

THE STATE (McLOUGHLIN)

.v.

THE EASTERN HEALTH BOARD

Judgment of Mr. Justice Barron delivered the 23rd day of
July 1986.

The Prosecutor in receipt of unemployment assistance. In November 1985 he applied to the Respondent for a fuel allowance as a supplementary welfare allowance. This application was refused on the ground that he was ineligible to receive it. He appealed unsuccessfully, his appeal being rejected on the ground that as a recipient of unemployment assistance he was in a category which was excluded from the scheme by the provisions of the relevant regulations. He has obtained a Conditional Order of Certiorari to quash these decisions and now seeks to have such Order made absolute notwithstanding cause shown. As one of the grounds upon which the Conditional Order was obtained was that the relevant section of the Social Welfare (Consolidation) Act, 1981 was repugnant to the provisions of the Constitution the Attorney General was joined in the proceedings for the purposes of contesting this submission. The Respondent has taken the point that the Minister for Social Welfare ought to have been joined in these proceedings as a Respondent. Counsel for the Attorney General has indicated that he has instructions to act on behalf of the Minister and accordingly the parties agreed that the proceedings were in order for hearing.

The Prosecutor made his application for supplementary welfare

allowance under the provisions of Section 209 of the Social Welfare (Consolidation) Act, 1981. Subsection (1) is as follows:-

"(1) Where the weekly amount of supplementary welfare allowance, if any, payable to a person pursuant to section 207, and any other income, including any payment under this Act or under any other statute, of that person, is not sufficient to meet his needs, then -

(a) in any case where that person is in receipt of supplementary welfare allowance, the weekly amount of such allowance payable to that person may, subject to this section, be increased, or

(b) in any other case, a weekly payment of supplementary welfare allowance may be made, subject to this section, to supplement that person's other income."

The Prosecutor was not in receipt of any supplementary welfare allowance and accordingly his application was under the provisions of Section 209 (1)(b). Subsection (2) of Section 209 made provision for the Minister to prescribe relevant regulations. Subsections(2) and (3) are as follows:-

"(2) The Minister may prescribe -

(a) the circumstances under which a payment may be made to any person pursuant to subsection (1), and

(b) the amounts of payments to be made either generally or in relation to a particular class of persons.

(3) Regulations under subsection (2) may provide for the granting of allowances in kind in relation to specified need and for all matters ancillary to and consequent on the provision of such allowances."

The relevant regulations relating to the Prosecutor's

application are contained in Article 6 of the Social Welfare (Supplementary Welfare Allowances) Regulations, 1977 as added to by the Social Welfare (Supplementary Welfare Allowances) (Amendment Regulations, 1985 and are as follows:-

"6 (3) Where a person to whom Section 11 (1)(b) of the Act applies has income which is not sufficient to meet his need, a weekly payment of an allowance may, subject to the provisions of sub-article (6) of this Article, be made to him of such amount as, when taken together with his other income, is determined by the Health Board to be appropriate to meet such needs.

(5) Where a Health Board determines that an increase of an allowance under sub-article (1) or an allowance under sub-article (3) of this Article is payable to a person in respect of heating needs, such increase or allowance may be granted in the form of an allowance in kind where the Health Board considers it appropriate in the circumstances.

(7) A fuel allowance may be paid for the period of thirty weeks beginning on the first Monday in October of each year to a person where:-

(a) he is in receipt of any one of the following payments:-

- (i) Old Age Pension
- (ii) Blind Pension
- (iii) Widows (non-contributory) Pension
- (iv) Deserted Wife's Allowance
- (v) Prisoners Wife's Allowance
- (vi) Social Assistance Allowance
- (vii) Single Woman's Allowance

- (viii) Supplementary Welfare Allowance (other than an allowance only under sections 209 (1)(b), 212 or 213 of the Act)
- (ix) Old Age (Contributory) Pension
- (x) Retirement Pension
- (xi) Invalidity Pension
- (xii) Widows (Contributory) Pension
- (xiii) Deserted Wife's Benefit
- (xiv) Disabled Persons Maintenance Allowance or Infectious Diseases Maintenance Allowance Under the Health Acts 1947 to 1982
- (xv) A Special Allowance under the Army Pensions Acts 1923 to 1980;

- (b) he is living alone or with no person other than
 - (i) a dependant spouse or a dependant child or children,
 - (ii) a person or persons who would otherwise be qualified for fuel allowance,
 - (iii) a person who resides with him for the purpose of providing constant care and attention where he is considered by the Health Board to be so incapacitated as to require such care and attention, and
- (c) he is considered by the Health Board to be unable to provide for his heating needs."

The reference to Section 11 (1)(b) of the Act is a reference to the Social Welfare (Supplementary Welfare Allowance) Act, 1975. The provision was re-enacted by the 1981 Act and Section 209 (1)(b) is in identical terms.

The Prosecutor's application was not considered because unemployment assistance is not one of the payments set out in Article 6 (7)(a). The evidence in support of the present application shows that the circumstances of the Prosecutor are such that had he not been considered ineligible it would have been proper to consider his application.

It is submitted on behalf of the Prosecutor that Regulation 6 (7)(a) is ultra vires the Minister, or, if not, then the provisions of Section 209 (2) are repugnant to the provisions of the Constitution as permitting invidious discrimination and as a delegation of legislative power.

The issue as to the validity of Regulation 6 (7)(a) is similar to that raised in The State (Kershaw) .v. Eastern Health Board I.L.R.M. 235. In that case, the applicant for a fuel allowance was in receipt of a benefit which disentitled her to receive such allowance. The direction of the Minister to this effect was contained in a circular by him to the Health Boards as to the manner in which the scheme should be administered. Finlay P. as he then was held the direction to be ultra vires the Minister. At page 239 he said:-

"Insofar, however, in the paragraph which I have quoted, it purports to exclude absolutely from the discretion of the deciding officer whether on the initial application or on appeal concerned with applications for supplementary social welfare allowances the discretion to grant such an allowance to a person in receipt of unemployment or disability benefit or unemployment assistance, it seems to me to be ultra vires the Minister. It was not contended on behalf of the respondents, nor does it seem to me that it could be contended that the issuing circular could possibly be an exercise by the

Minister of his power to prescribe matters in relation to social welfare supplementary allowances which is now contained in s. 209 (2) and (3) of the Act of 1981."

In that case Finlay, P. as he then was did not have to consider the effect of such a direction if contained in a Statutory Instrument, nor did he indicate obiter whether or not that would have been intra vires the Minister. Where as here the validity of the regulation is challenged, then the first question to be posed is, what is permitted by the section granting the power to make regulations; per O'Higgins C.J. in Cooke .v. Walsh 1984 I.L.R.M. 208 at page 213.

Section 209 (2)(a) empowers the Minister to prescribe the circumstances under which a payment may be made to any person pursuant to subsection (1). Persons entitled to payments under subsection (1) are those whose income is not sufficient to meet their needs. The circumstances which the Minister may prescribe are the circumstances in which the income of any person may be taken to be insufficient to meet his needs. There is no power to designate what persons or class of persons can or cannot come within such category. Section 209 (2)(b) empowers the Minister to prescribe the amount of payments generally or in relation to a particular class of persons. Here the power is to specify amounts which may be paid to those entitled. Again there is no power to designate what persons or class of persons can or cannot be entitled to receive payments.

Turning to the regulations, it is clear that Article 6(7) limits those who are eligible to receive payment - which of course will be in kind - to those in receipt of particular social welfare payments. This is not doing what the section authorises, but is removing, reducing or otherwise altering obligations imposed by

the Act, something which O'Higgins, C.J. in Cooke .v. Walsh found to be ultra vires.

The provisions in this case are very similar to those in Cooke .v. Walsh. In each the statute imposes a general obligation; and in each the regulation seeks to impose a limitation as to those who can come within that general obligation. I have no doubt but that the same result ensues and that the regulation is ultra vires. *In these circumstances, there is no ground upon which the validity of the section can be infringed*

On behalf of the Eastern Health Board it was submitted that the Prosecutor had disentitled himself to relief because he had failed in his Affidavit to disclose assistance which he had received from that Body both in money and in kind. I do not accept this contention. If it could be shown that had these matters been disclosed the Conditional Order would not have been granted then clearly the absence of such matters must be taken into account. However, here the receipt or otherwise of such assistance is not relevant to the purely legal issues raised. Insofar as such assistance goes to the merits of the application it seems to me that they support his claim that his income is insufficient to meet his needs so that failure to refer to them is not a breach of faith on his part.

The cause shown will be disallowed and the Conditional Order made absolute.

Henry Harrison
23/7/86