Neutral Citation [2008] IEHC 257

THE HIGH COURT

2007 No. 7838 P

BETWEEN

FRANK PRENDERGAST

PLAINTIFF

AND

THE HIGHER EDUCATION AUTHORITY, THE MINISTER FOR EDUCATION AND SCIENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Charleton delivered on the 30th day of July, 2008

1. The plaintiff is a Dubliner of twenty years of age and wants to become a doctor. In the competitive system of entry into the five medical schools in Ireland, his performance, over two occasions, on points in the Leaving Certificate examination has left him short of what was required. Were he not a European citizen, meaning for the purposes of this case, a citizen of a Member State of the European Union or of the wider countries forming part of the European Economic Area, however, his examination performance would have been adequate to secure him a place. This is because the Government has reserved a fixed quota of places in medical school for European citizens. This is what the plaintiff was obliged to compete for. In addition, a service industry has been created in education whereby non-Europeans can compete for separate places in the medical schools, to which European citizens are denied entry. He claims this is unlawful.

The Plaintiff's Account

2. The plaintiff was born in Ireland, though his parents also worked abroad, and has lived in Ireland, in China and in Malaysia. He was partially brought up in these places. He attended Gonzaga College in Dublin from 2000 to 2006. After the Junior Certificate, there is a transition year before the Leaving Certificate studies begin. During that year, students relax and also do some work experience. The plaintiff shadowed a gastroenterologist in St. Vincent's Hospital for a week. He was so stimulated by the experience that he decided that his vocation was in medicine. The maximum number of points that can be achieved in the Leaving Certificate, on the basis of A1s in six subjects, is 600 points. Everyone who wants to go to university, or any other participating third level college in Ireland, makes an application for a place in the course of their choice through the Central Applications Office. This was founded in 1976 to process Leaving Certificate students from Ireland and all European citizen applicants. Forty-four institutions at third level are involved; see Central Applications Office, *Board of Directors Report 2008* (Galway, Autumn 2008). A form is signed whereby an applicant agrees to be bound by the conditions attached to the system. The plaintiff signed this form. However, the plaintiff, like everybody else, had no choice but to sign. The conditions specify that he is only entitled to what he is offered.

3. In 2006, the plaintiff achieved 490 points in his Leaving Certificate. This was not nearly enough to get into medicine as a European citizen. He then repeated his Leaving Certificate, through the Institute of Education in Leeson Street in Dublin, and in 2007 achieved a score of 550 points. To enter medicine, he needed certain minimum requirements which are set by the five medical schools; Trinity College Dublin, National University of Ireland, Galway, University College Cork, University College Dublin and the Royal College of Surgeons in Ireland. On both Leaving Certificate performances, he comfortably met those requirements. The competitive nature of applying for a course in medicine with a fixed intake meant that in 2007, he was again disappointed. He tried to get into two universities in the United Kingdom. There, four universities will accept Irish students. He did two interviews but was not accepted. He could have applied, but I understand he did not apply, to one of a number of universities in central Europe that offer medical degrees through English. A condition of studying there is that over two or three years, one will learn the language and become so proficient in Slovak or Magyar, or in the appropriate tongue, as to be able to pursue clinical training on patients in the latter years of the course. I was told in opening that there may be scores of Irish students pursuing this route into medicine; however no evidence as to numbers was offered.

4. In his application to the Central Applications Office, the plaintiff's choices were, in order, medicine in any of the colleges, dentistry in Trinity College Dublin and then pharmacy. He achieved a place in pharmacy in Galway. At the time he gave evidence in this case, in July, 2008, he had completed his first year and had achieved a second class honours first division result. To become a pharmacist, he must study for three more years and then do a one-year practical registration course.

5. While studying in the Institute of Education, the plaintiff got to know a number of non-European citizens. For the purposes of this judgment, and for entry into medical school, I will refer to them as foreign students. They had the same ambition as him to study medicine. One of them achieved 500 points. He secured a place in the Royal College of Surgeons in Ireland because he was from outside Europe. The plaintiff felt bitterly aggrieved by this realisation. Some foreign students apply for admission to medical school through the Central Applications Office, though many do not, relying instead on the international baccalaureate or on national results as interpreted by the medical schools. About 18% of our Irish and European students, who applied for medicine as a first preference, got in. I do not know the percentage success rate of foreign students.

6. For competition in the places reserved for foreign students, as opposed to European citizens, in the five medical schools a lower threshold for entry is required. This still comfortably meets the minimum standard of results for eligibility to study medicine set by the medical schools and this threshold applies to every applicant. To be certain of a place in medicine in the five Irish medical schools, as I understand it, a European citizen student needs to achieve at least 570 points. In reality, all or almost all, these applicants are Irish. The figures in relation to foreign students are less clear. The plaintiff said that a non-European citizen needs only 450 points for the Royal College of Surgeons in Ireland. However, his acquaintance had achieved 500 points to gain entry. Professor Brendan Loftus of the National University of Ireland told the court that to study medicine in Galway the entry requirements for non-European citizens was currently at 500 points. In any event, it is considerably less.

7. The plaintiff's family is well off. University fees were abolished in Ireland in 1995, though students still pay a registration fee. At no stage prior to 1995, were the fees paid by students in State-funded colleges, in respect of any course, anything close to the economic cost of their education; in medicine the fees covered a fraction of the cost. If a foreign student wishes to come and study here, however, he or she must pay fees at a level which exceeds the economic cost. The number of foreign students in the Royal College of Surgeons in Ireland now greatly exceeds 50%. In the other four medical schools, the foreign intake is somewhere around a third, but the contribution that they make to the budget of the medical schools is around 50% or more. The plaintiff thought: why shouldn't I apply as if I were a foreign student and agree to pay what they would pay? He wrote the following letter in August 2007:-

> "We act for Frank Prendergast… a student who obtained 550 points in his Leaving Certificate this year. Our client applied for a place in your undergraduate medicine degree course[. H]owever, he has not been offered a place.
>
> It has come to our attention that several non-EU students have been offered places in this course notwithstanding that

> they obtained fewer points than our client (either in the Leaving Certificate or other equivalent examination). We understand that these non-EU students are obliged to pay significant fees to attend this course and we confirm that our client is also prepared to pay these fees. Please confirm that you are prepared to offer our client a place on this course on the same basis as these non-EU students. If you are not prepared to offer him a place, please indicate why you are not prepared to do so.
>
> This matter is obviously extremely urgent from our client's point of view and therefore we should as[k] you to reply to this letter by Wednesday 29th August, 2007. If we do not hear from you we may issue legal proceedings without further notice to you and this letter will be used to fix you with the costs of same."

8. The reply by Trinity College Dublin fairly sets out the scheme within which the five medical schools operate. It reads:-

> "I refer to your letter…There are two separate competitions – EU and non-EU – for entry to medicine in Trinity College. To be eligible for consideration for a place in medicine applicants must be EU nationals for the EU competition and non-EU nationals for the non-EU competition.
>
> Your client's results in the Leaving Certificate unfortunately are not competitive for an EU place in medicine, and as he is an EU, and not a non-EU national, he is not eligible for consideration for a non-EU place in medicine."

9. The replies which the plaintiff received from the other medical schools are similar. The Royal College of Surgeons in Ireland replied by indicating that they were restricted by the Higher Education Authority to offer only 39 medical places to European school leavers and that candidates for these places were ranked according to academic merit and offers issued in accordance with this ranking until all the places were filled.

10. In 2007, that same year, University College Dublin had a limit of 122 European citizen entrants into medicine, as set by the Higher Education Authority, and the National University of Ireland, Galway had 81 such places.

11. The plaintiff then issued these proceedings. He claims that setting a quota on places available to European Union students is unlawful; that any such direction was beyond the powers conferred on the defendants by the Higher Education Authority Act 1971; that the quota system is unconstitutional; and that the quota system is contrary to the relevant treaties of the European Union.

12. The relevant years where the situation of which the plaintiff complains are 2006 and 2007. I need, however, before returning to this to briefly refer to the facts, as I find them, as to the history of a quota system for medical schools in Ireland.

Historical Background

13. Some of the figures in the correspondence admitted before the court are inconsistent. The general trend, however, is clear. Starting in 1974, there were 556 students admitted to undergraduate programmes in the five Irish medical schools. Some small percentage of these may have first obtained a degree in another, likely related, discipline. As far as I can tell, about 10%, to no more than 20%, of these studying medicine in Ireland came from outside Ireland, North and South. Through the 1970s, similar numbers obtained with 513 entering medical school in 1977. In 1978, the Department of Education and the Department of Health came under pressure from the medical unions to reduce the number of Irish medicine graduates. Their view was that many doctors were being trained for the purpose of export and that at the current level of graduation there would soon be two doctors for every job available in Ireland. A sub-committee of the Higher Education Authority was established. It decided that there should be no more than 300 Irish entrants into the medical schools. They also recommended that not more than 28 non-Irish students should be admitted. I am satisfied that this decision was taken because the State did not want to fund the high expense of medical education beyond what was necessary to have a sufficient supply of Irish doctors for Irish needs. On a secondary basis, it was considered undesirable and wasteful to have major unemployment in the medical profession. There is no evidence from which I could infer that this decision was made in order to create a closed-shop of doctors in Ireland.

14. Prior to the year 2000, the Royal College of Surgeons in Ireland got an insignificant total grant per annum from the State of £18, 000.00. From 2000 onwards, the Royal College of Surgeons began to get a serious subvention from the State. In 1995, fees for a first undergraduate degree course were abolished by the Government. The Royal College of Surgeons in Ireland was outside this scheme. From 2000, however, it became obvious that they wanted to become part of this scheme and they started to receive a substantial subvention from the State. Eventually, in 2002 they came within the free fees scheme at their own request. This meant that prior to the year 2000 they were free of any constraint imposed by the Higher Education Authority, because they were free of any financial pressure that any government body might care to bear down on them. Before 2002, Irish students paid the Royal College of Surgeons in Ireland fees for their course, but foreign students paid very much more.

15. In essence, I am satisfied that, discounting the admission of foreign students and graduates, that the number of places available to Leaving Certificate students in Ireland dropped from around 500 in 1975, to a cap of 300 in 1980. The Royal College of Surgeons in Ireland, however, always took somewhat more than what was supposed to be their allocation, which was 25 out of 300, due to their freedom from State funding, and by the time the plaintiff came to apply for a place, they were taking about 40 people from Europe into their undergraduate course, some 42% of whom the statistics indicate for 2003, had previously obtained another degree. As far as I can tell, the number of foreign students graduating from Irish medical colleges during the late 1970s was in or around 20%.

16. It would seem that, historically, the Royal College of Surgeons in Ireland trained a large number of the foreign students as all the other colleges had a quota of only 28, for those from abroad, or about 10% of the numbers.

17. In the mid 1980s, the Government again came under pressure from medical unions to reduce the number of Irish medical graduates. There is nothing in the evidence to suggest that they ever sought a reduction in the number of foreign graduates. It was probably assumed by the pressure groups that these doctors would return to their countries of origin while Irish graduates would prefer to work here. The suggested reduction was from 300 places to 200 places for the Irish. This was rejected by the Minister for Education. During an address in June 1983, the then Minister stated:-

> "It has been put to me that the first consequence of a reduction in student numbers would be an increase in unit costs in that income from fees would be reduced while staffing levels could not be lowered because of the contractual rights of staff members and the numbers of specialisms to be catered for. Even if staff members could be reduced it is most unlikely that this could be achieved without involving the institutions and, consequently, the State in considerable redundancy payments. An alternative approach, of course, would be to increase the fees for the medical faculty to cover the loss of revenue. Consideration might also be given to the question of offering spare places to students at the full economic fee. Such a fee would be very high, of course, and would be outside the range of all but a very small minority of

> Irish students. There is a great demand by foreign students for places in the Irish medical schools and it is possible that available places would be taken up by them even at the full-cost economic fee. Suggestions along these lines need very careful consideration, however, given the clear implications in them that availability of medical education would be weighted heavily in favour of those who are rich enough to avail of it."

18. The pressure from the medical unions was resisted because, on analysis within the relevant departments of Government, their argument was inconsistent with the facts. It was noted in November, 1984 that 13.3% of all the posts available for non-consultant hospital doctors were held by non-nationals. This suggested a need for doctors which was not being fulfilled by the output of Irish graduates. The mass emigration and unemployment that the interest group had based its argument on was, therefore, undermined.

19. Ireland's position economically in the mid 1980s was very difficult. The training of medical graduates was, and still is, extremely expensive, compared to other disciplines. Given that the Higher Education Authority was strapped for funds, it was decided that if more foreign students could be attracted that they would finance the economic viability of the medical schools. This was the policy decided upon. At the time, the alternative Government plan was to shut the medical schools in Galway and in Trinity College Dublin. On the 30th July, 1987, the Government made the following decision:-

> "Intake of foreign students in university medical schools, at an annual fee of not less than £9,500.00, to be increased to the maximum extent possible (while maintaining planned intake of Irish students) with effect from the academic year 1987/1988."

20. Prior to making that decision it was noted that, possibly as a result of the reduction in numbers of Irish entrants, there was spare capacity that could be taken up by foreign entrants. The possibility of funding the medical schools through some students paying a full economic fee was attractive. At the time, all students paid some university fees. The Government rejected the notion that the medical schools could be funded through allowing some students who had well-off parents to pay the full economic fee. A note from the Minister for Health in August, 1987 stated that the emphasis should be on increasing the number of suitably qualified foreign applicants. It emphasised the difficulty in attracting them. It also rejected dividing Irish students into those who paid full fees, and those who paid a much lower subsidised fee. The departmental memo, in part, reads:-

> "…It could be claimed that if spare capacity exists in our medical schools preference should be given to Irish students whose parents are prepared to pay an economic fee. This would be undesirable since we would have two categories of medical student in the State subsidised schools, i.e. those who got in on their merits and those who got in on their money."

21. In consequence, the quota for Irish students remained the same, while the number of foreign students greatly increased. As a result of a creeping realisation of European Treaty rights of establishment and freedom of movement, references in official documents to Irish students became, over time, references to European students.

22. Through the 1990s, the number of foreign students steadily crept up. The number of Irish students also went up, but only very slightly, due mainly to the Royal College of Surgeons in Ireland taking almost double the number of Irish students set in its quota. As far as I can tell, by the year 2000, there were in or around 340 places, instead of the contemplated 305 places, available for European entrants. During that year, as well, the number of European and non-European entrants to medical school were equal for the first time, at about 50% each.

23. By the time the plaintiff first applied to enter medical school in 2006, the proportion of European to foreign entrants into medical school was about 40% to 60%. At that time, the percentage of non-consultant hospital doctors working in Ireland who were not European had increased from the 13% figure in 1984 to around 60% when this action commenced. The relevant authorities decided that a change was needed. In 2000 there was a body called the Medical Manpower Forum which was tasked with reporting to the Government on what precisely the appropriate intake of medical students should be. There were reviews on medical schools conducted in 2003 and ultimately these studies led to a report entitled Medical Education Ireland: a New Direction. This is commonly referred to as the Fottrell Report as it was chaired by Professor Patrick Fottrell, formerly President of the National University of Ireland in Galway; see *Fottrell et al, Medical Education in Ireland: A New Direction* (Report of the Working Group on Undergraduate Education and Training, Dublin, 2006).

24. This report of February, 2006 was adopted through the Ministers for Education and Health, and by suggestion from them, by the Higher Education Authority. It became the new policy for educating doctors in Ireland.

25. To some extent, the report clashed with another policy of the Government. In November, 2004 a report from an interdepartmental working group was issued on the internationalisation of Irish education services. This confirms what had been a Government policy for almost twenty years; that of selling Irish education, whether in medical or other spheres, to those from outside Europe who could afford to pay the full cost of courses at an economic rate. As has been obvious, from this brief survey, medicine has been among the educational courses most successfully sold as an Irish export. Ireland is perhaps a prime example of this trend in the education economy. Hungary, on the evidence presented to me, may be too. We are not, however, alone in this policy. Throughout Europe, the figures indicate, those from abroad seeking to purchase education favour medicine, science and engineering courses over the humanities. In Britain, the quota set for foreign students in medical schools is, in contrast, 10%.

The Fottrell Report

26. It is not for the court to make any comment on the effect of the policy whereby entrants from Europe to Irish medical schools were cut in the mid 1970s from a high of around of 500 or more down to 305. In order to specialise, the vast majority of Irish doctors need to gain experience abroad, typically in the United States or Britain. Therefore, there will always be a requirement for some percentage of non-European doctors in our hospitals. Having some foreign doctors is also, without any doubt, a healthy policy for Ireland. Had the policy of cuts in entry to medical school not been implemented, it is difficult to see there being anything close to the current majority of foreign non-consultant hospital doctors in the system. In the mid 1970s, it was not foreseen that European Union limits on working hours, cutting back on the 24 hour on-call system for junior doctors in our hospitals, an increasing demand for leisure by family practitioners and the family responsibilities of many doctors, would mean that more practitioners were needed per head of the population than was the case 30 years ago. In that time, the Irish population has also grown by 25% or more.

27. The Fottrell Committee did not make any recommendation that entry for non-European students should be capable of being purchased at the same cost by European students; in practice, meaning well-off Irish students. Instead, the long standing policy, of over 20 years duration, that money as a differential should not purchase entry to medical school was articulated in the foreword to the report, at p.vii, by the Minister for Education and Science:

> "Ireland's health system is critically dependent on an adequate supply of quality medical graduates. It is essential in that regard that the quality of our undergraduate medical education and training keeps pace with international best practice and that, at a wider level, our system of higher education continues to respond to key national social and economic needs. It is clear that controls on the number of places in our medical schools for Irish and EU students have required review for some time. It is also an important principle of entry to higher education that selection is based on fair, objective and transparent competitive measures."

28. The basic thrust of the Fottrell recommendations, which are being implemented by the respondents, is that a large percentage of the foreign students in Irish medical schools should be replaced over a period of four to five years with European students. The net result will be that the proportion of the intake of foreign students studying medicine in Ireland will decrease from around 60%, on the 2005 figures, to 25% in about 2011 or later. The figures presented to the court for the academic intake 2010/2011 indicate that the Royal College of Surgeons in Ireland will continue to have a majority of foreign students, taking up 69% of the entire allocation, with the total proportion over all the medical schools decreasing by that year to 29%. The Committee warned, at p.94, against too sudden a change in the policy of selling spare capacity in medical schools, beyond the European quota, in the following terms:

> "It is unwise to assume that non-EU student intake is a tap to be turned on or off at will. The large intake of non-EU students in Irish medical schools reflects over 20 years of effort in building an international presence and brand name. It is likely that even a short-term reduction in intake will lead to a long-term reduction in income.
>
> Again, it should be noted that the scale of the income loss reflects quite starkly the degree to which medical education in Ireland has become dependent on income from non-national students.
>
> It should be noted that the prime reason for restricting the intake of non-EU students is the general lack of clinical training capacity and the need to allocate clinical placements to EU students in the first instance, particularly in the context of an increase in EU student numbers. However, the current cohort of non-EU students contains a number who carry out their clinical training in their country of origin and do not therefore impact on clinical training capacity in Ireland. This scenario offers a potential strategy for the retention of non-EU students in the future."

29. The Fottrell Committee recommended that the intake of European students into Irish medical schools should be increased from the 2005 intake of 305 per annum to approximately 725 students over a period of five years. It recommended that in addition to undergraduate entry, that many of the entrants, about one-third, should be graduates. When a doctor finishes medical school it is necessary, as part of medical education, for the State to provide him or her with a year of training as an intern within a hospital. It is expected that many of the foreign graduate doctors will return to their countries of origin for intern training. Some, however, may stay here. As I understand it, at the current time there are about 500 intern posts in Irish hospitals. Of these, the European take is currently 340, and the rest are taken up by competition among our foreign graduates. The number of intern posts needs to be increased for the Fottrell plan to work. The first level for doctors working within a hospital, after the intern year, is the senior house officer position. I understand there are approximately 1,500 such posts and it is, therefore, I was told in evidence, now relatively easy for a European doctor to obtain employment at the end of the intern year. The intern posts, however, need to be greatly increased. This represents a cost to the Exchequer of somewhere around €65,000 per post, since the doctors are paid as interns, as opposed to being merely students, and also have to be supported in terms of administration and nursing. The real cost may be higher than that. To make these changes takes time as well as money.

30. The Fottrell recommendations to increase the intake of European students into the five Irish medicals school by around 130% was conditional upon several factors: the increased intake being phased over four years, during which the necessary preparatory arrangements were to be introduced; that by the end of that period there should be a 60:40 ratio between intake to the undergraduate and graduate programmes; that the proportion of non-EU students entering clinical training should be no greater than 25% of total student intake by the end of the phased increase for European students and should be maintained in the future; that the undergraduate programme should be of five years duration, dropping the pre-med year, and the graduate programme of four year duration where students had appropriate prior education; that the quota between European and foreign entry should be allocated across all the medical schools; that additional structured clinical training would be developed; that additional intern positions be provided; and that an interdepartmental steering group should be established to review progress and to amend the strategy as might be appropriate.

31. Moving from the 1978 quota of 305 places for European students entering Irish medical schools, the implementation by the respondents of the Fottrell Report, gave an additional 70 places in 2006, 40 in 2007, and 35 in 2008 at undergraduate level. In addition, graduate entry is being phased in at 60 places in 2007, 120 places in 2008, 180 places in 2009 and 240 places in 2010. Meanwhile, the percentage share of foreign to European entrants is expected to drop year by year to an entry of 29 % in 2010.

32. The foreign students provide a great deal of revenue to Irish medical schools. The 'Fottrell plan', as implemented by the respondents, is to buy back many of the places for foreign students, by increasing the subvention from the Higher Education Authority to the medical schools for European students, and substitute them with European students. By paying the relevant medical colleges extra money, it is expected that they will eventually not miss the foreign students in terms of revenue. Something will be lost, clearly, in terms of the important inter-cultural dialogue that is now a most valuable feature of medical training in Ireland; though that will be maintained through a healthy intake of foreign students at around one in four.

33. The central issue in this case is why the applicant should not be able to buy one of those places for foreign students. From the point of view of this Court, however, this is not a matter for debate or policy. It is squarely a matter as to whether the current system which bars him from taking a foreign place in medical school, and paying the full economic cost, is unlawful.

Current Situation

34. From the time the plaintiff graduates from pharmacy in 2011, he is entitled to apply, as a European citizen, for a place as a graduate in one of the four medical schools adopting graduate entry as a separate stream. Trinity College Dublin has decided not to operate this system. He will be competing for one of 240 graduate places. As I understand it, he will do an aptitude test. This, together with his degree results, will determine whether he gains a place. He is also entitled, on the basis of the Fottrell Report, to apply for medicine now, using his Leaving Certificate examination results and, in addition, doing an aptitude test. On the aptitude test, one may score up to 300 points. On the Leaving Certificate, as I have earlier indicated, one may score up to 600 points. There is, therefore, a maximum of 900 points available for the competitive undergraduate places, numbering 485 by 2010. Depending upon how he scores in the assessment, the plaintiff's high Leaving Certificate results could secure him a place through this competitive system. One of the difficulties the plaintiff will have, should he choose to attempt to enter as an undergraduate into medical school this year, is that he did not take English as a subject in his 2007 Leaving Certificate. However, he is required to be assessed on the 490 points achieved in 2006, when he did take English, without amalgamation with the 2007 results, and then to compete on the

basis of the special assessment in hoping to achieve the additional 300 marks.

35. The plaintiff has pointed to certain anomalies in the system. The one of which he most complains, and to which the bulk of the argument in this case was directed, was the setting of a quota for European students and the unavailability to him of any other place reserved for foreign students to European citizens who would also pay. As a graduate student in medicine, supposing the plaintiff was to secure a place in 2011, the plaintiff would have to pay fees. No undergraduate, at the moment, pays fees. Every European citizen, however, doing a second degree, after completing a first undergraduate degree, is also required to pay fees. The fees for graduate entry in to medicine are high. The evidence establishes that the true economic annual cost for medical studies is around €25,000. Of this, the European citizen graduate entering medicine will pay €12,000 while the State will pay €13,000. There will be a number of places in graduate entry available to foreign students as well. There, the plan is that they will annually pay about €42,000. Anyone doing a second degree in Ireland is, like graduate entrants in to medicine, required to pay a course fee. I have also been given figures for annual fees prior to 2006 in other courses where European graduates pursue them. Insofar as the evidence has been somewhat vague on this issue, it seems that the European citizen entering into a second undergraduate course, having first completed another degree, will pay fees of around €5,000 for Arts, €6,000 for engineering or any other technical subject and €7,000 for medicine. This latter figure has now become, as of 2006, the 'Fottrell figure' of €12,000. Clearly, therefore, the cost of entry in to medicine as a graduate, when you are a European citizen, has been greatly increased under the Fottrell plan. However, all European entrants are treated on the same basis in that those who are graduates are required to pay. It so happens that under the Fottrell implementation, that the cost of entry into medicine, as a graduate, has risen from about €7,000 to €12,000. None of these fees represent, on an annual basis, anything close to the cost to the colleges, and therefore to the State, of the courses, be they humanities, technical or, as I have indicated, medicine.

36. An additional anomaly is that citizens from the European Economic Area, for instance, Switzerland and Norway, who seek entry into an Irish medical school, must be resident within the European Union for three years prior to application to achieve an exemption from fees as an undergraduate, or the lower fee levels for entry into medicine for graduates. Irish people are treated in the same way. I do not know if there is an exception for diplomats, who may be housed in what is legally treated as Irish territory abroad by diplomatic treaty, but Irish people who have been living outside of the European Union for three years prior to seeking entry to a third level college as an undergraduate, or under the Fottrell scheme as a graduate, are required to pay as if they were a foreign student. The foregoing are the facts that I have found for the purpose of the decision in this case.

Statutory Authority

37. It is argued that there is no statutory basis upon which the respondents have required a limit to the number of Irish students, and more recently, European students, studying in Irish medical schools and it is argued that there is no statutory basis on which European students may not pay the fees set for foreign entrants and so gain entry as a student paying at that enhanced level. Insofar as I can tell, the decision that there should be a cap on the number of European citizens studying in Irish medical colleges was taken by a sub-committee of the Higher Education Authority in 1978. I am content to infer that this decision would not have been made without the communication of concern by the Minister for Education and the Minister for Health, and possibly other Ministers as well. The decision of July, 1987 to increase the intake of foreign students into university medical schools to the fullest extent that that was possible, beyond that cap, and at a full economic fee, was a Government decision.

38. An tÚdarás um Ard-Oideachas, the first respondent herein, was established by the Higher Education Authority Act 1971, in order to further the development of higher education in the State; to assist in co-ordinating State investment in higher education; to make proposals for State investment in higher education; to promote the public appreciation of the value of higher education and research; to promote "the attainment of equality of opportunity in higher education"; and to promote the democratisation of the structure of higher education. These general functions were given to An tÚdarás under s.3 in addition to its specific functions under s.4 of the Act, such as that of promoting the Irish language and our national culture. Under section 6 of the Act, An tÚdarás was to maintain a continuous review of the demand and need for higher education. Based on that, it was to recommend to the Minister for Education what provision should be made for places. Although the Act does not specifically say it, it is clearly to be implied that the demand for higher education is to be interpreted as the number of students who wish to pursue particular courses, while the need for higher education refers to the prudent disbursement of State resources in higher education for the proper management of the national culture and the national economy. The function of An tÚdarás, therefore, under s.6, read in conjunction with s. 3, is to assess what forms of higher education the State needs and how those places may be best allocated if there is excess demand, or how students may best be attracted to such courses if the demand is not sufficient.

39. Sections 7, 8 and 9, give An tÚdarás the authority to require any university, college or institution of higher education, to indicate its financial position so that proper planning of financial expenditure over suitable periods of time, may be made. These sections read:

> "7. -An tÚdarás may, annually or at such other intervals as it may determine, require any institution of higher education to submit a statement of its financial position to An tÚdarás and it shall be the duty of every institution of higher education to comply with any requirements which are imposed on it under this section.
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> 8. - (1) Any request by an institution of higher education for State subvention shall be submitted by the institution to An tÚdarás in such manner as An tÚdarás may require.
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> (2) Requests submitted under this section shall be examined by An tÚdarás annually or at such other intervals as it may determine.
>
> 9. - An tÚdarás may relate annual or other financial requirements of institutions of higher education to financial planning over such periods, as it considers suitable."

40. Sections 6 and 10 of the Act, read together, reflect concerns of the time. Thereby, An tÚdarás has the function of advising the Minister of Education of how the total number of students should be divided between the various institutions of higher education. The Act makes it clear that, "a reasonable balance" should be struck "in the distribution of the total, number of students as between institutions". Through the Act, therefore, it is set out that universities or colleges should not be allowed to die by reason of a lack of student numbers, but that, instead, a healthy supply of students should be maintained to third level institutions by balancing the distribution of student numbers between them. Historically, Trinity College Dublin once had a shortage of students. This does not mean, however, that an institute of higher education is entitled to change its policy so as to concentrate on all of its resources of subjects of limited cultural or economic value and yet require a proper distribution to it of students. This, it seems to me, is made clear by s. 11, which requires all institutions of higher education to supply to An tÚdarás, "all such information relative to the institution as An tÚdarás may require for the purpose of performing its functions". Under section 13 of the Act, An tÚdarás can institute and conduct studies on the problems of higher education and research. Its discretion, in that regard, is wide. After studying

the financial situation of any third level college, and after obtaining relevant information from it for the purpose of its functions, any problem in relation to higher education may be studied by An tÚdarás and a report may be published. Under s. 16 of the Act, An tÚdarás can appoint a person to advise it on matters relating to its functions, or appoint a committee in that regard.

41. There are two sources of funding to the Higher Education Authority, as An tÚdarás is often called. Specifically, An tÚdarás is entitled under s. 17 to accept "gifts of money, land or other property upon such trusts and conditions, if any, as may be specified by the donor". If a conditional gift is unacceptable, in the sense that it clashes with the functions of An tÚdarás, it may not accept it. The other, and principal, source of funding is the Government. Section 12 provides:

> "12. - (1) There shall be paid to An tÚdarás, out of moneys provided by the Oireachtas, such amounts for institutions of higher education as may be approved of by the Minister [for Education] with the consent of the Minister for Finance.
>
> (2) Any payment to an institution which An tÚdarás makes out of the amounts that it receives under the foregoing subsection shall be made in such manner and subject to such conditions as An tÚdarás thinks fit."

42. It should not be lost sight of, when considering what conditions might be attached to the grant of money by the Higher Education Authority to a medical school, that the Act has a specific purpose of co-ordinating State investment in higher education and of promoting the value of equality of opportunity in accessing it. There is a legal basis both for dispersing the taxpayers' money to the medical schools and for attaching conditions to that money. The proviso is that derived from the general principles of administrative law that the conditions attached by An tÚdarás should not be arbitrary or capricious, but should be related to its functions within the Act, as read as a whole, and in the light of its general functions as declared by section 3. It is clear, therefore, that the conditions that are attached to a grant on money, may be based on those which reasonably appear to be necessary after An tÚdarás has studied an issue in higher education, or which reasonably appear to be necessary in consequence of the funding available to it. It is even more apparent what An tÚdarás cannot do. It cannot decide to capriciously favour one college or university over another, whereby it is starved of students or funds; it cannot attach conditions to a grant which bear no reasonable relationship to the demand and need for higher education in Ireland; and it cannot act so as to deliberately enforce or promote inequality of opportunity in higher education. It would seem possible, therefore, under s.3(d) for some reasonable provision to be made in appropriate third level courses, where sufficient ability has been shown by prospective students, to allow for the education of those who are disadvantaged or those who are from developing countries.

43. It is plain, however, on the wording of the Act, that the Minister for Education and the Minister for Finance, can decide if the allocation of monies for third level education should be increased or decreased. If the Minister for Education has a view in relation to third level education, that may be studied by An tÚdarás as to its validity in fact and in terms of the specific and general functions that it has under the Higher Education Authority Act 1971. The attachment of conditions, however, is a matter for An tÚdarás. The Act makes this clear by stating that payments may be made to institutions of higher education "subject to such conditions as An tÚdarás thinks fit". On the facts in this case, I am satisfied that in 1978, the Higher Education Authority saw fit to reduce the number of places for entry into Irish medical schools, by around 40%. I am satisfied that payment to the five medical schools was made at an appropriate level so as to ensure the proper education and training of those students as doctors, in radically reduced numbers but that no further funding was available. An tÚdarás has the power, under the Higher Education Authority Act, to decide that, for instance, the pursuit by large numbers of students of the ancient forms of Latin, Greek and Hebrew, are not conducive to promoting and developing the national culture or the national economy. An tÚdarás would be entitled to consider, as a balancing factor, that a university, as such, is a place allowing students access to a universe of learning, and that the pursuit of apparently arcane disciplines assists in the promotion of scholarship, in foreign relations, and in the cherishing of education as a value in itself and as a valuable training of the mind for apparently unrelated subjects. An tÚdarás can decide, however, that more emphasis might need to be placed on scientific, technical or humanities subjects, and attach conditions to its funding, after appropriate study, and on a reasonable basis, for the purpose of furthering its objectives under the Act.

44. I find as a fact, on the evidence before me, that medical education is extremely demanding of its students and is extremely expensive for the State in the provision of the cost of annual places. In consequence, An tÚdarás was entitled to provide money to the five medical colleges, on condition that the number of Irish, and later European, entrants to medical education should not exceed a particular number. As it turns out, the decision to radically reduce the number of entrants into medical education in 1978 was probably a mistake. As it has now emerged, the numbers were too low. There may have been a point from 1978 through to the Fottrell Report, and the changes which first began to be implemented in 2006 in consequence on it, where that number was correct. Over the course of for some of those thirty years, however, until the matter was looked at again by Government, it is clear that Ireland produced too few doctors for its needs. It might have been the case that had the plaintiff challenged that cap on European citizen entrants into medical training in Ireland in the year 2000, that he might have been in a position to prove that the condition attached by An tÚdarás to the funding, namely, the limiting of places to 305, was such as to fly in the face of fundamental reason and common sense; that is was unreasonable and, therefore, unlawful. I do not know this, and I am not so deciding, because the evidence was not before me. On the basis of the evidence that is before me from Dr. Rósín Healey, a recently retired accident and emergency consultant in Our Lady's Hospital in Crumlin, and from Professor Brendan Loftus, the Dean of Medicine in the National University of Ireland, Galway, I would infer that the implementation of the Fottrell recommendations will, over time, be in a position to meet the foreseeable future needs of the Irish people for doctors. In fact, there will probably be a surplus if many people choose to study medicine in central Europe, but I do not know that because the figures were not put before the court. In that regard, An tÚdarás was entitled to take into account that there was always going to be a limiting feature on the education of doctors in Ireland. This is the availability of places for clinical training. Hundreds of trainee doctors cannot stand around a woman who is giving birth, or a child who is sick, or a cancer patient who is dying. Those numbers are necessarily to be limited in the teaching hospitals who give the medical schools the opportunity to train medical students in their last years. The plaintiff, however, in addition complains that making any of those places available to foreign students who can pay, without making such places available to him on the same basis, is outside the authority of the Government.

Powers of the executive

45. It is argued that the decision of the Government in 1988, to attract foreign students to Irish medical schools at a premium rate of payment, and the influence that was probably brought to bear on the Higher Education Authority in 1977 to limit the number of places for Irish, and later European, students in Irish medical schools and the decisions that the quota for European students at low, or no, fees should not be filled by foreign students and that European students should not be capable of taking the place of a foreign student while paying a premium rate were made without executive authority. To that list of impugned decisions I must add the series of decisions made by the Minister for Education and Science and the Minster for Health and Children, through the Higher Education Authority, whereby the recommendations of Professor Fottrell greatly increased the places available for European students at no fee, and decreased the places for foreign students. These arrangements must also fall if this argument succeeds. Why is the Fottrell recommendation, as adopted by the organs of government lawful, if all of its prior decisions are unlawful? In effect, the applicant asks that the entire system should be overturned. This would leave the medical schools free to make their own decisions as to entry, as to

who should pay, as to who should not pay and as to what numbers of European students and foreign students should be admitted to their courses, subject only to the natural limitation that is placed on numbers by clinical training. In other words, the decision would shift from the Executive and the Higher Education Authority to the medical schools in consultation with the teaching hospitals to which they are allied.

46. I have already held that the Higher Education Authority has clear statutory powers to make policy decisions in relation to institutions of higher education and to provide grants of money to those institutions based on conditions that are within its competence under the Higher Education Authority Act 1971. The reality is, however, that notwithstanding that An tÚdarás can receive gifts, its funding derives from the taxation revenue of the Irish people as dispersed through the Government. Does the Executive, therefore, have the power to give money for higher education based on a settled policy?

47. The relevant Articles of the Constitution include the Preamble which, in part, provides:-

> "In the Name of the Most Holy Trinity …We, the people of Éire … seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained … Do hereby adopt, enact, and give to ourselves this Constitution."

Article 6 provides:-

> "1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.
>
> 2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."

48. Under Article 15.2, the exclusive power for making laws is vested in the Oireachtas. Article 28A acknowledges that limited powers may be devolved to organs of local government. On the expenditure of public monies, Article 17.2 provides:-

> "Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach."

Article 28 provides:-

> "1. The Government shall consist of not less than seven and not more than fifteen members who shall be appointed by the President in accordance with the provisions of this Constitution.
>
> 2. The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.
>
> …
>
> 4.1º The Government shall be responsible to Dáil Éireann.
>
> 4.2º The Government shall meet and act as a collective authority, and shall be collectively responsible for the Departments of State administered by the members of the Government.
>
> …
>
> 4.4º The Government shall prepare Estimates of Receipts and Estimates of the Expenditure of the State for each financial year, and shall present them to Dáil Éireann for consideration."

Article 50 provides:-

> "1. Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.
>
> 2. Laws enacted before, but expressed to come into force after, the coming into operation of this Constitution, shall, unless otherwise enacted by the Oireachtas, come into force in accordance with the terms thereof."

49. Article 61 is part of the transitional provisions of the Constitution. It is no longer printed with the full text because it is of mostly historical interest. However, the devolution and assumption of power as a matter of history is important here. Article 61 provides:-

> "1. On the coming into operation of this Constitution, the Defence Forces and the Police Forces of Saorstát Éireann in existence immediately before the coming into operation of this Constitution shall become and be respectively the Defence Forces and the Police Forces of the State."

50. The powers of Government are not to be confused in their equivalence with the powers of local government. Every local authority is a creature of statute, the exercise of its powers is enabled under the Constitution but those powers do not arise out of the exercise of local government authority and history. Rather, the powers of local government to raise funds, to spend them, or to set up schemes to disburse them appropriately arise from specific statutory provisions. This is because local government did not exist as a lawful exercise of authority without the devolution of power to it by central government. So, it is always a central question as to what power was devolved. The doctrine of legal formalism is particularly apposite in the context of local government powers as those powers must firstly be granted by statute and, secondly, exercised in accordance with it. Only limited ancillary powers will be implied onto the statutory powers that exist and no ordinary or usual power, such as the power to buy and sell land or to engage employees, will be assumed unless by necessary implication. It is clear, even there, that the modern legislative policy is to reiterate basic powers in respect of every new function granted by legislation to local government in fear of an argument being made as to excess of a *vires*; Butler, *Keane on Local Government*, 2nd Ed., (Dublin, 2003), Chapter 1.

51. The powers of our national Government are obscured by the mists of time. By reason of invasion and conquest, whatever powers were exercised, and in whatever manner they were exercised, by those who governed Ireland under a quasi-feudal system were displaced by the rule of the Crown of England. By reason of the unwritten nature of those powers, it may be difficult to define precisely what they ever were. The concept of the devolution to Ireland of the powers exercisable under the Royal Prerogative, in addition to statute and common law, may be an unattractive way of describing some of the powers devolved in 1922 to Saorstát Éireannn, and thence in 1937 to Ireland, but there is a specific Article of the Constitution providing for this. This Article has to have a meaning in law, as does every word in it. It is also noticeable that it does not refer to the taking from the Crown of England of any powers that are apparently royal in origin. Article 49 provides:-

> "1. All powers, functions, rights and prerogatives whatsoever exercisable in or in respect of Saorstát Éireann immediately before the 11th day of December, 1936, whether in virtue of the Constitution then in force or otherwise, by the authority in which the executive power of Saorstát Éireann was then vested are hereby declared to belong to the people.
>
> 2. It is hereby enacted that, save to the extent to which provision is made by this Constitution or may hereafter be made by law for the exercise of any such power, function, right or prerogative by any of the organs established by this Constitution, the said powers, functions, rights and prerogatives shall not be exercised or be capable of being exercised in or in respect of the State save only by or on the authority of the Government."

52. It is clear that not every prerogative power that was vested in the King of England as the personification of the State has survived the enactment of the Constitution; *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101. It should be noted, however, that the specific Articles of the Constitution quoted refer in addition to prerogatives to powers, functions and rights that may be exercised "in or in respect of the State". That authority is vested in the Government of Ireland. It may be, and it does not fall for decision in this case, that it is only the royal aspect of the prerogative, such as immunity from suit of the State and the right to recover treasure trove, that has lapsed. Specifically, in *Webb v. Ireland* [1988] I.R. 353, Finlay C.J. at p. 382 refers to these as being "traced to the royal dignity of the King … to his position as sovereign or ruler". It would also not be correct to infer that those who drafted the Constitutions of 1922 and 1937 somehow did not know what they were doing and mistakenly created a Government without any traditional powers in executive matters.

53. In Hogan & Whyte, *J.M. Kelly: The Irish Constitution*, 4th Ed., (Dublin 2003), at para. 8.2.10, the learned editors offer the following comment on the *Webb v. Ireland* decision:-

> "Some questions would seem to arise on this view, if it is to be understood as meaning that no dimension whatever of the ancient prerogative survives for the public benefit. For instance, by what authority could the Government – in the absence of specific legislative authority – establish an extra-statutory scheme such as the Criminal Injuries Compensation Tribunal? What about the State's power to create corporations by letters patent? Did the prerogative power to grant such letters patent; the power to grant patents of precedent for counsel or, indeed, the right to grant passports vanish with the enactment of the Constitution of 1922? One might argue, perhaps, that the Government could discharge such powers by virtue of the executive powers granted to it by Article 28. The fact remains, however, that were it not for the very existence of the prerogative in the first place – and its supposed survival after 1922 – no one would have ever sought to argue that the Government could have discharged such functions in the absence of appropriate enabling legislation."

54. Apart from the measures referred to, the State has also exercised the power of entering into treaty obligations which are not inconsistent with the existing powers of the Constitution, some of them authorised by Article 29.4.2º and some limited thereby; has set up a civil legal aid scheme based on specific administrative measures as to competence and qualification, prior to legislation; has decided on the disbursement of funds in aid of developing countries; and, in large measure prior to specific enabling legislation, has directed the civil service, the army and the police force of the State. Now, in 2008, there may be acts providing for those bodies to obey lawful orders, but these are relatively recent. The army personnel were hardly entitled to refuse to serve in, or to logistically support, peacekeeping missions in Congo, for instance or in other places where the army has greatly advanced Ireland's stature as a country committed to the pacific settlement of disputes. To organise the civil service and the army and the Gardaí, the Government through its ministers needs to hire people and to dispense with their services. All of this affects people's rights and liabilities, sometimes in far-reaching ways. I will shortly return to this. A further specific power that was exercised by the Government was that related to Irish children of foreign parents. Article 2 of the Constitution provides for the entitlement and birthright of every person born on this island to "be part of the Irish Nation". As a matter of fundamental law, Irish people are entitled to stay in Ireland that is the most basic right of citizenship. By virtue of the 27th Amendment to the Constitution and, in consequence, the Irish Nationality and Citizenship Act 2004, a person born here who does not have one parent who is an Irish citizen is not entitled by reason of birth alone to become an Irish citizen. *Bode v. Minister for Justice, Equality and Law Reform* [2007] I.E.S.C. 62, concerned a scheme set up by the Minister for Justice to allow the foreign parents of Irish children to remain in the State for the purpose of rearing those children and, thereafter, indefinitely. The precise terms of the scheme involves deciding those who qualified, and those who did not qualify. This is important, in the context of the argument presented before this Court that the powers under the Constitution not provided for by legislation can only exist, or can only operate, where no one's rights or liabilities are affected. By including one group of people within the scheme, in the carefully thought-through manner that is apparent from its text, the Government was excluding other groups. That thereby affected their rights and their liabilities. They argued that they had an entitlement to be considered individually for inclusion and not excluded by reason of the executive power of the Government. At para. 22 of the judgment, Denham J. said the following:-

> "In this case one of the fundamental powers of a State arises for consideration. In every State, of whatever model, the State has the power to control the entry, the residency, and the exit, of foreign nationals. This power is an aspect of the executive power to protect the integrity of the State. It has long been recognised that in Ireland this executive power is exercised by the Minister on behalf of the State.
>
> …
>
> While steps taken by a State are often restrictive of the movement of foreign nationals, the State may also exercise its powers so as to take actions in a particular situation where it has been determined that the common good is served by giving benefits of residency to a category of foreign nationals - as a gift, in effect. The inherent power of the State includes the power to establish an *ex gratia* scheme of this nature. Such an arrangement is distinct from circumstances where legal rights of individuals may fall to be considered and determined.
>
> Exercising such power, in light of unique circumstances in Ireland in 2005, in addition to the specific statutory procedures, [whereby non-citizens may seek a declaration of refugee status, and thereby become entitled to the rights provided to

refugees], a special administrative scheme, the IBC 05 Scheme, was introduced by the Minister. The Minister obtained Government approval. It was a generous scheme, for those who came within its criteria. It was an example of the State exercising its discretion to allow specific foreign nationals to reside in Ireland. Yet, the foreign nationals still retained all rights under the formal procedures [relating to refugees]."

55. In Hogan & Whyte, *J.M. Kelly: The Irish Constitution*, 4th Ed., (Dublin 2003), at para. 5.1.18, the editors offer the following view:-

> "It is also the case that it is not always necessary for the Government to have to rely on statutory authority in order to exercise executive power. The Government frequently exercises the executive power of the State in relation to foreign affairs, and specifically the conclusion of international agreements, without having to have recourse to legislation and in the domestic arena, successive Governments have used extra-statutory schemes to provide benefits to citizens. Governments may also enter into contracts and acquire and dispose of property without statutory authority and on a number of occasions, companies have been established by the executive in the absence of statutory authorisation. On the other hand, legislation is required before the executive may impose any obligation or burden on citizens."

56. I have doubts as to the validity and applicability of the last sentence quoted in all circumstances. Central to the exercise of government power is the establishment of policies for the proper governance of Ireland. Taxation of the people, which can only be carried out by legislation in specific terms, provides the funds that are necessary to implement policy. No doubt, in deciding upon a policy the Government will have regard to the directive principles of social policy as set out under Article 45 of the Constitution, which are "not … cognisable by any Court under any of the provisions of" the Constitution. The fundamental function of Government is to keep order, to decide the direction in which the country is to go and to disburse the funds collected through taxation from the people in aid of their objective. In a democracy, the people are entitled, in the event of disagreement with the Government on issues, large and small, to vote accordingly. I do not believe that this Court is entitled to set policy, or to exchange one policy for another, or by applying the doctrine of legal formalism derived from local government law, to thereby declare that the Fottrell recommendations should be set at nought, as implemented through Government policy, or that the previous policy was illegal because the Court may be persuaded to disagree with it. I cannot find anything to suggest that the Government does not have the power to decide what funds should go to higher education or to suggest to the Higher Education Authority the policies that it sees as best be pursued, once An tÚdarás retains discretion in accordance with its legal role. This Court has no role in policy. The role of the courts, in this regard, was set out by Murray J. in *T.D. v. Minister for Education* [2001] 4 I.R. 259, at pp. 331 and 332, as follows:-

> "Thus it is not in issue that the superior courts, in determining cases brought before them, may make orders affecting, restricting or setting aside actions of the Executive which are not in accordance with law or the Constitution or make declaratory orders as to its obligations. The learned High Court Judge correctly cited the law in this regard as stated by Finlay C.J. in *Crotty v. An Taoiseach* [1987] I.R. 713 at p. 773:-
>
> > 'With regard to the executive, the position would appear to be as follows:- This Court has on appeal from the High Court a right and duty to interfere with the activities of the executive in order to protect or secure the constitutional rights of individual litigants where such rights have been or are being invaded by those activities or where activities of the executive threaten an invasion of such rights.'
>
> Equally the superior courts may set aside an Act of the Oireachtas on the grounds that it is repugnant to the Constitution.
>
> In *Landers v. Attorney General* (1973) 109 I.L.T.R. 1, Finlay, J. (as he then was), in referring to the constitutional discretion left to the State to balance the priority to be accorded to one right as against another in the interests of the common good stated at p. 6:-
>
> > 'The Court must as I construe its obligations under the Constitution be as scrupulous in avoiding such a choosing as it must be energetic in preserving a clear and threatened constitutional right. *In the same way I do not consider that it is any part of the function of the Court to adjudicate as to what is the best method by which the State can carry out one of its constitutional duties* ' (emphasis added).
>
> The courts have jurisdiction to intervene to prevent an invasion of rights or determine constitutional obligations. The views expressed by Finlay, J. and reflected in other judicial pronouncements which I cite, mean, as I understand them, that it is the executive not the courts who decide and implement the policies calculated to carry out its constitutional obligations. Moreover, Finlay J. clearly saw no difficulty in the amplitude of the powers of the court to protect rights while at the same time refraining from trespassing on the exercise of their functions by the organs of State.
>
> Such jurisdiction can only be exercised in deciding on justiciable matters in issue between parties litigating those issues before the court (other than an Article 26 reference). The courts have no general supervisory or investigatory functions."

57. Hardiman J. in the same case at pp. 360 and 361 stated:-

> "The exercise of the executive power is vested in the Government which is responsible to Dáil Éireann. On the ordinary principles of construction I believe that this responsibility is an exclusive one; the Government is not in this respect responsible to any other person or body. As appears from the citation earlier in this judgment from *Buckley and Others (Sinn Féin) v. Attorney General and Another* [1950] I.R. 67, these articles, combined with Article 6, not merely set forth the distribution of powers, but they 'require that these powers should not be exercised otherwise'. I agree with the observations of Murray J. in this case to the effect that the order under appeal would tend to 'undermine the answerability of the executive to Dáil Éireann and thus impinge on core constitutional functions of both those organs of State'. In my view those observations are clearly borne out by the passage which follows them in the judgment of Murray J.
>
> In my judgment in *Sinnott v. Minister for Education* [2001] 2 I.R. 545, I gave a number of reasons why the courts could not assume the policy making role in relation to the multitude of social and economic issues which form the staple of public debate. I said at p. 710:-
>
> > 'Firstly, to do so would offend the constitutional separation of powers. Secondly, it would lead the courts into the

taking of decisions in areas in which they have no special qualifications or experience. Thirdly, it would permit the courts to take such decisions even though they are not, and cannot be, democratically responsible for them as the legislature and the executive are. Fourthly, the evidence based adversarial procedures of the court, which are excellently adapted for the administrative of commutative justice, are too technical, too expensive, too focused on the individual issue to be an appropriate method for deciding on issues of policy.'

This list is by no means exhaustive. One might add that if the courts (or either of the other organs of government) expand their powers beyond their constitutional remit, this expansion will necessarily be at the expense of the other organs of government. It will also be progressive. If citizens are taught to look to the courts for remedies for matters within the legislative or executive remit, they will progressively seek further remedies there, and progressively cease to look to the political arms of government. Such a development would certainly downgrade the political arms of government and, just as significantly, it would tend to involve the courts, progressively, in political matters. This cannot be permitted to occur."

58. All of the cases cited in argument before this Court as limiting the power of the Government to set policy and to disburse funds in accordance with that policy are, on analysis, ones that are specifically concerned with statutory interpretation and vires. I want to look at two of these. In *O'Neill v. Minister for Agriculture* [1998] 1 I.R. 539, the imposition of conditions for artificial insemination whereby those entitled to pursue that activity was restricted was held to be beyond the powers in the relevant statute. In *Humphrey v. Minister for the Environment* [2001] 1 I.L.R.M. 241, the respondent was entitled to make regulations for the control and operation of taxis. His powers, however, were specifically limited under s. 82(2) of the Road Traffic Act 1961, to licensing such vehicles, to setting fees for licences, and authorising the fixing of maximum fares. The Minister was not entitled, however, to set a licence fee related to the capital value of the subject of a licence so as to be in the nature of a tax. There is no doubt that the Government is not entitled to rely on aspects of the prerogative inherited from our rule by another power, that relate to the dignity of the monarch and which are inconsistent with the Christian and democratic nature of the State under the Constitution. That does not mean that the Government has no residue of inherited powers that are not provided for by statute. Actions of Government which have, for instance, the result of imposing a tax; or of increasing police powers, or similar powers by departmental officials, whereby people may be arrested or dwellings searched or compelled to undergo interrogation; or which go outside the specific terms of the statutory scheme passed by the Oireachtas to regulate a particular area of administration are, in the history and tradition of the Irish people, outside the realm of any constitutional construction of powers that are capable of being exercised by the Government. The full extent and the limit of those powers are not to be decided by me in this case. I am satisfied, however, on the authorities cited, that the government is entitled: to set a policy for the training of a specific number of medical graduates to meet the needs of the State; to decide what funds are appropriate to be disbursed in that regard; to decide that particular forms of education should be free, or should be contributed to by fees; and to decide that foreign students can take up spare places at an economic cost to the benefit of the economy.

59. Another fundamental part of the plaintiff's argument, however, is that this treatment of him, whereby he is not entitled to buy a place as a foreign student is unequal, and therefore unconstitutional.

The equality issue

60. The Equal Status Act 2000 ("the Act of 2000"), provides further evidence of the reality of the Government policy that is challenged in this litigation. Under section 3 of that Act of 2000, as amended by s. 48 of the Equality Act 2004, discrimination in relation to the sale of goods and supply of services on the unacceptable bases set out in the legislation, is outlawed. A person who claims discrimination must, under s. 21, seek redress by referring the case to the Director of the Equality Tribunal that is set up by the Act. Redress may be ordered under s. 27 of the Equal Status Act 2000, as amended by s. 61 of the Equality Act 2004, through compensation or a mandatory order. Thereafter the matter may be appealed to the Circuit Court under s. 28 of the Equal Status Act, 2000, or, further, on a point of law to the High Court. An injunction may also be granted by the Circuit Court or the High Court, on the application of the Director of the Equality Tribunal where discrimination is likely to reoccur. Redress under the Act is to the statutory bodies set up. Legal norms were not created in this legislation that are justiciable in the ordinary courts as breaches of statutory duty; *Doherty v. South Dublin County Council (No. 2)* [2007] 2 I.R. 696. Section 7 of the Act of 2000 forbids any educational establishment, whether supported by public funds or not, from discriminating on the terms of admission to a course. Section 3(d)(i) of that Act, however, provides that it is not discrimination to provide different treatment in relation to "fees for admission or attendance by persons who are nationals of a member state of the European Union and persons who are not" or "the allocation of places at the establishment to those nationals and other nationals".

61. Despite the specific exclusion by legislation of the complaint of the plaintiff in this case, and despite no claim having been brought arguing that the foregoing sub-section is unconstitutional, it is argued that the alleged unequal treatment of the plaintiff is contrary to the Constitution.

62. Article 40 provides:-

"1. All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

63. Article 41 of the Constitution recognises the family as a moral institution and as the fundamental building block of society. Article 42 provides:-

"1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State."

64. It is argued that I should read the guarantee of equality set out in Article 40.1 of the Constitution together with Article 42.1, taken in isolation from its context. It is clear that the context of Article 42 is to allow provision to be made by law for the setting up of schools, but in such a way as not to infringe religious freedom, or to destroy private education or to allow home schooling. Just because the parents of the plaintiff may have the means whereby, were they eligible, they might purchase a place for him as a foreign student in an Irish medical school, does not mean they have a constitutional entitlement to upset the Government's policy in relation to the equality of educational opportunity that, I am satisfied, fairly operates in this field. There is also another impact which

upsetting the Government policy may have. One can anticipate around seven hundred European graduates, almost all of them Irish, from Irish medical schools annually from about 2015. There will, in addition, be just under two hundred foreign medical graduates. If, every year, there are about two hundred young Irish men and women whose parents are prepared to pay for their medical education at full economic cost, by whatever means, in addition to whatever number are being trained in the neighbouring kingdom and those paying for medical education in central Europe, this will result in a strong oversupply of Irish and European medical graduates, most of whom will wish eventually to take up positions in Ireland. Inevitably, the response by the Higher Education Authority and the Government will have to be to re-think the quota of seven hundred and twenty five places for European citizen students. It can be predicted, as at least a probability, that the quota for those exempt from fees as European students will be brought under pressure to be revised downwards to the extent of the displacement by Irish students of the foreign students. Competition for the decreased free undergraduate, or low fee graduate, places will be even more severe. This may or may not happen. I am not entitled to form my judgement around my personal predictions as to the future. This is why the setting of policies in this entire area is utterly unsuited to any adjudication which a Court might make.

65. To understand this, the stark, and superficially attractive, argument of the plaintiff based upon his own situation, it must be set in context. The plaintiff spent a year sitting in the same classroom, at least some of the time, with a foreign student who did less well than he did in the Leaving Certificate but yet obtained a place in the Royal College of Surgeons in Ireland. That foreign student did not take up a place reserved for European citizen students. He took up a place in medical school for a course that was sold on the basis of the benefit it would bring, by way of fees, to the medical school, and in terms of what the student would spend in the economy here simply by living in Ireland, and the international ties that might be made between his country of origin and the State, to the economic benefit of the community generally. That foreign student may have wealthy parents or he may, like many Malaysian and other students in our medical schools, be there on a scholarship. He or she may be contracted to their national government to either repay the fees or to work at an appropriate rate as a hospital doctor in their home country for a full decade. Sitting with Mr. Prendergast and this foreign student were undoubtedly other Irish young men and women who are anxious to consider a career in medicine.

66. Were I to strike down the existing Fottrell scheme as an unconstitutional inequality, I must consider the effect that it would have. I am not entitled to act in an unthinking way. Furthermore, I am only entitled to act within the limit of my authority, which is to correct legal wrongs and not to set Government policy. As between Mr. Prendergast and another Irish student the following could emerge were I, as urged, to strike down the respondents' organisation of medical education in Ireland. He might be able to pay the full economic cost to the medical school of his education but another Irish student might not. Why should he gain access to a medical career based on his money and lesser points performance in the Leaving Certificate when that other student, on perhaps better points, does not?

67. It is the policy of the Government that that should not happen. Furthermore, that policy is based on sound reasoning. There is no evidence before me to suggest that it is arbitrary or capricious. The foreign student does not have the right to stay in Ireland upon the completion of her or his training. He or she does not have the right to vote and nor are social welfare, health protection rights and housing rights conferred by statute applicable to him or her. These rights would be equally applicable, however, as between Mr. Prendergast, as, for this is what he wants to be, a paying student in an Irish medical school, and another student who is excluded, perhaps having done better than Mr. Prendergast, but who does not have the money to pay the full economic fees. Is the Court, on that basis, to strike down a carefully thought through Government policy based merely on looking at one side of the situation? To do so would be to replace one alleged inequality with a different but very real and unjust inequality. Is the other Irish student, who can not pay the full economic fees of medical school to be required to mortgage his or her future to a huge bank loan; to persuade his or her parents to mortgage the family farm; or to merely accept the situation and look on with envy on a basis whereby Mr. Prendergast can obtain what he wants in circumstances where the only difference is that of money? The plaintiff seeks a declaration overturning the current system and the grant by the Court of a declaration is a discretionary remedy. The creation by declaration of such an inequitable system may have no effect in the plaintiff's favour. Of all the many hundreds of European students competing for a place in medical school, there may be hundreds who may pay, thus leaving Mr. Prendergast with an insufficiency of points on an open competition system. There may be hundreds more foreign students whose points performance in the Leaving Certificate, or in equivalent examinations, exceeds his. The declaration sought in this case, turning a carefully thought-through scheme based on the recommendations of Professor Fottrell into a market free-for-all based on money would be to cause this Court to upset the principle of equality of access to education among those entitled to rights as European citizens and to replace it with a legal nullity where untrammelled market forces can operate. Such a situation would not be in accordance with the high constitutional principles of prudence or charity and it would do nothing towards furthering the constitutional aim of true social order.

68. It was conceded on behalf of the plaintiff that the Government have the authority to determine that a certain amount of money should go into education; that a percentage of it should be to third level education; that priorities can be set in relation to particular courses and that a quota can be set for State-subsidised places. This concession was correct in law. It is argued, however, that the Government can never exclude an Irish person from any State -subsidised place, apart from perhaps a small percentage reserved to foreign students for the multicultural enhancement of our universities or in aid of educating those from developing countries. I cannot agree. Once there is authority to set a quota on the number of places that the State will pay for in medical education, there is also authority to set the conditions under which those who have rights in national and European law, by virtue of their citizenship, may enter. The fundamental condition here is that they should not pay, or if as graduate entrants into medical school they pay university fees after obtaining a first fee-free degree, that they should pay at a greatly reduced rate. As to fees for graduate entry, Government policy is that graduates entering a university undergraduate course must pay. But, for every educational pursuit there is a cost in time and in the loss of revenue from the gainful employment that might otherwise have been pursued. I cannot see this as being unlawful as the kind of inequality outlawed by Article 40, referring as it does to equality in the Irish text: "Áirítear gurb ionann ina bpearsain daonna na saoránaigh uile i láthair an dlí."

69. In *Quinn's Supermarket v. Attorney General* [1972] I.R. 1, Walsh J. referred to Article 40.1 in the following terms (at pp. 13 and 14):-

> "…this provision is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. This list does not pretend to be complete; but it is merely intended to illustrate the view that this guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow."

70. A similar passage is to be found from the judgment of Kenny J. at page 31 of the report. In *State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567, at p. 639, Walsh J. proffered the following explanation:-

> "In the opinion of the Court section 1 of Article 40 is not to be read as a guarantee or undertaking that all citizens shall be treated by the law as equal for all purposes, but rather as an acknowledgement of the human equality of all citizens and that such equality will be recognised in the laws of the State. The section itself in its provision, 'this shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function,' is a recognition that inequality may or must result from some special abilities or from some deficiency or from some special need and it is clear that the Article does not either envisage or guarantee equal measure in all things to all citizens. To do so regardless of the factors mentioned would be inequality."

71. An example of a difference in social function providing for a lawful distinction in treatment emerges from *Dillane v. Ireland* [1980] I.L.R.M. 167. Under the Rules of the District Court, a judge could never award costs against a member of An Garda Síochána acting as a prosecutor, even where the prosecution was unsuccessful. Such costs could, however, have been awarded against a common informer. At page 169, Henchy J. approved the apparent inequality of treatment as between a Garda acting in the course of his duties as prosecutor, and therefore immune from an award of costs against him, and a common informer:-

> "It is the latter requirement for immunity from costs or witnesses' expenses that, in my opinion, provides a valid constitutional justification, on the ground of social function, for the discrimination complained of between one kind of common informer and another. When the State, whether directly by statute or mediately through the exercise of a delegated power of subordinate legislation, makes a discrimination in favour of, or against, a person or a category of persons, on the express or implied ground of a difference in social function, the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of. It seems to me to have been well within the law-making discretion allowed by Article 40.1 for the District Court Rules Committee to draw a distinction between, on the one hand, a common informer who is a Garda acting in discharge of his duties as a police officer, and on the other, a common informer who is either a mere member of the public or a Garda not acting in discharge of his duties as a police officer. Whether the court supports or approves of that distinction is irrelevant: what matters is whether it could reasonably have been arrived at as a matter of policy by those to whom the elected representatives of the people delegated the power of laying down the principles upon which costs are to be awarded…. For a variety of reasons – among them the desirability that members of the Garda Síochána should be encouraged to discharge their police duties assiduously by being given immunity from liability for costs or witnesses' expenses in the District Court – this discrimination could reasonably be thought a justifiable concomitant of the social functions of the members of the Garda Síochána when carrying out their duties as police officers."

72. In the Article 26 reference of *Planning and Development Bill, 1999* [2000] 2 I.R. 321, whereby certain developers of large parcels of land would have to make provision to the State for social and affordable housing, the Supreme Court declared at page 357:-

> "The fact that a particular planning scheme may result in the conferring of benefits on some categories of persons seen by the Oireachtas as being in particular need of assistance and that this is done at the expense of landowners who are benefiting financially from related planning decisions can be said to be a form of unequal treatment. However, Article 40 does not preclude the Oireachtas from enacting legislation based on any form of discrimination: as has often been pointed out, far from promoting equality, such an approach would simply result in greater inequality in our society. As Barrington J. pointed out in *Brennan v. The Attorney General* [1994] I.L.R.M. 355, in a passage subsequently approved by this court in *The Employment Equality Bill, 1996* [1997] 2 I.R. 321, 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."

73. It is also clear that arrangements in relation to social welfare and disbursements for education are matters of Government policy. The single judgment of the Supreme Court in *MacMathúna v. Attorney General* [1995] 1 I.R. 484, at p. 499, makes this clear:-

> "It is clear that the provisions of the social welfare allowance for children of married parents living together is not by any means the only form of financial support provided by the State for the upbringing of children by married parents. Such matters as the contributions of the State to free primary and secondary education, provision of free or assisted medical services and other matters would all go into the question as to whether the support was a proper discharge of the constitutional duty. Added to that would be the vital question as to whether it was a proper discharge of the constitutional duty of the State under Article 41 bearing in mind the other constitutional duties of the State and the other demands properly to be made upon the resources of the State.
>
> As is already indicated in this judgment these are peculiarly matters within the field of national policy, to be decided by a combination of the executive and the legislature, that cannot be adjudicated upon by the courts."

74. When issues as to a conflict between constitutional rights fall to be decided by legislation, then once the Oireachtas strikes a reasonable balance in the resolution of that question, the courts must not interfere, even though they might have balanced the result differently; see the Article 26 reference relating to the *Regulation of Information (Services outside the State for Termination of Pregnancies) Bill,* [1995] 1 I.R. 1. Where, as between potential issues concerning equality of treatment the Government makes a resolution, as between valid legal choices, then I would hold that the courts should not interfere once that resolution is a reasonable one based upon a policy which is neither arbitrary nor capricious. I also note that s. 2 of the Higher Education Authority Act 1971, makes it one of the specific aims of An tÚdarás to promote equality of access to higher education. By upsetting the Government's plans in the Fottrell scheme, this Court would be undermining the aim, based on the principle of equality, that access to State subsidised education at primary degree level by European citizens should be unrelated to any ability by the student, or his or her parents, to gain such a place by paying economic fees, at the expense of another student who does not have that ability. This has nothing to do with the nature of the human personality and it is not unconstitutional.

Competition

75. Mr. Colm McCarthy, an economist in University College Dublin, gave evidence on the competition issue. Mr. McCarthy was part of the Oireachtas Committee which reported in July, 2004 which made recommendations for more places for European citizens in Irish medical schools; for the provision of a mandatory aptitude test as a condition of entry; and which addressed the foreign student intake issue; see Joint Committee on Health and Children, *Second Report – Restrictive Practices in Medical Training in Ireland* (Stationery Office, Dublin, 2004). The result of this Report was the Fottrell Committee whose final recommendations were adopted by the government. My impression of Mr. McCarthy was that while he is clearly a brilliant economist, and a very clear witness, he was having extreme difficulty if saying anything in favour of the plaintiff on the competition issue. He pointed out that the Royal College of Surgeons in Ireland was not dependent on the Exchequer, at least up to 2002, and more formally with the adoption by that medical school of the free fees scheme for a first degree in third level education in 2002. There is nothing that was before me in this case to stop that college from going back to their pre-2002 position, when they entered the State fees scheme, and so leaving themselves

free to ignore Government policy. They could then take in more Irish students, not under the free fees scheme, or at a full economic fee, and less, or more, foreign students. Irish and European students would, however, under the Treaty have to be treated equally. How they would access the clinical training places in the teaching hospitals for such a 'go-it-alone' policy, I cannot imagine.

76. It is true, as Mr. McCarthy pointed out, that having a large number of medical graduates may result in unemployment, or underemployment, and a consequent pressure, through competition to reduce fees. This is the classical economic model of supply and demand but it tells the Court little about the breaches of competition law asserted. It is also possible, I would hold, that the medical unions would either encourage emigration or would take measures against doctors selling their services for uneconomic fees. Furthermore, I would hold, the provision of medical education is so expensive that there is nothing wrong in competition terms with the Government setting a reasonable quota in terms of what it will spend on the provision of free or highly subsidised places. Nothing in the Government's policy is anti-competitive. Furthermore, nothing in the Government's policy, as of the present time, prevents any independent college, in practice the Royal College of Surgeons in Ireland, from opting out of the Central Applications Office system, from opting out of Government subsidies and from pursuing an economic policy based on the open market. The current situation is not an abuse by the Government, through undertakings, of a dominant position under Article 82 of the Treaty. The current policy has, on the evidence before me, no effect at all on trade between Member States of the European Union.

Conclusion
77. I must therefore reject the plaintiff's claim.