingly, the court should, in observance of the presumption of constitutionality which applies to Acts of the Oireachtas, including Bills referred to the court pursuant to Article 26 of the Constitution, interpret the Bill so far as possible so as to bring it into harmony with the Constitution. It is only on a strained interpretation that this particular Bill could be read as rendering unlawful the failure, in the past, of recipients of in-patient services to pay for them. On the contrary, the Bill is careful to render lawful only charges which were in fact paid. Thus, it is unnecessary to adopt any interpretation other than the literal one of the Bill.

United States caselaw: restrictions on curative legislation

96 The next question concerns a proposition advanced by counsel assigned by the court, which they conceded was rather novel, that even under its general legislative power, and apart altogether from any injustice to persons with vested rights, the Oireachtas did not have power to adopt curative legislation purporting to validate past acts which were expressly prohibited by the legislation then in force. This contention is founded on certain United States caselaw. However, it is appropriate to consider, in the first instance, the provisions of the Constitution. Article 15.2.1° provides that:-

> "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

97 The Constitution itself, however, places a number of restrictions, express or implied, on the scope of the legislative power. Most importantly, Article 15.4.1° provides that:-

> "The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof."

98 Furthermore, the Constitution confers in Article 34.3.2° express jurisdiction on the High Court to consider "the question of the validity of any law having regard to the provisions of this Constitution". This is by no means a common or usual power among the constitutions of the world. No corresponding power was contained in the constitution of the United States of America and it fell to the supreme court of that nation to discover that it existed. The boundaries of the legislative power of the Oireachtas are, other than in the important case of the laws of the European Union, to be found within the Constitution itself. Counsel for the Attorney General drew attention to a number of express restrictions on the power, instancing certain electoral provisions. Another obvious example might be that no law could be passed providing for the conferring of titles of nobility (Article 40.2.1°). In practice, the most important restraints on legislative power have been found to flow from the guarantees of fundamental rights declared in Articles 40 to 46 of the Constitution.

99 Nonetheless, having recognised these clear constitutional limits, the consequence of the role of the Oireachtas as the sole and exclusive law-maker for the State means that, in principle, it may legislate on any subject. There is no subject matter in respect of which it is incompetent to legislate. The Oireachtas is the parliament of a unitary state. The constitution of a federation necessarily designates the respective competences of the federal government and its component states or provinces. Keane C.J., as already cited, stated, with the agreement of the other members of the court, at p.

636 in *Leontjava v. Director of Public Prosecutions* [2004] 1 I.R. 591, that "the Constitution affords a strikingly wide latitude to the Oireachtas in adopting whatever form of legislation it considers appropriate in particular cases". He was speaking, in that case, of the form rather than the subject matter of legislation. Nonetheless, his words are equally apt if considered in the latter context.

100 In deference to the careful arguments of counsel assigned by the court, it is appropriate to consider the authority advanced for the proposition that, having regard to the legislative background and history, the legislative power should be so limited as to deprive the Oireachtas of the power to enact the Bill. It is convenient to refer to the first in time of the American cases. It is *United States v. Heinszen* (1907) 206 U.S. 370. The entire matter arose against the background of the Spanish-American War. The President of the United States, while the Philippines were under the military control of the United States during the war, in the exercise of executive power, made orders imposing tariffs on goods imported into the islands. These were valid and lawful. However, upon the ratification of the treaty of peace with Spain, the Philippines were no longer a foreign country and the tariffs, though they continued for a time to be collected, were unlawful. A validating statute was passed by congress with retrospective effect. The Supreme Court upheld the validity of this curative act, principally on the basis of ratification of the unauthorised act of an agent. *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District* (1922) 258 U.S. 338 was decided in 1922. It concerned the unlawful collection of tolls for passage through a lock of the defendants' canal. A retrospective Florida statute purported to validate the collection. Holmes J. distinguished *United States v. Heinszen.* He said:-

> "But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act … If we apply that principle this statute is invalid. For if the Legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls."

At a later point, having explained away some cases in which acts done in the name of the government had been ratified and also cases of slight technical defect, he thought that in these cases "the meaning simply is that constitutional principles must leave some play to the joints of the machine". The principal ground for the decision in *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District* (1922) 258 U.S. 338 appears to have been that, at the time of passage through the canal

lock, there was no power to collect tolls. However, it seems plain that they were, in fact, collected and paid. Thus it is difficult to follow the analogy with the baker's free supply of rolls. The reference to "play to the joints of the machine" suggests that there was no compelling distinction between that case and *United States v. Heinszen* (1907) 206 U.S. 370. In the much more recent case of *Washington National Arena Limited Partnership v. Treasurer, Prince George's County, Maryland* (1980) 410 A 2d 1060, the court of appeals of Maryland attempted a reconciliation of the above "two leading Supreme Court cases", while acknowledging that "the line between permissible 'curative' legislation and unconstitutionally retroactive legislation has been some what difficult to draw" (see p. 1065). It appears to have concluded that, in *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District* (1922) 258 U.S. 338, the commissioners "were, at the time of the toll collections violating the legislative policy *as ascertained by the courts"* (emphasis added) (p. 1067). The highlighted expression appears important. It echoes the remark of Holmes J. that "the transaction [collection of tolls] was not one for which payment naturally could have been expected" which falls well short of an express prohibition on the collection of tolls. Finally, the Maryland Court warned that its distinction between *United States v. Heinszen* (1907) 206 U.S. 370 and *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District* (1922) 258 U.S. 338 could not always "like a mathematical formula" determine whether curative legislation should be upheld. In a later reference, *Van Emmerik v. Janklow* (1982) 454 U.S. 1131, it appears that the court, in 1982, acknowledged "the difficulty in discerning the difference between permissible curative legislation and unconstitutionally retroactive legislation". It notes its duty to "define this boundary". This court does not find it possible to discern from the American cases any clear principle regarding permissible retrospective legislation, which would warrant its adoption in the context of interpretation of our Constitution. The American context is quite different. There is no basis for imposing *a priori* limits to the nature of retrospective legislation, other than those which are to be derived from the Constitution itself, as interpreted by this court.

Murphy v. The Attorney General [1982] I.R. 241

101 Finally, before considering what the court considers to be the core constitutional issues, it is at this point appropriate to consider the extent to which the judgments of this court in *Murphy v. The Attorney General* [1982] I.R. 241 may be considered to have a bearing on the constitutional issues which arise in respect of the provisions and on which counsel for the

Attorney General relied so extensively in their submissions. In doing so the court must give careful consideration, firstly, to the judgment of the majority of this court pronounced by Henchy J. in *Murphy v. The Attorney General.* The circumstances in which that judgment came to be given were unusual, if not unique, in the history of this court. On the 25th January, 1980, the court, on appeal from the judgment of Hamilton J., gave judgment declaring ss. 192 to 198 of the Income Tax Act 1967 to be repugnant to the Constitution. The appeal, being taken by the Attorney General, concerned only the issue of constitutionality. The plaintiffs had included in their proceedings a claim for accounts and inquiries as to the amounts of tax overpaid by them as a result of the impugned sections and their repayment. This had not been the subject matter of the appeal. Following the delivery of judgment on the 25th January, 1980, the Attorney General – not, be it noted, the plaintiffs – requested to be allowed to, "speak to the minutes of the order". His purpose was to ascertain the extent to which the plaintiffs could sustain their claim for accounts and inquiries. In reality, the concern of the State related to the extent to which it might be compelled to make repayments of overpaid tax to persons similarly situated. The court, Henchy J. dissenting, agreed to hear this application. This procedure related only to the claim of the plaintiffs in *Murphy v. The Attorney General.* Although the decision had implications for other taxpayers, the court did not formally rule on their cases. Apart from repeating his principled objection to this procedure, Henchy J. pointed out that "the facts had not yet been fully investigated". Nonetheless, it is apparent from his judgment that the court had at its disposal a significant amount of information about the amounts of tax paid by the plaintiffs, the extent of the impact on them of the impugned sections and the date when they first objected: see pp. 317 and 318. It may be observed that, in the present cases, the court has no information at all about the circumstances or even the name of any patient who has paid the unlawfully imposed charges, which are purportedly retrospectively validated by the Bill.

102 It is necessary, however, to examine the judgment delivered by Henchy J. on the issue. It is of the first importance to observe that the judgment of Henchy J. is not authority for the proposition that persons from whom money has been unlawfully collected by the State, whether in the form of taxes or otherwise, are not entitled to recover those amounts. The contrary is the case, as appears at several points in the judgment. The consequence of a declaration that a law is repugnant to the Constitution is that, as stated at p. 313, "from the date of its enactment, the condemned provision will normally provide no legal justification for any acts done or left undone, or for transactions undertaken in pursuance of it; and the person damnified by the operation of the invalid provision will normally be

accorded by the Courts all permitted and necessary redress;" and at p. 314 that "it is central to the due administration of justice in an ordered society that one of the primary concerns of the Courts should be to see that prejudice suffered at the hands of those who act without legal justification, where legal justification is required, shall not stand beyond the reach of corrective legal proceedings;" at p. 316, referring to monies collected under the condemned sections: "Whether the action be framed at common law for money had and received or (as here) in equity for an account of money held as a constructive trustee for the plaintiffs, I would hold that, in the absence of countervailing circumstances (to which I shall presently refer), such money may be recovered;" at p. 317, referring specifically to the plaintiff's claim: "Any one of such payments would normally be recoverable as money exacted *colore officii*, for the nature of P.A.Y.E. collection of income tax is such that in the relevant period the plaintiffs' salaries were subject to compulsory deduction by their employers of the income tax which was exigible under the now condemned statutory provisions. The payments were, therefore, involuntary to the point of being compulsory collections".

103 It is clear, therefore, that Henchy J. pronounced in favour of a general rule of recovery of amounts of money unlawfully collected by the State or State authorities. The Attorney General relies, of course, on his several statements, at p. 314, that this is "not a universal rule" and that there may be "transcendent considerations". The same page contains the following passage:-

> "Over the centuries the law has come to recognize, in one degree or another that factors such as prescription (negative or positive), waiver, estoppel, laches, a statute of limitation, *res judicata*, or other matters (most of which may be grouped under the heading of public policy) may debar a person from obtaining redress in the courts for injury, pecuniary or otherwise, which would be justiciable and redressable if such considerations had not intervened."

104 Each of the circumstances here described is an instance of a defence to a lawful claim, which, therefore, presupposes the existence of a valid claim. It is, of course, possible that patients seeking recovery of charges unlawfully required of them would be met and perhaps defeated by some such defence. The right to put them forward is preserved by subs. (7) of the Bill. To extinguish the claims entirely, without permitting a claim to be advanced, is an entirely different matter.

105 Henchy J. cited, at p. 319, a number of authorities from other jurisdictions suggesting that there may be circumstances in which full restitution would be inequitable. In particular, a New Zealand statute allowed relief to be refused in full or in part where monies have been

received in good faith and the recipient has so altered his position as to render full restitution inequitable. The Bill, however, contains no provision for inquiry as to whether the charges were received in good faith. The claims are to be extinguished whether or not the monies were collected in good faith. In this connection, it is particularly material that, apart altogether from the express prohibition of charging contained in s. 53(1) of the Act of 1970, as and from 2001, all persons aged 70 or over were entitled by statute to be treated as having full eligibility regardless of means. Nonetheless, collection of charges continued. Counsel for the Attorney General frankly and rightly accepted at the hearing that there was no conceivable basis upon which anybody could reasonably have thought the charges could lawfully be levied or collected from persons aged 70 or over after that time. He also accepted the possibility that some such fully eligible persons had made protests. The court is satisfied, accordingly, that *Murphy v. The Attorney General* [1982] I.R. 241 offers no support for the Bill, insofar as reliance is placed on equitable principles relieving defendants from full restitution on the grounds of good faith.

106 It is also necessary to consider the precise grounds, set out at pp. 319 and 320, for refusing recovery to the plaintiffs in *Murphy v. The Attorney General* [1982] I.R. 241 beyond the date upon which they had instituted their proceedings. Henchy J. commences by recalling the presumption of constitutionality, stating that it is beyond question that the State in its executive capacity received the monies in question in good faith, in reliance on the presumption that the now condemned sections were favoured with constitutionality. Clearly, the unlawful collection of charges, at present under consideration, was not protected by any presumption, constitutional or otherwise. For the reasons mentioned in the preceding paragraph, the State is not in a position to rely on any presumption of good faith. This is not to say that monies were necessarily collected in bad faith. Rather, as already stated, the Bill permits no inquiry as to whether there was good or bad faith. The validation of the unlawful collection of charges is the very justification and sole reason for which the Oireachtas came to enact retrospective validating legislation.

107 Finally, it is necessary to consider the decision of the European Court of Human Rights in *National & Provincial Building Society v. United Kingdom* (1997) 25 E.H.R.R. 127, which counsel for the Attorney General cited, in effect, as being analogous to and in support of their reliance on the decision in *Murphy v. The Attorney General* [1982] I.R. 241. That decision arose from a long and extremely complex history of tax legislation and attendant litigation in the courts of England and Wales and then at the European Court of Human Rights. In deference to the strong reliance placed upon it, it is necessary to explain its background. Building societies

in England collect tax from their deposit holders, which they remit to the Inland Revenue. For a number of years, there existed an extra-statutory arrangement under which the societies negotiated a composite tax rate (taking account of the varying tax rates applying to their customers) and paid over tax in each year by reference to a preceding equivalent period. Different societies used different reference periods. It was decided, in the mid-1980s, to place the entire system on a new statutory footing. This involved abandoning the preceding-year basis. As a result, there was a "gap period" between the old and the new periods for which tax was paid. Regulations were adopted, containing provisions to enable tax to be recovered for the "gap periods". These were held to be invalid in the English courts, for what the United Kingdom government told the European Court of Human Rights, and it accepted, were "purely technical" reasons, and which do not concern us. The Woolwich Building Society successfully brought proceedings for recovery of tax paid under the invalid regulations, coincidentally those already cited regarding the law of restitution. Parliament passed retrospective legislation validating the regulations and excluding any recovery claims other than those of the Woolwich. There was a large dispute between the societies and the United Kingdom government as to whether the effect of this legislation was to impose double taxation on the societies or whether the effect of the invalidation of the legislation was to confer very large windfall gains on the societies. It is vital to a proper understanding of the decision of the European Court of Human Rights to note that it fully accepted the government's position. The court found that the societies had deducted the tax for the gap periods from interest paid to their investors and that these amounts were lodged in their reserves. The court said at para. 59:-

> "It is an inescapable conclusion that had steps not been taken to bring those amounts into account in the move from the prior period system to the actual-year system, the applicant societies would have been left with considerable sums of money representing unpaid tax."

The court rejected the argument that there was double taxation. There was mere acceleration of payment. The court accepted that the effect of the retrospective legislation was to deprive the applicant societies of the right to bring a claim of the same type as the Woolwich, but considered that these would be "opportunistic legal proceedings to exploit technical defects in the … Regulations and to frustrate the original intention of Parliament". It also considered that the effect of not adopting the contested legislation would have been to allow the societies "to retain a windfall". It is easy to see why the court did not accept that the societies were suffering any unjust interference with their claims. Indeed, the court declined to rule directly that these claims were "possessions" for the purposes of article 1 of

protocol 1. By reason of the changeover of payments, there was a gap. The societies would have been allowed to retain amounts for tax that they had collected from their clients.

108 The Attorney General argued that the decision of the majority of this court in *Murphy v. The Attorney General* [1982] I.R. 241, supported by the reasoning of the European Court of Human Rights in *National & Provincial Building Society v. United Kingdom* (1997) 25 E.H.R.R. 127, provides justification for the Bill. In this connection, it is submitted that the patients received the services for which they were charged and that their right to free provision of the services was statutory and not constitutional. The court does not find these arguments persuasive. At the time of their provision, the patients were entitled to have the services free of charge and the charges were imposed and money demanded unlawfully and contrary to the express provisions of the statute. The situation of the building societies in *National & Provincial Building Society v. United Kingdom* (1997) 25 E.H.R.R. 127 is much more analogous to the case of *Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 I.R. 64, decided by this court. The building societies could never, as a matter of justice, have been considered entitled to retain monies they had deducted for tax from their clients and not paid over to the Revenue. The court, therefore, rejects the arguments of the Attorney General insofar as they are based on both *Murphy v. The Attorney General* and *National & Provincial Building Society v. United Kingdom.*

Property rights: Articles 40 and 43

Articles 40.3.2° and 43

109 The court now turns to what it considers to be the core issues which arise from the submissions of counsel concerning the constitutionality of the Bill. These concern the nature of the existing rights of persons entitled to recover charges unlawfully paid and the justification of the State for delimiting those rights. In their submissions counsel assigned by the court also argued that such legislation would be especially objectionable insofar as it purported to interfere with vested rights. They cited the judgment of O'Higgins C.J. in *Hamilton v. Hamilton* [1982] I.R. 466 at p. 474:-

> "Retrospective legislation, since it necessarily affects vested rights, has always been regarded as being *prima facie* unjust."

Henchy, Griffin and Hederman JJ. agreed with the conclusions of the then Chief Justice. Henchy J. added at p. 484:-

> "The judicial authorities (which are mentioned in the judgment which the Chief Justice has just delivered) make clear that, because there is a presumption that a statute does not intend to operate unfairly,

unjustly or oppressively by trenching on rights or obligations lawfully acquired or created before the statute came into force, it should be construed as prospective in its application and not retrospective, unless there is a clear and unambiguous intention to the contrary expressed, or necessarily implied, in the statute, or unless the change effected by the statute is purely procedural."

110 These two statements concern only the approach of the common law to the interpretation of retrospective legislation. The topic was further considered by this court in *Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 I.R. 64. Fennelly J., speaking for a unanimous court, referred at p. 85 to the need "to segregate the two issues, namely the correct approach to the interpretation of statutes with potential retrospective effect in accordance with common law principles and the interpretation of provisions with such effect in the light of the Constitution". In the case of this reference, it is not suggested that any particular issue of interpretation arises. It is acknowledged that subs. (5) has the retrospective effect of deeming the past collection and payment of charges to be lawful and that that will deprive the affected persons of the right to restitution. Indeed, that is its acknowledged purpose. The relevance of *Hamilton v. Hamilton* [1982] I.R. 466 is, therefore, its repetition of the presumption that retrospective legislation which affects vested rights is *prima facie* unjust. The relevance of *Minister for Social, Community and Family Affairs v. Scanlon* is that retrospective legislation is not necessarily unjust. In that case, the defendant had received disability benefits over a number of years, although he had been working during that time. At the time of payment of the benefits, there was no provision for their recovery. An amendment was introduced with retrospective effect. The constitutionality of the provision was not challenged, but it was submitted that it should, to be compatible with the Constitution, not be construed so as to have retrospective effect. This submission was rejected, except in one respect, on the ground that there was no identifiable constitutional right to retain benefits which had been wrongly obtained.

111 The nature of the property right enjoyed by patients affected by subs. (5) has already been analysed as being a *chose in action*. It is now necessary to consider the constitutional provisions protecting the rights of private property.

112 Under the heading, "Private Property" the Constitution contains the following Article 43:-

"1. 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2. 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."

Article 40.3 of the Constitution provides:-

"1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

113 As was stated by Keane C.J. delivering the judgment of the court in *The Planning and Development Bill, 1999* [2000] 2 I.R. 321 at p. 347, "the interpretation of these Articles and, in particular, the analysis of the relationship between Article 40.3.2° and Article 43 have not been free from difficulty". A comprehensive discussion of evolving jurisprudence on this subject is contained in Hogan and Whyte, *J. M. Kelly: The Irish Constitution* (4th ed., pp. 1978 to 1993). The learned authors conclude, at p. 1993, that "when considering constitutional protection of property rights, these Articles mutually inform each other". Keane C.J., in the judgment mentioned above, recalled at p. 347, firstly, the statement of O'Higgins C.J. delivering the judgment of the court in *Blake v. The Attorney General* [1982] I.R. 117 at p. 135:-

> "Article 43 is headed by the words 'private property'. It defines … the attitude of the State to the concept of the private ownership of external goods and contains the State's acknowledgement that a natural right to such exists, antecedent to positive law, and that the State will not attempt to abolish this right or the associated right to transfer, bequeath and inherit property. The Article does, however, recognise that the State 'may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.' It is an Article which prohibits the abolition of private property as an institution, but at the same time permits, in particular circumstances, the regulation of the exercise of that right and of the general right to transfer, bequeath and inherit property. In short, it is an Article directed to the State and to its attitude to these rights,

which are declared to be antecedent to positive law. It does not deal with a citizen's right to a particular item of property, such as controlled premises. Such rights are dealt with in Article 40 under the heading "personal rights" and are specifically designated among the personal rights of citizens. Under Article 40 the State is bound, in its laws, to respect and as far as practicable to defend and vindicate the personal rights of citizens.

There exists, therefore, a double protection for the property rights of a citizen. As far as he is concerned, the State cannot abolish or attempt to abolish the right of private ownership as an institution or the general right to transfer, bequeath and inherit property. In addition, he has the further protection under Article 40 as to the exercise by him of his own property rights in particular items of property."

Keane C.J. proceeded, however, to suggest some modification of the approach adopted in *Blake v. The Attorney General* [1982] I.R. 117. He said, at p. 348:-

"It is clear, particularly when the later decisions of the court are examined, that this approach cannot now be adopted without at least some reservations. It is no doubt the case that the individual citizen who challenges the constitutional validity of legislation which purports to delimit or regulate the property rights undertakes the burden of establishing that the legislation in question constitutes an unjust attack on those rights within the meaning of Article 40. It is also possible to envisage an extreme case in which the Oireachtas by some form of attainder legislation purported to confiscate the property of an individual citizen without any social justification whatever. In such a case, no inquiry would be called for as to whether the legislation also conformed to the requirements of Article 43. The challenge typically arises, however, as it has done here, in circumstances where the State contends that the legislation is required by the exigencies of the common good. In such cases, it is inevitable that there will be an inquiry as to whether, objectively viewed, it could be regarded as so required and as to whether the restrictions or delimitations effected of the property rights of individual citizens (including the plaintiff in cases other than references under Article 26) are reasonably proportionate to the ends sought to be achieved.

That the provisions of Article 43 are relevant to the inquiry undertaken by the courts where they are considering a challenge to the constitutionality of legislation on the ground that it constitutes an unjust attack on the property rights of the citizen within the meaning of Article 40 was made clear in the subsequent decision of this court in *Dre-*

her v. Irish Land Commission [1984] I.L.R.M. 94, which it will be necessary to consider at a later point."

114 In the case of *Dreher v. Irish Land Commission* [1984] I.L.R.M. 94, mentioned in that passage, Walsh J., with the agreement of the other members of the court, had expressed at p. 96 the opinion that "any State action that is authorised by Article 43 of the Constitution and conforms to that Article cannot by definition be unjust for the purpose of Article 40.3.2°". This statement was followed in several later cases, notably *O'Callaghan v. Commissioners of Public Works* [1985] I.L.R.M. 364 and *Madigan v. Attorney General* [1986] I.L.R.M. 136 at p. 161. It remains a correct statement of the close relationship between the two Articles. It remains, of course, necessary to consider how the court should interpret Article 43 and, in particular how it should exercise its own power of review of legislation, which the Oireachtas has enacted in accordance with its own views of necessary regulation of property rights in the interests of social justice and the exigencies of the common good.

115 In *Tuohy v. Courtney* [1994] 3 I.R. 1, this court was concerned with a challenge to the constitutionality of a provision of the Statute of Limitations 1957, proceeding, without necessarily deciding the point, on the basis that the right to litigate was a property right protected by the Constitution. It had been agreed, as stated at p. 47, that "in legislating for time limits on the bringing of actions, [the Oireachtas] is essentially engaged in a balancing of constitutional rights and duties". Finlay C.J., delivering the judgment of the court, laid down a principle of general application when dealing with such legislation. He said, at p. 47:-

> "What has to be balanced is the constitutional right of the plaintiff to litigate against two other contesting rights or duties, firstly, the constitutional right of the defendant in his property to be protected against unjust or burdensome claims and, secondly, the interest of the public constituting an interest or requirement of the common good which is involved in the avoidance of stale or delayed claims.
>
> The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."

116 The foregoing statement was followed by this court in *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321, a case concerning a challenge to the constitutionality of certain provisions of the Civil Liability Act 1961, regarding

concurrent wrongdoers, though the judgment of the court is silent as to whether the rights of litigants in that context constituted property rights. Keane J. had treated them as property rights in his High Court judgment. The same passage from *Tuohy v. Courtney* [1994] 3 I.R. 1 was applied by this court in *White v. Dublin City Council* [2004] 1 I.R. 545, also a case dealing with the constitutionality of a limitation period. Once more, the court found it unnecessary, following the view of Finlay C.J., to determine whether the right to litigate constituted a property right. Implicit in the statement that there would be no material difference in the constitutional protection provided is the assumption that the Oireachtas may have been involved in deciding whether the principles of social justice required the regulation of the exercise of the property rights in question and whether their delimitation was therefore justified by the exigencies of the common good. Denham J., delivering the judgment of the court, stated, at p. 568, that, "striking a balance in the form of a limitation period is quintessentially a matter for the judgment of the legislator". She went on to state at p. 569 that the passage from the judgment of Finlay C.J. "in effect restates … the presumption of constitutionality enjoyed by all Acts of the Oireachtas".

117 An important part of the analysis of justification for interference with constitutional property rights is the question of compensation. Reference has already been made to the statement of Keane C.J. in *The Planning and Development Bill, 1999* [2000] 2 I.R. 321 at p. 352:-

> "There can be no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property."

118 That reference concerned a form of taking of property with a measure of compensation. There have been cases where the court has upheld interference with property rights without compensation. In *O'Callaghan v. Commissioners of Public Works* [1985] I.L.R.M. 364, the court did not consider that the absence of any provision for compensation for the making of a preservation order in respect of a public monument on the plaintiff's lands rendered the relevant legislation repugnant to the Constitution. The court, in the judgment of O'Higgins C.J., pointed out, at p. 367, that, "the order does not deprive the owner of his ownership nor of his rights to use the monument in any manner not inconsistent with it preservation". It also pointed out at p. 368 that the plaintiff was aware of the limitation at the time of purchase and that what was involved was "a requirement of what should be regarded as the common duty of all citizens". In *Dreher v. Irish Land Commission* [1984] I.L.R.M. 94, this court rejected a challenge to provisions of the Land Acts to the effect that compensation for land compulsorily acquired under that legislation was to be paid only in the

form of land bonds, the value of which was liable to fluctuation. An examination of the facts of that case shows that, as the court pointed out, the plaintiff received full compensation for the value of his land, that the bonds were issued at and intended to be kept at par and that, on the facts of the case, they had traded above par at a time when the plaintiff could have disposed of them. For these reasons, Keane C.J., in the judgment of the court in *The Planning and Development Bill, 1999* [2000] 2 I.R. 321 at p. 351, expressed the view that *Dreher v. Irish Land Commission*, "should be regarded as one which was essentially decided on its special facts". Against these cases may be set the decision of this court in *Electricity Supply Board v. Gormley* [1985] I.R. 129, where a statutory power of the plaintiff to erect masts to carry electricity power lines across the defendant's lands, though not a power to lop trees and branches, without payment of compensation, was held to be unconstitutional. In a number of other cases there has been discussion of the appropriate level of compensation: see *Blake v. The Attorney General* [1982] I.R. 117; *The Housing (Private Rented Dwellings) Bill, 1981* [1983] I.R. 181 and *Dreher v. Irish Land Commission*. From a consideration of these and other decided cases, it is clear that where an Act of the Oireachtas interferes with a property right, the presence or absence of compensation is generally a material consideration when deciding whether that interference is justified pursuant to Article 43 or whether it constitutes an "unjust attack" on those rights. In practice, substantial encroachment on rights, without compensation, will rarely be justified.

119 For the purposes of its consideration of whether the Bill or any provision thereof is repugnant to the Constitution, the court is satisfied that the correct approach is: firstly, to examine the nature of the property rights at issue; secondly, to consider whether the Bill consists of a regulation of those rights in accordance with principles of social justice and whether the Bill is required so as to delimit those rights in accordance with the exigencies of the common good; thirdly, in the light of its conclusions on these issues, to consider whether the Bill constitutes an unjust attack on those property rights.

120 According to the text of Article 43, the private ownership of external goods is a "natural right". For that reason, it is "antecedent to positive law". It inheres in man, "by virtue of his rational being". The former Supreme Court, in *Buckley (Sinn Féin) v. Attorney General* [1950] I.R. 67 recalled that these rights had "been the subject of philosophical discussion for many centuries". But it did say that the constitutional guarantee meant that "man by virtue, and as an attribute of, his human personality is so entitled to such a right that no positive law is competent to deprive him of it". The right to the ownership of property has a moral quality which is intimately related to

the humanity of each individual. It is also one of the pillars of the free and democratic society established under the Constitution. Owners of property must, however, in exercising their rights respect the rights of other members of society. Article 43.2.1°, therefore, declares that these rights, "ought, in civil society, to be regulated by the principles of social justice". The property of persons of modest means must necessarily, in accordance with those principles, be deserving of particular protection, since any abridgement of the rights of such persons will normally be proportionately more severe in its effects.

121 For the reasons already given, the court is satisfied that patients upon whom charges for in-patient services were unlawfully imposed from and after 1976 and, *a fortiori*, after 2001 and who paid those charges were entitled, as of right, to recover those charges. The actions for recovery could be based upon the law of restitution already discussed. They might be based on the modern approach to the recovery of money paid under a mistake of law (see *Rogers v. Louth County Council* [1981] I.R. 265). The action might take the simple form of a claim for the repayment of money had and received to the use of the plaintiff or a claim in equity for a declaration that certain monies were held in trust. The form of the action is immaterial for present purposes. What is clear is that the patients had a property right consisting of a right of action to recover the monies. While the Attorney General has not seriously contested the existence of this form of right, counsel on his behalf have advanced some arguments designed to cast doubt upon it. Firstly, it was said that the right was a mere statutory right, the right to the free provision of services, a right susceptible of change or amendment. This, in the view of the court, does not address the nature of the property right. Because the statutory right existed, patients were entitled to receive the relevant services free of charge. This right persisted so long as s. 53(1) of the Act of 1970 remained unchanged, as it did. Secondly, it was said that the patients had, in fact, received the services. The same response is appropriate. The services should have been supplied on the express legal basis that they were free of charge. The charging was unlawful. Thirdly, it is said that in many cases, the beneficiaries of any recovery will be the relatives, often the distant relatives of the patients, who, in many cases are now deceased. This argument does not address the legal character of a property right. The right in question is assignable and will devolve on the estates of deceased persons. In any event, the Bill does not seek to establish any scheme for distinguishing between meritorious and unmeritorious beneficiaries of recoupment claims. All are treated in the same way.

122 In contrast to the approach taken by counsel for the Attorney General, as outlined in the preceding paragraph, counsel assigned by the court relied

on the views expressed by the European Court of Human Rights in *Pressos Compania Naviera S.A. v Belgium* (1995) 21 E.H.R.R. 301. That case concerned retrospective Belgian legislation concerning claims for damages by a number of ship-owners as a result of alleged negligence of Belgian pilots. The Belgian government claimed that, as a result of a decision of the *Cour de Cassation*, it found itself exposed to enormous unforeseen damages claims. Belgium adopted a law exempting the Belgian government from liability for the negligence of pilots, with retrospective effect. The applicants had existing claims. The court held at para. 33 that the interference with existing claims to be "a deprivation of property within the meaning" of article 1 of protocol 1. It noted at para. 38 that the justification was "the need to protect the State's financial interests". Dealing with the proportionality of the interference, the court stated that "the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable … only in exceptional circumstances". Responding to reliance on financial considerations, it stated at para. 43:-

> "Such considerations could not justify legislating with retrospective effect with the aim and consequence of depriving the applicants of their claims for compensation.
>
> Such a fundamental interference with the applicants' rights is inconsistent with preserving a fair balance between the interests at stake."

While the court does not rely on that case for its final conclusions, and although it has its own particular facts giving rise to issues to be resolved under the terms of the European Convention on Human Rights, it is nonetheless illustrative of the issues which can arise for courts when retrospective legislation affects the legal status of previous transactions.

123 As regards the issues arising in this reference, it bears repetition that the property rights to be abrogated in their entirety by the Bill belong to the most vulnerable members of society. While the extension of full eligibility to all aged 70 or over, regardless of means, in 2001 means that a number will not be of limited means, the reality is that a great many will still be among the poorest in our society. Whatever exceptions may exist, it is an undoubted fact that the Bill will affect very many people who are old, or poor or disabled, mentally or physically, or in many cases all of these. As already stated, persons so situated will almost certainly have had little or no capacity to understand their rights under the legislation or to protest at the unlawfulness of the charges. All of these elements will be relevant to a consideration of the grounds upon which the Attorney General justifies the legislation.

124 Although counsel for the Attorney General on occasions referred to the Bill as curative, the court does not consider that the Bill is simply a curative or remedial statute, insofar as its retrospective provisions are concerned. Curative statutes are those measures that will either ratify prior official conduct or make a remedial adjustment in an administrative scheme. They often are the result of previous court decisions which overrule certain administrative conduct. In these situations the legislature is simply correcting the statutory flaws or filling a gap in statutory authority which had not been considered necessary and which the Oireachtas could always have adopted. Curative statutes, in the classical sense, remove unintended flaws in existing legislation and help to give full effect to the legislative intent behind the initial or original legislation. It goes without saying that any such legislation must be in conformity with the Constitution but its purely curative or remedial nature is a factor to be taken into account in the consideration of any constitutional issue.

125 The situation which the Bill addresses is quite different. The original intent of the legislature is to be found in s. 53 of the Act of 1970, which expressly conferred on persons of full eligibility under the Health Acts the right to in-patient services without charge. In deeming the charges imposed contrary to the provisions of that section as lawful, the Bill is not simply curative, since it goes directly contrary to the legislative intent of the initial legislation. It thereby seeks to alter the legal effect of completed transactions which had been conferred on them by an Act of the Oireachtas. This inevitably gives rise to considerations that differ from the simply curative or remedial legislation of the kind referred to above, particularly in respect of the rights of persons to recover monies paid for charges which were imposed on transactions contrary to the express intent of the Oireachtas.

126 Furthermore, for this reason it should be emphasised that it would be entirely inaccurate to characterise the recovery by persons of the monies which they paid in respect of the unlawful charges as anything in the nature of a windfall for such persons with a valid claim.

Justification of expense to the State

127 It is admittedly not possible to establish definitively the factual background to the legislation, although this judgment seeks to identify certain matters of fact on the basis of common sense. The basic proposition advanced on behalf of the State is clear and simple. It is that the cost to the exchequer of repaying all patients in the relevant category will be very great. It was not contended on behalf of the State that it is faced with a serious financial crisis. It was stated that, going back as far as 1976, some 275,000 patients would have received the relevant services. Taking into

account the right of the State to limit its liability by reliance on the Statute of Limitations, it was said that the figure to be repaid for the past six years could be of the order of €500 million. Counsel assigned by the court pointed out that the total budget for the health services for the current year is of the order of €11 billion, which was not contradicted by counsel for the Attorney General.

128 The court accepts that, upon discovery of an unforeseen liability to reimburse patients in the relevant categories, the State may find itself faced with a significant additional financial burden. However, while it is the opinion of the court that the financial burden on the State of making the relevant repayments is a substantial one, it is by no means clear that it can be described as anything like catastrophic or indeed that it is beyond the means of the State to make provision for this liability within the scope of normal budgetary management.

129 Counsel for the Attorney General has submitted, in reliance especially on Article 43 of the Constitution and of the judgment of this court in *Tuohy v. Courtney* [1994] 3 I.R. 1, that the Oireachtas, in enacting the Bill, was engaged in balancing complex economic and social considerations, a matter classically within legislative rather than judicial competence. Accordingly, the court should be extremely slow to intervene. It should be recalled also that Keane C.J. wrote to similar effect in *The Planning and Development Bill, 1999* [2000] 2 I.R. 321 where, speaking of the presumption of constitutionality, he said at p. 358:-

> "It is peculiarly the province of the Oireachtas to seek to reconcile in this area the conflicting rights of different sections of society and that clearly places a heavy onus on those who assert that the manner in which they have sought to reconcile those conflicting rights is in breach of the guarantee of equality."

In considering that argument, it is of prime importance to consider the extent of the interference with property rights proposed by the Bill. What it proposes is the extinction of the rights in question. All patients, from whom charges have been unlawfully collected, regardless of their circumstances, are simply to be deprived of any right to recover sums lawfully due to them. No relief against this effect is provided, discretionary or otherwise, in the Bill, though the court was informed of the discretionary decision of the State to make *ex gratia* payments of €2,000 each to some 20,000 people. The absence of compensation is, in reality, the object of the legislation. This aspect of the caselaw is not, therefore, particularly relevant, except to show the exceptional nature of these aspects of the Bill.

130 In the view of the court, such legislation cannot be regarded as "regulating" the exercise of property rights. It is straining the meaning of the reference in Article 43.2.1° of the Constitution to the "principles of

social justice" to extend it to the expropriation of property solely in the financial interests of the State. This is not at all the type of balancing legislation which was in contemplation in *Tuohy v. Courtney* [1994] 3 I.R. 1, *White v. Dublin City Council* [2004] 1 I.R. 545 or *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321. All of these cases concerned legislation designed to reconcile the interests of different categories of people in society. The case of *The Planning and Development Bill, 1999* [2000] 2 I.R. 321 might be thought to present an alternative case of such reconciliation. However, that Bill was not designed to protect the financial interests of the State, but rather to provide land for housing for social reasons. Furthermore, there was provision for compensation. The court does not exclude the possibility that, in certain cases, the delimitation of property rights may be undertaken in the interests of general public policy. However, the invocation of these Articles in circumstances where rights such as arise in this case, rights very largely of persons of modest means, are to be extinguished in the sole interests of the State's finances would require extraordinary circumstances.

131 Moreover, it is evident from the terms of the Bill and the submissions on behalf of the Attorney General, that the persons who are affected by its retrospective provision are being required by the Bill to bear the consequential burden of the unlawful charges in order to protect the exchequer generally, or the health budget in particular, from that burden. The rationale for so doing, according to the submissions of the Attorney General, is that these were persons who actually benefited from the services in question. The court does not accept this as a rational basis for requiring that class of person to bear the burden of the ultimate cost of the charges which were unlawfully imposed on them. Those persons are in no different position from all other persons who enjoyed a whole range of free statutory services or benefits under the Health Acts. The fact that they received a service to which they were freely entitled by statute is not a distinguishing feature. Their only distinguishing feature is that they were unlawfully charged for the service. It is, in effect, for this reason that their property rights are being abrogated.

132 Where a statutory measure abrogates a property right, as this Bill does, and the State seeks to justify it by reference to the interests of the common good or those of general public policy involving matters of finance alone, such a measure, if capable of justification, could only be justified as an objective imperative for the purpose of avoiding an extreme financial crisis or a fundamental disequilibrium in public finances.

133 Having regard to the terms of the Bill and taking into account all of the submissions of counsel, nothing has emerged in the course of the reference from which the court could conclude that the abrogation of the property

rights in question is an imperative for the avoidance of an extreme financial crisis or a fundamental disequilibrium in public finances.

134 For the reasons set out above the court is satisfied that subs. (5) and the associated provisions of the Bill constitute an abrogation of property rights and an unjust attack on them contrary to the provisions of the Constitution and in particular Articles 43 and 40.3.2° .

135 Having regard to the conclusion expressed in the immediately preceding paragraph, it is unnecessary to consider any argument based on the principle of proportionality. It is also not necessary to consider the arguments related to Article 40.1 and Article 34. The court does not consider that any issue arises concerning s. 53(8) of the Act of 1970, as inserted by s. 1(b) of the Bill.

Decision of the court pursuant to Article 26

136 The prospective provisions of the Bill, that is to say those provisions which require the imposition of charges for in-patient services to be provided in the future, concern matters for which the Oireachtas has power to legislate. The power to regulate and impose such charges delegated to the Minister by s. 1(a) of the Bill falls within the principles and policies of the Bill and, in the view of the court, is compatible with Article 15.2.1° of the Constitution. Having regard to the maximum level of charges and the discretionary provision concerning the imposition of charges in individual cases, the court does not consider that those charges, either in principle or in themselves, could be considered an infringement of any constitutional right.

137 The retrospective provisions of the Bill are those which abrogate the right of persons, otherwise entitled to do so, to recover monies for charges unlawfully imposed upon them in the past for the provision of certain in-patient services.

138 The practice which gave rise to the imposition of such charges was not one which was followed simply in the absence of lawful authority but was one which was contrary to the express provisions of s. 53(1) of the Health Act 1970, by virtue of which the Oireachtas has decreed that the in-patient services in question be provided without charge. The recovery of such monies thus unlawfully charged by those entitled to do so could not properly be characterised as a “windfall”.

139 The court considers that the right to recover monies for the charges thus imposed is a property right of the persons concerned which is protected by Articles 43 and 40.3.2° of the Constitution from, *inter alia*, unjust attack by the State.

140 The Constitution, in protecting property rights, does not encompass only property rights which are of great value. It protects such rights even when they are of modest value and in particular, as in this case, where the persons affected are among the more vulnerable sections of society and might more readily be exposed to the risk of unjust attack.

141 For the reasons expressed in this judgment, the court has decided that the retrospective provisions of the Bill contained in s. 1(b) which provide for the insertion of subss. (5), (6) and (7), and subsection (11), insofar as it defines "relevant charge", in s. 53 of the Act of 1970, are repugnant to the Constitution and in particular Articles 43 and 40.3.2° thereof.

Solicitors instructing counsel assigned by the court: *Gleeson McGrath Baldwin.*

Solicitor for the Attorney General: *The Chief State Solicitor*.

Elizabeth Donovan, Barrister
