Neutral Citation No. [2010] IEHC 78

THE HIGH COURT

JUDICIAL REVIEW

2009 800 JR

BETWEEN

THE GARDA REPRESENTATIVE ASSOCIATION

APPLICANT

AND

THE MINISTER FOR FINANCE

RESPONDENT

JUDGMENT of Mr. Justice Charleton delivered the 25th day of March 2010.

1. The applicant claims that the respondent has failed to properly exercise his discretion to exclude gardaí from an austerity measure known as the "pension levy". It is argued that the Minister for Finance did not properly consider their application in that regard and, further, that he gave no adequate reasons for his refusal. All of this has a background and a context. From September, 2008 it became obvious that Ireland was facing a severe monetary crisis. There have been three national budgets announced by the Minister for Finance in Dáil Éireann since that month with the stated purpose of returning the public finances to something approaching a manageable balance. Tax revenue has fallen markedly while State expenditure has remained broadly the same as before. Austere fiscal measures were introduced by the Government in an attempt to control the public finances. One of these involves deductions from public service pay and this is made lawful by the Financial Emergency Measures in the Public Interest Act 2009. That Act is at issue in this judicial review. In effect, it makes less money available to public servants by charging them an extra percentage of money from their pay for the pension provision which the State makes for them.

2. As to the correct response to the economic situation facing the country, public debate may inform the choices available to Government. Ultimately, however, the challenge in alleviating the nation's problems lies with those who are elected to Dáil and Seanad Éireann and who, in turn, have chosen the Government. The court cannot, and does not, have any view in the executive or political sphere. If, however, in the imposition of any austerity measure a legal error is made then, clearly, this may be subject to the possibility of judicial review.

The 2009 Act

3. The conditions and fundamental terms of employment of public servants tend in the modern era to be circumscribed by statute and regulation. Since the public service involves many different forms of employment, the conditions under which people work, their rates of pay and their pension entitlements tend to differ from sector to sector. It is beyond doubt, however, that those who are permanently employed within the public service enjoy pension entitlements by which the State guarantees to abide; in contrast to privately funded pension arrangements which are markedly subject to variation in the financial markets. The fiscal measure in question in this case aimed at ameliorating our current economic crisis by levying members of the public service through taking from their pay packet a percentage that depended upon their rate of remuneration as a payment towards the stability and amplitude of public service pension arrangements. This was implemented by the Financial Emergency Measures in the Public Interest Act 2009. That Act begins with an unusually strong series of recitals:-

> *"WHEREAS a serious disturbance in the economy and a decline in the economic circumstances of the State have occurred, which threaten the well-being of the community;*
>
> *AND WHEREAS as a consequence a serious deterioration in the revenues of the State has occurred and there are significant and increasing Exchequer commitments in respect of public service pensions;*
>
> *AND WHEREAS it is necessary to cut current Exchequer spending substantially to demonstrate to the international financial markets that public expenditure is being significantly controlled so as to ensure continued access to international funding, and to protect the State's credit rating and reverse the erosion of the State's international competitiveness;*
>
> *AND WHEREAS the burden of job losses and salary reductions in the private sector has been very substantial and it is equitable that the public sector should share that burden;*
>
> *AND WHEREAS it is necessary to take the measures in this Act as part of a range of measures to address the economic crisis;*
>
> *AND WHEREAS the value of the public service pensions is significantly and markedly more favourable than those generally available in other employment"*

4. The actual deduction by way of the pension levy is enabled under s. 3 of the Financial Emergency Measures in the

Public Interest Act 2009, which requires payment of a contribution from remuneration as required by s.2, whereby the Minister for Finance can make regulations in order to calculate the relevant amount made payable as a contribution from public servants and collect and recover it. Under s. 4 of the Act, public servants are obliged to make such payments for the benefit of the Exchequer. In practice, the sum is deducted at the source of payment. In addition to public servants, reductions are enabled by virtue of s. 9 to the rates of payment for health professionals such as doctors, dentists, pharmacists, optometrists, ophthalmologists, podiatrists and chiropodists, who give services to the State. Other payments made by the State, including those due under existing contracts may be reduced pursuant to section 10. Since the Act is an emergency measure, so expressed, under s. 13 it must be first reviewed on the 30th June, 2010, by the Minister for Finance and, thereafter, every other year while it remains in force. The purpose of the ministerial review is to consider whether the continued operation of the Act is necessary and, in that regard, a report must be laid before each House of the Oireachtas by the Minister.

5. Where a doubt arises as to whether a person is properly the subject of a deduction under the Act then, s. 15 provides that this issue is to be submitted to the Minister by the public servant who would authorise the payment, and hence the reduction in payment of the remuneration concerned, to be determined finally by the Minister. Section 1 of the Act makes it clear in express terms that the pension levy is intended to apply to every public servant and to every public service body, save for those expressly excluded. The broad scope of the Act covers those who are both public servants and are part of a public service pension scheme. Certain exclusions occur in s.1; namely, the President, a member of the judiciary or a military judge. By its terms, the Act expressly includes within the scheme; the Civil Service, the Garda Síochána, the Permanent Defence Forces, local authorities, the Health Service Executive, the Central Bank and Financial Services Authority of Ireland and others who are subject to a public service pension scheme, as so defined. A schedule to the Act excludes from its operation certain semi-State commercial bodies and companies, like Bord na Móna and the Dublin Airport Authority and this is enabled by the definition of a public service body in s. 1 (h).

6. It is clear on reading the Act that a considered choice has been made as to those from whom the levy will be taken and those who are excluded from the operation of the Act. It is necessary to quote in full s. 2 of the Act which provides for deductions to be made from the remuneration of public servants:-

"2.—(1) This section applies to a person—

(a) who—

(i) is a public servant on 1 March 2009, or

(ii) is not a public servant on that date but after that date

is appointed or otherwise becomes a public servant, and

(b) who, on 1 March 2009 or at any time afterwards—

(i) is a member of a public service pension scheme,

(ii) is entitled to a benefit under such a scheme, or

(iii) receives a payment in lieu of membership in such a

scheme.

(2) In this section, a person to whom this section applies is

referred to as a "relevant person".

(3) The person who is responsible for, or authorises, the payment

of remuneration to a relevant person shall deduct or cause to be

deducted an amount at the applicable rate or rates specified in the

Table in this subsection—

(a) in the case of the period 1 March 2009 to 31 December 2009, in respect of that period, and
(b) in the case of the year 2010 and each subsequent year, in respect of the year concerned,from the remuneration from time to time payable to the relevant person during that period or any such year.

TABLE

Amount of Remuneration	Rate of deduction
Up to €15,000	3 per cent
Any excess over €15,000 but not over €20,000	6 per cent
Any amount over €20,000	10 per cent

(4) The deduction which this section requires shall be made in accordance with any regulations made by the Minister under section 3.

(5) This section has effect notwithstanding—
(a) any other enactment,
(b) any pension scheme or arrangement,
(c) any other agreement or contractual arrangement, or
(d) any understanding, expectation, circular or instrument or other document".

7. Under s.8 of the Act a residual discretion is vested in the Minister to exempt a particular class or group of public servants, or to otherwise modify the obligation to pay under section 2. This would allow the Minister, for instance, to defer payments for a particular period, or to exempt a particular kind of public servant either entirely or by reducing the full extent of the statutory obligation just set out above. Since s. 8 is central to this judicial review I now quote it:-

> *"8.—Where the Minister is satisfied that there is a particular class or group of public servants who, by reason of exceptional circumstances (because of some particular aspect or condition of their employment, office or position) which, in the Minister's opinion, are materially distinguished from other classes or groups of public servants to which section 2 applies, then the Minister, if he or she considers it to be just and equitable in all the circumstances to do so, may by direction—*
>
> (a) exempt that class or group from deductions under section2, either entirely or to such extent as the Minister considers appropriate, or
>
> (b) modify the obligation under section 2 to make deductions from their remuneration in such manner as the Minister thinks fit, having regard to the nature and degree of the financial burden that would otherwise be borne by that class or group,
>
> and the provisions of this Act relating to deductions, and of any regulations made under any of those provisions, shall be read subject to any such direction."

8. I now turn to the relevant correspondence between the parties.

Correspondence
9. On the 9th February, 2009, the applicant wrote to An Taoiseach seeking a meeting in relation to the pension levy that had previously been proposed in the political sphere. Talks took place between various interested parties about, in some way, reducing public service pay. The applicant has said on affidavit that it felt aggrieved at being excluded from these talks. This may have some connection to the applicant being a representative organ and not a registered trade union. That, however, is not a matter which can concern the court. In any event, although alternatives were mooted by those to whom the pension levy was to apply, the Financial Emergency Measures in the Public Interest Act 2009 came into force on the 27th February, 2009. A number of groups then sought an exemption. These included those gardaí represented by the applicant.

10. A document was prepared for the applicant by Dr. Gerard McMahon entitled "An Assessment of the Relative Impact of the Pension Levy on the Garda Rank of An Garda Síochána". The document argues in a very forceful, though rhetorical, way that members of An Garda Síochána of garda rank should be exempt from the pension levy. It points out, among other factors, that gardaí are barred from any form of industrial action on pain of criminal sanction; that they are barred from several forms of secondary employment; that the spouse of a garda is constricted as to employment opportunities; that the calculation of overtime is at a special and lower rate than applies elsewhere; and that gardaí must work as and when required. Dr. McMahon states:-

> *"It is clear that the imposition of the levy on gardaí is more unjust than on any other public sector worker category. That is, members of An Garda Síochána are materially distinguished from other public servants covered by the levy. Accordingly under s. 8 of the aforementioned enactment, the Association is petitioning the Minister for Finance to give effect to an exemption (in whole or in part) from the application of the levy on the basis that the conditions of employment of gardaí constitute exceptional circumstances that materially distinguish them from other classes or groups of public servants. In the specific circumstances pertaining to gardaí … it would be just and equitable to either desist from imposing the levy or else to impose a reduced levy."*

11. Among other arguments canvassed was the unfairness that the pension levy applies across the entirety of the income of a garda, which is to both basic pay and overtime, whereas a pension in the public service is calculated solely by reference to basic pay. This, however, I understand applies to all public servants under the statutory scheme.

12. By letter dated the 21st April, 2009, the applicant wrote to Brian Lenihan T.D., Minister for Finance, in this way:-

> *"The Garda Representative Association is extremely concerned at the imposition of the pension levy on members of An Garda Síochána. The imposition of the levy is unjust and unfair on members of An Garda Síochána whose terms and conditions of employment differ significantly from that of other public servants for the following reasons.*
>
> *The method of calculation of the payment of overtime, allowances and night duty is substantially less favourable than that which applies to other sections of the public service.*
>
> *Equally, the number of hours members of An Garda Síochána are required to work and the divisor method applied to the calculation of payments again differs to that which applies across the public service to the detriment to members of An Garda Síochána.*
>
> *Members of An Garda Síochána are restricted from secondary employment, which clearly distinguishes them from other public servants. The association commissioned the attached report which clearly sets out a particular grievance with the conditions of our employment and in particular certain obligations distinguishes us from other*

public servants.

The Association believes that the Minister should give us the benefit of Section 8 of the Act which specifically set out the following:- [Section 8 of the Act is quoted in full]

It is the respectful submission of the Garda Representative Association that the Minister should allow members of Garda rank to be exempt from the deduction of the pension levy as it currently applies given the provisions of this section. We would ask the Minister to read our submission and to advise us of his determination."

13. The respondent replied by letter dated the 11th June, 2009, as follows:-

"I refer to your submission seeking exemption from the pension-related deduction under section 8 of the Financial Emergency Measures in the Public Interest Act 2009, which provides for the full or partial exemption from the pension related deduction for particular classes or groups of public servants who, in the Minister for Finance's opinion, are materially distinguished from other classes or groups of public servants by reason of exceptional circumstances.

Having given careful consideration to your submission, I am not satisfied that it would be deemed reasonable that the circumstances of your members are such that it would be just and equitable to exempt them or modify their obligation because of the financial burden. There are various and varying terms and conditions of employment across the public service reflecting the particular circumstances of the area of employment.

As you may be aware, in order to ameliorate the impact of the deduction, particularly on lower paid public servants (with a partial offset by an increase on earnings above €60,000), I announced, in the Supplementary Budget of 7 April 2009, a change to the structure of the deduction which will inter alia exempt the first €15,000 of earnings.

The pension-related deduction has been introduced at a time of great pressure on the public finances and takes account of the valuable pension benefits available to public servants. It is currently applied in a consistent manner in the public service and I am satisfied that it is fair and appropriate that your members be subject to the deduction."

Discretion and amplitude

14. The respondent must make a lawful decision. That is, one that is within the power conferred on him and by a process which is fair. The respondent decided that an entitlement which was in his discretion to give should not be extended to gardaí represented by the applicant. In making that decision he was required, pursuant to the Act, to consider the submission made and to make a decision based upon the statutory parameters which are defined by s. 8 of the Act as interpreted within its proper context. Whereas the notice of opposition pleads that what is involved in this case is not a justiciable controversy, that point was not pursued in argument before the court. In my view that was correct.

15. There can be cases where the exercise of a decision by the executive is outside the scope of judicial review. The Government has the power to set policy on areas of national interest and to disperse funds in accordance with that policy. These decisions are, in my view, in a category beyond the scope of judicial review; Prendergast v. The High Education Authority [2008] I.E.H.C. 257, (Unreported, High Court, Charleton J., 30th July, 2008). Where, on the other hand, rights and obligations are set out in statute, whereby funds may be made available to those applying in particular circumstances, or where a licence to conduct an otherwise prohibited activity may be made available, the executive power is limited in its operation by the wording of the statute and, in taking decisions, it must act within the legislative scheme. A judicial review is not a reconsideration of the disposal of executive power; whether it was right in policy or fact finding or whether it was wrong. Rather, it is concerned with the limitations that the relevant statute places upon the exercise of that power and the correct implementation of procedures that have been shown to lead to fair results. Exceptionally, as well, the High Court can review the substance of a decision where it emerges as being so unreasonable as to fly in the face of fundamental reason and common sense.

16. Ultimately, the power of the High Court to judicially review ministerial, quasi judicial and administrative decisions, thus exercised, cannot substitute any view that the court might have as to how a decision should be exercised. Rather, the error is identified, the decision is quashed, and the matter then returned to the executive, or to the quasi judicial official or administrative officer, to be considered again. Bluntly put, the court has no power to substitute its own view for that of the decision maker, much less to grant a licence. As Keane J. stated in Carrigaline Limited v. Minister for Transport [1997] 1 I.L.R.M. 241 at p.284:-

"It is…clear…that this Court cannot set aside a decision of a competent authority merely because it disagrees with the view of that authority. It cannot, in short, act as a court of appeal from the decision where no such appellate jurisdiction has been conferred on it by law. Subject to that crucial limitation, however, the court can and must set aside a decision where it is shown to be unlawful because of the manner in which the decision was made, whether because the competent authority failed to consider the manner in a fair and impartial manner or because it took into account factors which it should have excluded or excluded factors which it should have taken into account."

17. The Minister was not entitled to act outside the statute. To do so would be to exercise an authority that was not conferred upon him; see for example The State (Costello) v. Boffin [1980] I.L.R.M. 233. Where a discretion is given, however, to either say yes or to refuse an application then, absent proof of an unfair procedure leading to a decision, or a decision being flawed through the incorporation of inadmissible material, the attack by way of judicial review proceedings will tend to focus on the apparent unreasonableness of what had been decided.

18. A discretion may be either ample or narrow. In some instances an apparent discretion given to a Minister in legislation will fade away and become an entitlement of those to whom the statute is addressed; as, for example, where a statute

sets out a series of qualifying criteria which, once they are fulfilled, gives an apparent discretion to a Minister, or other official, to grant an entitlement. In such a case an apparent empowerment, whereby the Minister or an official may grant a benefit, a common statutory wording, becomes instead an entitlement to receive same once the detailed qualifying criteria set out in legislation are met. An example of this is the decision of Barron J. in University of Limerick v. John Ryan & Ors and the County Council of the County of Limerick (Unreported, High Court, Barron J., 21st February, 1991). Hence, s. 13 of the Housing Act 1988 was held in that case not simply to empower a housing authority to provide caravan sites for the Irish Traveller Community but, because the proper construction of the statute required it, imposed a duty so to do. That decision has been followed many times in similar cases.

19. The proper construction of a statute provides the answer as to whether a list of qualifying conditions, if met by an applicant, amount to an entitlement to whatever benefit is conferred by legislation, or whether those qualifying criteria merely enable the Minister, or quasi-judicial or administrative official, to exercise a discretion in that person's favour. By way of contrast to the Housing Act cases, those which concern citizenship and naturalisation tend to demonstrate the exercise of discretion apparently unfettered by particular qualifying criteria. Under the provisions of ss. 14 to 16 of the Irish Nationality and Citizenship Act 1956, as amended, it was previously the case that on meeting the criteria set out in s. 15 of that Act, a non-Irish citizen might apparently obtain citizenship. The criteria set out included that an applicant for a certificate of naturalisation should be an adult of good character who has had a particular period of residence within the State, who intended to continue with that residence and who had declared fidelity to the nation. The wording of the Act, however, made it clear, in its terms, that the discretion of the Minister was in no way fettered by these apparent qualifying criteria being met. Instead, the Minister had an entitlement "in his absolute discretion" to grant a naturalisation certificate. While the adoption of an inflexible policy, in favour of or against certain categories of applicant was unlawful, in contrast to having regard to policy rules which might guide such a discretion, the entitlement was the Minister's to grant naturalisation and not that of the applicant to obtain it simply because he was eligible to apply; Mishra v. Minister for Justice [1996] 1 I.R. 189. At pp. 203 to 204 of the report of that case Kelly J. said:-

> *"The absolute discretion which is conferred upon the first respondent is, in my view, subject of course to its being exercised in accordance with constitutional justice (see East Donegal Co-Operative v. Attorney General [1970] I.R. 317 at 341). In Pok Sun Shum v. Ireland [1986] I.L.R.M. 593, Costello J….had to consider the exercise of the very discretion which is the subject matter of this application. He concluded that the dictates of natural or constitutional justice did not in general require the Minister to give an applicant a hearing or inform him of the reasons for his decision. He went further and pointed out that the Minister might be satisfied that all of the conditions set out in s. 15 were met but, nonetheless, might refuse a certificate of naturalisation on grounds of public policy which had nothing to do with the individual applicant. I agree with these views. In so concluding, it must be borne in mind that the award of a certificate of naturalisation is a privilege and not a right. The fact that an applicant may comply with all of the statutory provisions set out in s. 15 of the Act does not mean that it automatically follows that he is entitled to citizenship. If such were the case, there would be no discretion at all vested in the Minister. She would become a mere cipher who when satisfied that the statutory requirements of s. 15 were met would be obliged to grant citizenship. Such an approach would effectively rewrite the section and abolish the discretion."*

20. Discretion, therefore, is a power which may, on the one hand, be so circumscribed as to be extinguished, but it may also, on the other hand, be a power which is so wide as to put it, for most practical purposes, beyond the scope of judicial review. In between these two extremes, there are situations where the answer to the extent of discretion is to be found in the legislative text interpreted in accordance with its plain wording or, if any ambiguity arises, then in accordance with the purpose behind the enactment. Absent an unfair process or a consideration outside of the jurisdiction imposed by the legislation, the strength of a challenge that must be mounted by an applicant in judicial review proceedings with a view to showing an unlawful or unreasonable decision is squarely dependent upon the breadth of the particular discretion conferred by legislation. This, it seems to me, may be compared in a limited way to the approach that can sometimes be properly taken by the court in giving due deference to administrative or quasi-judicial bodies which make specialised decisions within areas of particular expertise or which are concerned with decisions on policy objectives. In one category of cases, it may be compelling for the court to say that because the statute markedly circumscribes discretion by setting out detailed qualifying criteria, a decision was improperly arrived at because a particular factor was not considered. On the other end of the spectrum the ample nature of a discretion conferred by statute, that is the ample nature of decision making powers declared by legislation, may, in effect, make what may be argued to be in judicial review proceedings an entitlement, into a boon within the grant of the Minister, or other decision-making body.

21. One of the criteria for analysis, in that regard, must be the nature of the decision under consideration. Is it one based on policy, or is it one based upon meeting terms for entitlement? Is the decision one which is capable of being analysed by a court on the same basis that the court decides litigation between parties, or is it a decision within the political sphere? The more the discretion tends to be exercised within the sphere of what is best for the balancing of burdens and benefits within the community at large, the more inherently likely it is to carry with it the hallmarks of an amplitude of discretion that is characteristic of policy making and political decisions. In forming this view, I have been aided by the judgment, on an analogous issue, of Clarke J. in Ashford Castle Limited v. Services Industrial Professional Technical Union [2007] 4 I.R. 70 at paras. 32 to 45.

22. Mistakes can be made in the field of policy which are subject to judicial review and provided an entitlement for the court to interfere. This is established by reference to the relevant statutory framework. The further a decision operates within the boundary of political choice, the more care the court should exercise in interfering with a discretion granted by statute. As I have already indicated, in some policy areas, political decision making is beyond judicial review. It is not beyond review, however, where rights and liabilities are defined by legislation subject either to entitlement, in some statutory examples, or to a wide or narrow discretion to grant or refuse, in other enactments. In O'Reilly v. Limerick Corporation [1989] I.L.R.M. 181, the plaintiffs, as members of the Irish Traveller Community sought a mandatory injunction directing the defendant to build suitable serviced halting sites to enable them to follow their nomadic avocation. In refusing to grant that order, but in declaring that the defendants should review the house building programme under the Housing Act 1988, as amended, at pp. 193 to 195 of the report, Costello J. analysed the distinction between the judicial and political spheres. I find his comments useful in illuminating the problem before me as to the breath of discretion granted to the Minister for Finance in s. 8 of the Financial Emergency Measures in the Public Interest Act 2009, and I therefore reproduce them in part:-

"The question raised by their claim is this; can the courts with constitutional propriety adjudicate on an allegation that the organs of Government responsible for the distribution of the nation's wealth have improperly exercised their powers? Or would such an adjudication be an infringement by the courts of the role which the Constitution has conferred on them?

It will, I think, help to answer these questions if I refer briefly to certain aspects of the traditional academic distinction which is made between the two different types of justice which should exist in a political community, distributive justice and communicative justice and to the different concepts involved in this distinction. There is an important distinction to be made between the relationship which arises in dealings between individuals (a term which includes dealings between individuals and servants of the State and public authorities) and the relationship which arises between the individual and those in authority in a political community (which for convenience I will call the Government) when goods held in common for the benefit of the entire community, (which would nowadays include wealth raised by taxation) fall to be distributed and allocated. Different obligations in justice arise from these different relationships. Distributive justice is concerned with the distribution and allocation of common goods and common burdens. But it cannot be said that any of the goods held in common (or any part of the wealth raised by taxation) belong exclusively to any member of the political community. An obligation in distributive justice is placed on those administering the common stock of goods, the common resource and the wealth held in common which has been raised by taxation, to distribute them and the commonwealth fairly and to determine what is due to each individual. But that distribution can only be made by reference to the common good and by those charged with furthering the common good (the Government); it cannot be made by any individual who may claim a share in the common stock and no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he has been deprived of what is his due. This situation is very different in the case of commutative justice. What is due to an individual from another individual (including a public authority) from a relationship arising from their mutual dealings can be ascertained and is due to him exclusively and the precepts of commutative justice will enable an arbitrator such as a court to decide what is properly due should the matter be disputed. This distinction explains why the court has jurisdiction to award damages against the State when a servant of the State for whose activity it is vicariously liable commits a wrong and why it may not get jurisdiction in cases where the claim is for damages based on a failure to distribute adequately in the plaintiffs' favour a portion of the community's wealth.

I must of course apply the law of the Constitution to the plaintiffs' claims and if there was anything in the Constitution which would require me to ignore the principles which I have just outlined I should have to do so. But there is not; indeed I think they accord well with the constitutional text. The State (against whom damages are sought) is the legal embodiment of the political community whose affairs are regulated by the Constitution. The powers of Government of the State are to be exercised by the organs of the State established by it. The sole and exclusive power of making laws for the State is vested in the Oireachtas; the executive power of the State is exercised by or on the authority of the Government; and justice is to be administered in courts established by law. In relation to the raising of a common fund to pay for the many services which the State provides by law, the Government is constitutionally responsible to Dáil Éireann for preparing annual estimates of proposed expenditure and estimates of proposed receipts from taxation. Approval for plans and expenditure and the raising of taxes is given in the first instance by Dáil Éireann and later by the Oireachtas by the enactment of the annual Appropriation Act and the annual Finance Act. This means that questions relating to raising common funds by taxation and the mode of distribution of common funds are determined by the Oireachtas, although laws enacted by the Oireachtas may give wide discretionary powers to public authorities and public officials (including Ministers) as to their distribution in individual cases. It is the Oireachtas or officials acting under the authority of the Oireachtas which under the Constitution determine the amount of the community's wealth which is to be raised by taxation and used for common purposes and the Oireachtas or officials acting on its authority determine how the nation's wealth is to be distributed and allotted. The courts' constitutional function is to administer justice but I do not think that by exercising the suggested supervisory role it could be said that a court was administering justice as contemplated by the Constitution. What could be involved in the exercise of the suggested jurisdiction would be the imposition by the court of its view that there had been an unfair distribution of national resources. To arrive at such a conclusion it would have to make an assessment of the validity of the many competing claims on those resources, the correct priority to be given to them and the financial implications of the plaintiffs' claim. As the present case demonstrates, it may also be required to decide whether a correct allocation of physical resources available for public purposes has been made. In exercising this function the court would not be administering justice as it does when determining an issue relating to commutative justice but it would be engaged in an entirely different exercise, namely, an adjudication on the fairness or otherwise of the manner in which other organs of the State had administered public resources. Apart from the fact that members of the judiciary have no special qualification to undertake such a function, the manner in which justice is administered in the courts, that is on a case by case basis, make them a wholly inappropriate institution for the fulfilment of the suggested role. I cannot construe the Constitution as conferring it on them. So I must hold that I am not empowered to make the adjudication which the plaintiffs' ask me to make. I should add that I am sure that the concept of justice which is to be found in the Constitution embraces the concept that the nations' wealth should be justly distributed (that is the concept of distributive justice), but I am equally sure that a claim that this has not occurred should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts."

23. The discretion in the Financial Emergency Measures in the Public Interest Act 2009 is both policy-based and fiscal. The legislation makes that clear in the express wording of the text, even leaving out of consideration the context within which it was enacted. The wording used in s.8, analysed as part of the statutory scheme, together with the subject matter of the responsibility devolved on the respondent, places policy and financial responsibility on the respondent in any exercise of his discretion.

The exercise of the discretion

24. Turning to the precise provisions in question in the Financial Emergency Measures in the Public Interest Act 2009, the relevant express inclusion of all public servants, save for those excluded, for the purposes of deductions by way of the pension levy is made by section 2. In that regard, the specific inclusion in s. 1 of the Act of both the Civil Service and An Garda Síochána makes it clear that the Oireachtas always envisaged that those who exercise the vital and difficult function of garda within our community should be subject to the levy. On that basis alone, it becomes very difficult indeed to argue, as against a decision by the Oireachtas leaving gardaí within the scope of the levy, that the Minister

acted improperly in failing to exempt them under s. 8 of the Act. Further, it is clear that the exemption under s. 8, or a modification of the relevant obligation, can only arise where the Minister is satisfied that there are exceptional circumstances arising out of some particular and special feature of their employment. The Oireachtas must be taken to have known that which is general public knowledge: that the gardaí cannot strike, that they are constricted as to what they may do by way of employment in their spare time and perhaps also that their overtime rate is set at a particular level because of the historical obligations of police officers in relation to their public duties.

25. The discretion being faced by the respondent is not to include the Garda Síochána in the pension levy, in his discretion, but rather to find exceptional circumstances before he would even be entitled in law to consider excluding them. That being so, the burden faced by the respondent in making his decision in favour of the Garda Representative Association representations would be to, firstly, clearly identify some exceptional circumstance for removing or ameliorating the pension levy in respect of a body expressly included within the terms of the Act by vote of the Oireachtas. Further, the discretion to be exercised by the Minister is not capable of being lawfully used to confer an exemption or amelioration on any class or group of public servants merely because they are able to show exceptional circumstances by reference to some aspect or condition of their employment. It must, secondly, be just and equitable in the circumstances for the Minister to exercise that discretion. Even, thirdly, if it is just and equitable to confer a decision in favour of a group applying for an exemption or amelioration, the amplitude of the discretion conferred by this legislative wording makes it clear that the Minister is unfettered in the decision which he is then empowered to make. By referring, in s. 8 of the Act, to an entitlement in the Minister to make a decision of exemption or modification in favour of some class or group of public servants where it is, on the consideration of the Minister both "just and equitable", the amplitude of the discretionary power is declared by the legislative context to be at the extreme end of the spectrum. This amounts, in my view, to an unfettered discretion since the wording clearly excludes by express terms any entitlement by reason of qualification.

26. That being so, I would find it impossible to hold in favour of the applicant either on the basis of the argument so eloquently advanced or to imagine any situation, absent a Minister declining to consider a submission at all, where the court could declare such a decision unlawful by reason of the improper exercise of a discretion. I am therefore compelled to hold that the submission to the respondent was fully and adequately considered by him in accordance with the law as I understand it.

27. I should add that although leave to pursue judicial review was not granted on the basis of a ground that the Minister had previously fettered his discretion by reference to a fixed policy, that argument is not advanced where the only evidence of such a policy is contained within the express wording of the Act and where there is no evidence whatever that the Minister failed to consider the application for an exemption in any way other than within the principles of policy set out in the text of the Act.

Reasons

28. In the letter of the respondent dated the 11th June, 2009, adequate reasons are given for the rejection of the submission of the applicant. It is clear that the respondent did not consider it reasonable to exempt the gardaí from the burdens of the pension levy carried by the public service; the existence of varying circumstances of employment within the public service was not even enough to qualify as an exceptional circumstance. He indicates, in addition, that the burden of the pension levy was being offset in respect of public servants on lower levels of remuneration. Finally, the respondent expresses the view that consistency of application of the pension levy is both fair and appropriate across the public service in rebalancing the perilous state of the public finances.

29. This was not a decision which required the expression of reasons. Since the discretion of the Minister was unfettered, beyond a requirement to consider the application, which he did, it was unnecessary, beyond courtesy to state anything beyond an acceptance or rejection of the submission of the applicant. I do not believe that this was a case where natural justice required the expression of reasons. Even so, there were reasons given by the respondent and they were fulsome ones.

30. The entitlement to reasons can arise by reason of the exercise of the proper administration of functions which are quasi judicial in nature; State (Creedon) v. Criminal Injuries Compensation Tribunal [1988] I.R. 51. That obligation to give reasons can arise, within an administrative context, where an obligation to act fairly and judicially in accordance with the principles of natural justice is demanded by virtue of a statutory scheme of licensing; International Fishing Vessels v. Minister for Marine [1989] I.R. 149. In that case, an entitlement to a licence, or a strong chance of a more favourable decision, arose by reason of meeting particular criteria, such as the nationality of the crew, the size of the vessel and the sufficiency of its equipment and thus, as a matter of law, required reasons for refusing the licence to be stated. By stating a reason for rejection, the applicant could then know that there was a particular condition that he had not met, but which he might meet in the future; or through making another application having first satisfied himself that he met the proper criteria. Even within that context, discursive reasons are not necessary. In South Bucks District Council and Othersl v. Porter (No. 2) [2004] 1 W.L.R. 1953, Browne L.J. at para. 36 conveniently summarised the law in relation to the obligation to provide reasons as follows:-

> *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter, or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he is genuinely being substantially prejudiced by the failure to provide an adequately reasoned decision."*

31. In Mulholland v. An Bord Pleanála (No. 2) [2006] 1 I.R. 453, Kelly J. reviewed the case law in this area and identified a

number of general objectives which the doctrine of fair procedures sought to achieve by requiring reasons for quasi judicial or administrative decisions. At para. 34 he held that the reasons given for a decision must be sufficient to:-

> *"1. give to the applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;*
>
> *2. arm himself for such a hearing or review;*
>
> *3. know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and*
>
> *4. enable the courts to review the decision."*

32. In no sense can I find that the reasons here given were inadequate. In addition to the correspondence which I have quoted, a careful memorandum was prepared for the respondent prior to his decision by David Owen, dated the 4th June, 2009. Appended to that memorandum were the report of Dr. McMahon and the letter from the applicant. The degree to which a decision has to be supported by detailed reasons depends upon the nature of the decision itself; F.P. v. The Minister for Justice [2002] 1 I.R. 164 pp. 172 to 173, per Hardiman J. As O'Flaherty J. put it in Faulkner v. The Minister for Industry and Commerce (Unreported, Supreme Court, 10th December, 1996) at p.9:-

> *"I would reiterate, what has been said on a number of occasions, that when reasons are required from administrative tribunals they should be required only to give the broad gist of the basis for their decisions. We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis."*

33. Even within the sphere of criminal justice, reasons need not be extensive. A jury gives no reasons for its decisions as to guilt or that guilt has not been proven beyond reasonable doubt; just guilty or not guilty. A District Judge is only obliged to give such reasons as will enable the accused to know that he has been convicted because the evidence of a particular prosecution witness was accepted, or that he is not entitled to succeed on an application for a direction at the close of the prosecution case, and must therefore consider giving evidence himself, because the District Judge has stated in some form that she or he finds the prosecution case up to that point to be sufficient; Kenny v. Judge Coughlan [2008] I.E.H.C. 28, (Unreported, High Court, Ó Néill J., 8th February, 2008).

34. Within this context, it is clear that the reasons courteously given by the respondent for refusing the application for an exemption from the pension levy were both sufficient and adequate.

Result
35. In the result, I must refuse this application.