High Court of Ireland Decisions

Judgment

Title:	P.C. -v- The Minister for Social Protection & ors
Neutral Citation:	[2016] IEHC 315
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THE HIGH COURT

RECORD NO: 2013/6753P

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT, 2003.

BETWEEN

P.C.

PLAINTIFF

AND

THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

THE IRISH HUMAN RIGHTS COMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Binchy delivered on the 29th day of April, 2015

1. The plaintiff in these proceedings seeks to challenge the constitutionality of s. 249(1) of the Social Welfare (Consolidation) Act, 2005, (hereinafter "the Act of 2005"), which operates to disqualify the plaintiff from receiving payment of the State Pension (Contributory) (hereinafter "SPC") while imprisoned. The matter came on for hearing on 12th November, 2015 and was heard by the Court over a period of four days, concluding on 18th November, 2015.

2. Specifically, the plaintiff seeks a declaration that s. 249(1) of the Act of 2005 is incompatible with Articles 34, 38, 40.1, 40.3 and/or 43 of the Constitution. The plaintiff also seeks damages in respect of the alleged breach of his constitutional rights. Furthermore, the plaintiff seeks an injunction directing the defendants to make provision in law for the payment to the plaintiff of the SPC. The plaintiff also claims that s. 249(1) operates in breach of his rights under Articles 3,5,6, and 8, (in conjunction with Article 14) and 13 and Article 1 of Protocol 1 of the European Convention on Human Rights (hereinafter "the Convention"), and seeks a declaration pursuant to s. 5 of the European Convention on Human Rights Act, 2003 that s.249(1) of the Act of 2005 is incompatible with the Convention. The plaintiff also seeks damages pursuant to section 5 of that Act.

3. Section 249(1) states:

> "Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit under Part 2 (including any increase of benefit) for any period during which that person -
>
> (a) is absent from the State, or
>
> (b) is undergoing imprisonment or detention in legal custody."

Background facts:

4. The plaintiff is a seventy five year old man who is currently serving a period of imprisonment in a prison within the State. The plaintiff was tried and convicted on 25th March, 2011 of 60 counts of sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended, and 14 counts of rape contrary to s. 48 of the Offences Against the Person Act 1861 and s.2 of the Criminal Law (Rape) Act 1981 as amended. The offences were committed against a family member. Consequent upon his conviction, the plaintiff was duly registered as a sex offender by order of the Court dated 26th May, 2011. On 26th May, 2011 the plaintiff was sentenced to a period of ten years imprisonment in respect of the convictions for sexual assault and to fifteen years imprisonment in respect of the convictions for rape. The final three years of the latter sentence were suspended, and both sentences were to run concurrently.

5. The plaintiff has worked in the State for most of his life and throughout his life has made Pay Related Social Insurance ("PRSI") contributions. Owing to these contributions, the plaintiff is an insured person for the purpose of the Act of 2005. On 10th February, 2005 the plaintiff was awarded 98% (standard rate) of the State Pension (Transition). However, it was clarified by counsel for the defendants, that the plaintiff was in fact entitled to, and was subsequently awarded 100% (standard rate) State Pension (Transition). The State Pension (Transition) was a non means tested payment, paid to

retired persons aged 65 until they reach 66 when they become entitled to SPC, who had paid sufficient social insurance contributions, but who by reason of not yet having reached the age of 66, were not yet eligible to receive payment of the SPC. As of that date, the plaintiff was also eligible for and received an increase for a qualified adult in respect of his partner and an increase of qualified child in respect of three dependant children, as well as a fuel allowance.

6. The plaintiff was automatically transferred to the SPC on the 10th February, 2006, having attained the age of 66, and having complied with the provisions of s.108 and s.109 of the Act of 2005. The plaintiff became entitled to, and received the SPC from that date. Upon his leaving the family home on 11th October, 2006, the increase for a qualified adult and the increase for qualified a child were terminated on 12th October, 2006. The plaintiff received the SPC from that date until 18th March, 2011, which was the week preceding his conviction. Thereafter, the defendant did not pay the pension to the plaintiff, who, having commenced a sentence of imprisonment was disqualified under s. 249(1) from receiving the SPC. This was confirmed in correspondence sent by the first named defendant to the plaintiff on 14th December, 2012.

7. In his statement of claim, the plaintiff pleads that by reason of the termination of his SPC, his entitlement thereto has been abrogated and that he has been left practically destitute, having no other source of income while in prison, apart from a prison gratuity. The plaintiff initially received €18.90 per week from the prison authorities while incarcerated; at that stage, the plaintiff was on an enhanced regime within the prison. However, that amount was reduced to €11.90 per week, owing to the plaintiff's inability to work within the prison. The plaintiff particularises the disadvantages he faces by virtue of his limited means, which he alleges stems from the refusal of the second named defendant to pay to him his SPC while imprisoned. These disadvantages include the fact that the plaintiff has no money to spend on: items in the prison tuck shop; clothing; or electrical goods such as an X-box or a DVD player. The statement of claim also particularises that while each prison cell is equipped with a kettle and tea, the plaintiff cannot afford coffee, which he enjoys. It was also pleaded that the plaintiff cannot afford to buy items of clothing and relies on the clothing provided by the prison service or by the St. Vincent de Paul Society.

8. The plaintiff also pleads that he suffers from age related ailments including hypertension and also a wrist injury. This is an injury the plaintiff alleges resulted from an accident which occurred in prison. However, these conditions are denied in the defence of the defendant. It is common case that if the plaintiff was available for work in the prison he could earn an extra €3.50 per week, bringing his weekly prison allowance to a total of €15.40.

Evidence given at trial

9. Evidence was given by the plaintiff in relation to his work history and his PRSI contributions. The plaintiff confirmed that he qualified for the State pension (transition) upon attaining the age of 65 and thereafter, having attained the age of 66 he received the SPC until he was tried and convicted of the offences detailed above. The plaintiff gave evidence that he worked for a short period between 2011 and 2012 during his imprisonment; however, he ceased working in prison due to a wrist injury, which he alleges occurred due to an accident in prison, and in respect of which the plaintiff has issued proceedings in the Circuit Court claiming compensation for personal injuries. The plaintiff also gave evidence of his other medical complaints which include a heel spur on his foot, varicose veins and hypertension. The plaintiff gave further evidence of having had a tumour removed from his face, as well as the removal of a cyst from his back. The plaintiff attributes his inability to work in prison to these medical issues.

10. The plaintiff gave evidence that his inability to work within the prison means that

financially, he is in a less advantageous position than other prisoners, many of whom have the ability to work and therefore to earn more money. This coupled with the fact that he receives no financial contributions from his family, and has no other income of any kind, means that he is unable to purchase basic goods in prison, for example, a pair of shoes, or clothing and that in order to purchase such goods the plaintiff has to save his weekly allowance of €11.90.

11. Evidence was given by the plaintiff in respect of the provision of clothing by the prison to him; each prisoner is provided with three pairs of jeans, underwear and two jumpers and these items are worn until another item is needed. The plaintiff gave evidence that the effect of his inability to buy clothing means that he has to wear the prison issued red, and that this has resulted in his being singled out and jeered by other prisoners, making him feel socially excluded. The plaintiff informed the Court that other prisoners, who are in receipt of pensions, either private or State pensions (such as from the Army) had the ability to buy clothes or other items such as DVD players or playstations. The plaintiff stated that he could not afford to buy coffee, which he says he especially enjoys.

12. During cross examination, evidence was also given by the plaintiff in relation to his conditions of imprisonment; he shares a cell with another man and the cell has in-cell sanitation and a shower. The plaintiff confirmed that receives: laundry services; cleaning products for his cell; a TV; a kettle and tea bags, milk and sugar. The plaintiff also confirmed in evidence that he has access to medical, chiropody, dental and optical care while in prison. Counselling, educational and library facilities are also available to the plaintiff. The plaintiff said that he was changed from the enhanced prison regime to the basic regime (under the incentivised regime policy of the Irish Prison Service) following a review in April 2015, and as a result he now receives the reduced sum of €11.90 per week The plaintiff denied that he refused to participate in the "Building Better Lives Programme" aimed at rehabilitating sex offenders.

13. The plaintiff confirmed that he made an application to the prison hardship fund in 2013, and that €50 was paid into his prison account. The plaintiff also gave evidence regarding the bartering trade in prison in lieu of the free circulation of cash in the prison population.

14. Two witnesses were called on behalf of the defendants. Firstly, a Principal Officer from the Department of Social Protection, Ms. Anne-Marie Cassidy, whose responsibilities include matters relating to the SPC. Ms. Cassidy stated that in 1953, the Department established a social insurance fund ("the fund"), which she described as being founded on the principle of "solidarity," by which those able to work, make financial contributions for the benefit of people who are unable to work or who are unable to obtain work. Ms. Cassidy said that in broad terms the fund is financed by contributions (in terms of percentages) from the following sources: 22% contribution by the employee/self employed person; over 60% contribution by the employer; 1% contribution from health insurance and 15% contribution from the State (these were broad figures).

15. Ms. Cassidy stated that the benefits paid under the scheme support people who have contributed and satisfy the criteria of the scheme. She said that there is no individual attachment to the monies an individual has paid into the scheme; an individual's money goes into the fund and monies from the fund are paid to those in need. The witness confirmed that the rates paid by employers or employees can be varied by the legislature and such changes are announced by the Government in the budget. In the view of Ms. Cassidy, the purpose of the SPC is to meet one contingency i.e. retirement over the age of 66. Sometimes an individual may meet more than one social welfare contingency, for example if an individual is both ill and unemployed, the

Department compares the rates of both applicable benefits and pays the higher rate. Ms. Cassidy said that each social welfare scheme has its own eligibility criteria and conditions to determine eligibility to obtain a benefit under the scheme. In the plaintiff's case, Ms. Cassidy confirmed that his pension will be re-instated when he is released from prison.

16. In cross examination, Ms. Cassidy was asked by counsel for the plaintiff how many prisoners are currently disqualified from receiving the SPC under s. 249(1). The witness was unable to provide the Court with an answer to this question. However, she stated that there are approximately 30-40 disqualifications per year under s. 249(1).

17. Counsel asked whether the Department of Social Protection makes payments to the Department of Justice arising out of disqualifications, from the SPC pursuant to section 249(1) and the witness told the Court that no such payments are made. The witness was asked why the Department of Social Protection does not pay the SPC to the Department of Justice, in circumstances where the Department of Justice is paying for the cost of imprisonment of the plaintiff. In response, the witness said that this is unnecessary because the State is paying for the imprisonment of the plaintiff. The witness confirmed that high earning individuals also avail of the SPC and receive it at the same rate as the plaintiff. Ms. Cassidy confirmed that if a high earning individual lost all of their money, he/she would continue to receive the benefit at the rate of €230 per week, despite having contributed more, in financial terms, to the fund. The witness also confirmed in her evidence that the SPC is not means tested and that individuals with private pensions can also avail of the SPC.

18. The second witness for the defendants was Ms. Anne-Marie Allen, Assistant Governor of the Midlands Prison. Ms Allen gave evidence that taking into account remission, the plaintiff's anticipated release date is 23rd March, 2020. Ms. Allen told the Court that the plaintiff lives in a shared cell in G wing in the prison, a wing that houses some elderly prisoners. However, the plaintiff is on a waiting list to obtain a single cell. Ms. Allen described the plaintiff's cell as being equipped with a shower unit, a sink, toilet, worktop and two beds. There is also a TV in the plaintiff's cell. The witness also gave evidence that the prisoners receive three meals a day and provided the Court with a 28 day prison food menu in this regard.

19. The witness also described the prison account management system which operates in lieu of cash in the prison; family and friends can lodge money into the prisoner's account, in addition to the monies that the prisoner receives from the prison. Ms. Allen gave evidence that a prisoner can spend freely in the prison tuck shop; however, a large amount of spending by one prisoner would be flagged for the attention of the Governor of the prison. The Court was also provided with a pricelist for the prison tuck shop, and the witness confirmed that the plaintiff had, on a previous occasion purchased sachets of coffee from the prison tuck shop.

20. In addition to the facilities described by the plaintiff, Ms. Allen gave evidence that other services were also available in the prison, including: medical services, addiction services; access to a doctor from the Central Mental Hospital; psychological services, and also recreational and gym facilities. Ms. Allen gave evidence that the cost to the State of imprisoning an individual is approximately €65,000 per annum, this figure being based on a recent report of the Irish Prison Service. The witness stated that the plaintiff had not lodged any complaints in relation to his conditions of detention.

21. During cross examination, Ms. Allen agreed that she was not aware of any provision in law that required a prisoner to "pay their keep". She agreed that that cost of maintaining a prisoner is fully borne by the State. Ms. Allen was unable to indicate to the Court how many prisoners in the State are in receipt (or were eligible prior to

imprisonment) of the SPC. Nor was Ms. Allen able to inform the Court of the number of prisoners in the Midlands Prison who are 66 and over. Ms. Allen stated that between 5 and10 prisoners of the plaintiff's age are working in the Midlands Prison for which they are paid an extra €4.50 per week. She agreed that a prisoner on the basic regime of €11.90 per week would be unable to buy a newspaper every day, and that this small purchase had the potential to improve a prisoner's quality of life while incarcerated. Ms. Allen also confirmed that if a prisoner wanted to buy clothes outside the prison, this could be facilitated, but shop prices would be paid for same. The witness agreed that the ability of a prisoner to have his own clothing would impact positively on a prisoner's psychological wellbeing and that it was important for prison to be normalised with a view to minimising the effects of institutionalisation of prisoners.

22. Ms. Allen was questioned in respect of s.13(e) of the Prisons Act 2007 which in general terms provides for sanctions for breaching discipline, and subparagraph (e) specifically provides for the *"forfeiture of such sum of money credited or to be credited to the prisoner from public funds as may be specified by the governor."* Ms. Allen agreed that this was a sanction that could be imposed for a maximum period of 60 days. When asked if a prisoner could access his or her private pension fund while imprisoned, Ms. Allen told the Court that it is open to a prisoner to get his family or friends to lodge monies into his prison account, including private pension income.

The Pleadings

23. I have already set out at paragraph 2 above the reliefs which the plaintiff seeks in the proceedings. In his statement of claim, the plaintiff claims:

> (i) That a disqualification from entitlement to a pension in respect of which he has made PRSI contributions constitutes an interference with his property rights and/or his right to earn a livelihood contrary to Articles 40.3 and/or 43 of Bunreacht na hÉireann and further that it amounts to an additional punishment to that imposed by a Court contrary to Articles 34 and/or 38 and/or 40.3 of the Constitution;
>
> (ii) That section 249(1) is unconstitutional by reason of being an interference with the independence of the judiciary as well as the plaintiff's property rights, his right to earn a livelihood, his right to trial in due course of law, his right to fair procedures, his equality rights, his right to respect for his private life and his right to personal autonomy;
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> (iii) That by reason of s. 249(1), the plaintiff is not treated equally before the law by reason of his status as an older prisoner in receipt of the State Pension Contributory and that the section is unfairly discriminatory in its effect in that it does not apply to others who are in receipt of a private pension or are otherwise in receipt of other income or are of private means, and that there is no legitimate legislative basis for treating the plaintiff differently;
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> (iv) That s. 249(1) is incompatible with the Convention by reason of interference thereby effected with the plaintiff's right to freedom from degrading and humiliating treatment and/or his right to a trial in accordance with law and/or his right to respect for his private life and/or his property rights and/or his right to an effective remedy and/or his equality rights contrary to Articles 3, 5, 6, 8 and/or 13 and/or Article 1 of Protocol 1, in conjunction with Article 14 of the Convention;
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> (v) The plaintiff claims that as a result of the breach of his rights as aforesaid, he has been left practically destitute while in prison; unlike

others who have other means, he is not in a position to ameliorate his conditions in prison by reason of the disqualification effected by s. 249(1).

24. In their defence the defendants plead:-

(i) That s. 249(1) forms part of a detailed series of disqualifications to social welfare benefits the purpose of which is, in general terms, to ensure that certain persons who do not need benefits by virtue of being absent from the State or while imprisoned, or detained in legal custody, are not paid those benefits for the duration of their absence from the State or imprisonment;

(ii) that the disqualification provisions referred to above ensure that those who are imprisoned are not unjustly enriched while imprisoned, by accumulating substantial cash sums while having their needs provided for in State care. It is pleaded that this is a legitimate and objectively justified social policy choice made by the Oireachtas, and as a temporary disqualification, the measure is proportionate to the policy choices made by the Oireachtas.

(iii) that the plaintiff's claim is wholly unfounded and that s. 249(1) is not incompatible either with the Constitution or the European Convention of Human Rights;

(iv) that s. 249(1) is a condition of a statutory scheme and that such rights as are created by that statutory scheme do not inhere by virtue of the plaintiff's contributions, and nor are they absolute or unfettered; that the purpose of the contributory old age pension (now the SPC) was and is to make provision for the needs of elderly former workers as part of a wider system of social security and assistance for social need, and that the purpose of the disqualification under s. 249(1) is to ensure that payment of State benefits are not made to persons whose needs are otherwise being provided by the State; it is pleaded that the disqualification is not imposed by way of a penalty, but rather as a measure to ensure that prisoners, such as the plaintiff, do not profit from their wrongdoing; in the alternative it is pleaded that if the disqualification constitutes a penalty, it is a proportionate measure to the objective of deterrence of criminal activity, as it only applies to those sums by which a prisoner would be unjustly enriched during imprisonment; it is also pleaded that the plaintiff is on an enhanced prison regime and as such has a reasonable level of disposable income equivalent to many other prisoners;

(v) that the Irish Prison Service provides all basic living needs, including clothing, food, accommodation and medical expenses and it is denied that the plaintiff is destitute or practically destitute;

(vi) that privileges enjoyed inside prison do not and cannot equate to the standard of living that a prisoner would enjoy outside prison;

(vii) that the section does not constitutes a breach of any of the plaintiff's rights under Bunreacht na hÉireann or the Convention.

The Plaintiff's Submissions

Additional Punishment

25. Counsel for the plaintiff submits that s. 249(1) of the Act of 2005:-

(i) Constitutes an additional punishment to the sentence of imprisonment already imposed by a Court on the plaintiff thereby violating the entitlement of the plaintiff to be sentenced by a trial court in due course of law as required by Articles 34.1 and 38.1 of

Bunreacht na hÉireann;

(ii) That the impugned section violates the entitlement to be sentenced by a judge, which is an integral part of the administration of justice;

(iii) That the manner of operation of the impugned section does not allow for any independent consideration of the factors in the case, but rather the sanction is triggered, not by the nature of the offence, but by the coinciding facts of the existences of a custodial sentence and an entitlement to the SPC;

(iv) That the section constitutes a legislative interference with the sentencing function of the Courts, in that it imposes an extra penalty on an individual in receipt of the SPC, without permitting the fact of the same to be taken into account at sentencing stage;

(v) That the operation of the section constitutes a non-judicial punishment and imposes a continuing and disproportionate penalty upon the plaintiff by virtue of the fact that he is an old age pensioner, dependent upon the SPC as his sole source of income.

26. In support of the above submissions, counsel relies upon the well established authorities of in *Re: Deaton v. Attorney General* [1963] 1 I.R. 170, *Conroy v. Attorney General & anor* [1965] I.R. 411, *in re Haughey* [1971] 1 I.R. 217 and the *State (Healy) v. Donoghoe* [1976] I.R. 325. It is further submitted that the effect upon the plaintiff of the disqualification from entitlement to SPC is equivalent to imposition of a fine having a value of approximately €100,000.00 (this is a rough calculation based upon today's value of the SPC, taken up to the date it is expected the plaintiff will be released from prison). This it is submitted is by any standards a very significant fine. Accordingly, it is submitted, the effect and manner of operation of s. 249(1) of the Act violates the plaintiff's constitutional rights to be sentenced by a trial in due course of law contrary to Articles 34 and 38.1 of the Constitution. Furthermore the argument is made that it is contrary to natural and constitutional justice and the guarantee of basic fairness of procedures protected not only in Article 38 but also by Article 40.1 and/or Article 40.3 of the Constitution.

Discrimination

27. Counsel for the plaintiff argues that s. 249(1) is discriminatory in its effect insofar as it operates to deprive persons such as the plaintiff of their right to receive the SPC, whereas others who are in receipt of pensions, whether private pensions or other types of public pensions, continue to receive their pension whilst serving a term of imprisonment. It is submitted that this impacts most severely on the least well-off in society, and as a result those who are less well-off are subjected to a much harsher prison sentence than those who are in a position to ameliorate their prison conditions through other sources of income that are not subject to the same measures. The result of this, it is submitted, is that the plaintiff has been left practically destitute.

28. Counsel relies on the authority of *Cox v. Ireland* [1992] 2 I.R. 503 in support of the proposition that the disqualification of the plaintiff from entitlement to receive the SPC while imprisoned is arbitrary, impermissibly wide and indiscriminate. In that case, the Supreme Court struck down a provision whereby a person convicted of an offence scheduled to the Offences Against the State Act, 1939, forfeited any office or employment which was remunerated out of the central fund or monies provided by the Oireachtas or local taxation and also forfeited any accrued pension entitlements. In the Act of 1939, there was a saving provision whereby the Government was entitled at its absolute discretion to remit in whole or in part, any forfeiture or disqualification incurred under the impugned section. Notwithstanding that saver, the Court struck down the impugned provision, inter alia, because the Court held, that it:

> "potentially constitutes an attack, firstly on the unenumerated constitutional right of that person to earn a living and, secondly, on certain property rights protected by the Constitution, such as the right to a pension, gratuity or other emolument already earned …"

Counsel submits that the plaintiff's case in these proceedings is even stronger than that in *Cox* by reason of the absence in this case of any saving provision such as was vested in the Government under the Offences Against the State Act in Cox.

29. Counsel further relies upon the decision of this Court in the case of *Lovett v. Minister for Education* [1997] 1 I.L.R.M. 89. Mr. Lovett was a school teacher who was convicted and sentenced in connection with offences concerning financial irregularities in the finances of the school. Following his conviction, he applied for early retirement on grounds of disability. However, as a result of his sentence, he was informed that his pension was forfeited pursuant to the provisions of the superannuation scheme to which he had contributed during his years of employment. That scheme had been established pursuant to the Teachers' Superannuation Act, 1928 which provided for the establishment of a pension fund, and contributions to and payments out of the fund. It also provided that:-

> "If any person in receipt of a pension under the principle scheme is, during the continuation of such pension, convicted of a crime or offence by a court of competent jurisdiction and is sentenced by that court for that crime or offence to imprisonment with hard labour for any term or to imprisonment for a term exceeding 12 months or to penal servitude for any term, such pension shall be forfeited as from the date of such conviction …"

30. As Mr. Lovett had been sentenced to imprisonment for a term exceeding twelve months, he was informed that his pension had been forfeited. Noting that the pension concerned was a contributory one, Kelly J. found that Mr. Lovett's right to a pension constituted a property right protected by the Constitution. He then went on to consider whether there had been a failure on the part of the State in the protection of that constitutional right, and whether the forfeiture of the pension was warranted by the objective sought to be secured through the same. Referring to the decision of the Supreme Court in Cox, Kelly J., having considered the possible objectives of the State in the impugned provision, found that it failed to pass the test prescribed by the Supreme Court in Cox and that it did not, as far as practicable, protect the constitutional rights of the plaintiff. This was because a retired teacher could not escape the effects of the forfeiture provisions, even in circumstances where he could show that the offence of which he was convicted was a minor one, had nothing to do with his former occupation and attracted a correspondingly minor penalty. Counsel submits that the forfeiture provision in that scheme, which was struck down was not as far-reaching as the impugned provision in this case which is a disqualification provision i.e. counsel submits that the concept of forfeiture is something less far-reaching than that of disqualification.

Property Right

31. One of the principle arguments advanced on behalf of the plaintiff is that once a person has met the requirements for payment of SPC, as the plaintiff has in this case, he acquires a property right, which is protected both by the Constitution and the Convention. While acknowledging that the property rights of the individual are not absolute and may be regulated in the interests of the exigencies of the common good, it is submitted that for any interference with an accrued property right to be valid, it must be rationally connected to an object of sufficient public importance, and must be proportionate. The argument is made that the property rights of vulnerable people, such as the plaintiff, who have no other source of income and no family support, benefit from particular or special constitutional protection. Reliance is placed upon the *Health (Amendment) (No. 2) Bill 2004* [2005] 1 IR 105 in this regard. It is submitted that s. 249(1) is not rationally connected to any objective of sufficient importance to warrant

such draconian interference with the plaintiff's rights.

32. Referring to the argument made on behalf of the defendants that payment of State benefits are not made to persons whose needs are otherwise being provided by the State, it is submitted on behalf of the plaintiff that entitlement to SPC is not needs based; even the wealthiest in society who meet the criteria for eligibility to SPC receive payment of the same. The plaintiff makes the argument that since eligibility for SPC is not needs based, therefore the denial of the right to receive the same on this basis cannot pass any proportionality test.

33. While the defendants assert that a finding against them will expose the State to significant expense, and that the section is designed to protect the financial interests of the State, counsel for the plaintiff submits that this cannot be so, as there are unlikely to be very many persons in the State who are in the same position as the plaintiff, and who would be entitled to receive payment of SPC but for s. 249(1).

Personal Autonomy
34. It was further submitted on behalf of the plaintiff that, because he has been left practically destitute through the operation of s. 249(1), his constitutional right to personal autonomy has been breached; he cannot make personal choices that other prisoners may make including the purchase of his own clothing and that as a result, the plaintiff is at risk of becoming institutionalised in breach of his constitutional right to personal autonomy. It is also argued that all of this will in turn affect his ability to rehabilitate and reintegrate into society upon his release from prison. The plaintiff relies upon the cases of *Creighton v. Ireland* [2010] IESC 50; *Governor of X Prison v. PMcD* [2015] IEHC 259; and *Nash v. Chief Executive of the Irish Prison Service* [2015] IEHC 504.

Presumption of Constitutionality
35. While acknowledging that the presumption of constitutionality must apply to s. 249(1), counsel for the plaintiff argues that when considering the application of the presumption to the section, the section must be viewed in the light of its provenance and in particular its origins in the Old Age Pension Act, 1908. Counsel submits that the legislature cannot reasonably be presumed to have engaged in any balancing exercise, weighing the property interests of persons such as the plaintiff on the one hand against the exigencies of the common good on the other. Moreover, it is argued that the legislature did not have regard to the fact that the measure impacts disproportionately on the less well-off and more vulnerable members of society. Since the plaintiff has demonstrated that his rights are under attack, the burden shifts to the State to demonstrate that s. 249(1) is a proportionate measure necessitated by the common good and that the defendants have failed to so demonstrate.

The Convention Arguments
36. A number of arguments were advanced on behalf of the plaintiff to the effect that his rights under the Convention are violated by operation of the section. In general terms it is submitted that the Minister is obliged to perform his functions in a manner compatible with the obligations of the State under the Convention. Specifically, it is alleged that s. 249(1) operates in breach of the following articles of the Convention:-

(i) Article 3
Article 3 of the Convention states that no-one shall be subjected to torture or inhuman or degrading treatment or punishment. It is submitted that s. 249(1) imposes an extra-judicial punishment on the plaintiff, and that depriving him of his only source of income has rendered him destitute with the result that he cannot afford the small luxuries which make life in a prison more tolerable and that he suffers the "indignity" of wearing prison issued or donated clothing, all of which are in the submission of the plaintiff humiliating

and degrading to him, contrary to Article 3 of the Convention.

(ii) Article 5
Article 5 provides that no-one should be deprived of his or her liberty save in accordance with procedures prescribed by law. It is argued that because the manner in which s. 249(1) operates is arbitrary, affecting only those persons who have an entitlement to the SPC and not those who have independent means or a different type of pension, that the plaintiff's imprisonment must be considered arbitrary. Reliance is placed on the decision of the ECtHR in *Saadi v. United Kingdom* (App. No. 13229/03) (2008) 47 E.H.R.R.17 where the Court held that Article 5.1

> "requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness … a deprivation of liberty maybe lawful in terms of domestic law but still arbitrary and thus contrary to the Convention."

(iii) Article 6
Article 6 of the Convention states that in the determination of a person's civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The plaintiff argues that although the social welfare system may be classified as administrative or public in terms of the administration of law, the fact that the question arising in this case concerns the loss of a pecuniary interest as a penalty for a finding of criminal wrongdoing clearly attracts the protections of Article 6 including the right to be heard in respect of the proposed sanction. The plaintiff relies upon the decision of the ECtHR in the case of Editions Periscope v. France (1992) 14 EHRR 597 as well as the case of Janosevic v. Sweden (App. No. 34619/97) (2004) 38 EHRR 22. The latter case involved the imposition of tax surcharges upon the applicant. The court found that the penalties were both deterrent and punitive in nature and, that being the case, for the purposes of Article 6 of the Convention, the applicant was charged with a criminal offence, and therefore Article 6 rights were engaged.

Similarly, in this case, it is submitted on behalf of the plaintiff that s. 249 (1) constitutes the imposition of a penalty and/or a punishment in the form of the withdrawal of his SPC without a ruling to this effect from a judge during a sentencing hearing at which the plaintiff was afforded an opportunity to be heard in respect of the proposed sanction.

(iv) Article 8
Article 8 of the Convention states that everyone has the right to respect for his or her private and family life, his or her home, and his or her correspondence. It is submitted on behalf of the plaintiff that s. 249(1) is in breach of Article 8 because it interferes with his rights to personal autonomy, bodily integrity, independence and dignity and that this is also contrary to Article 14 which prohibits discrimination. It is argued that the section 249(1) is discriminatory because the section only applies to people over a specified age. It is argued that social security forms an integral part of human dignity and having an income in prison enables a prisoner and the development of personal responsibility is a recognised part of a prisoner's rehabilitation. Reliance is placed upon the case of *Sidabras and Dziautas v. Lithuania* 55480/00 and 59330/00 (2006) 42 EHRR 6 in support of this argument.

(v) Article 13
Article 13 is concerned with the right of an individual to an effective remedy for alleged violations of rights under the Convention. The plaintiff did not advance any arguments under this article, but simply asked that the Court would consider this article in conjunction with Article 6, the argument being that the plaintiff did not get a hearing in

relation to the application of section 249(1) to the plaintiff.

(vi) Article 14
Article 14 of the Convention contains a prohibition against discrimination on any grounds including "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" in respect of the enjoyment of any of the Convention rights.

Article 1, Protocol No. 1
37. Considerable reliance was placed upon this Article which states that:-

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one should be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

38. It is submitted that where a contracting State has in force legislation providing for the payment as of right of a welfare benefit, whether conditional or not on the prior payment of contributions, that legislation must be regarded as generating a propriety interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements. A number of cases were relied upon in support of this proposition; *Stec and others v. United Kingdom* (App. No. 65731/01) 43 E.H.R.R. 47, *Andrejeva v. Latvia,* App. No. 55707/00 (2010) 51 EHRR 28, *Carson and others v. United Kingdom* (App. No. 42184/05) (2010) 51 EHRR 13, and *Stummer v. Austria* (App. No. 37452/02) 7th July, 2011 (2012) 54 EHRR 11

39. Reliance was also placed upon the case of *Paulet v. United Kingdom* (App. No. 6219/08) (2015) 61 EHRR 39, as authority for the proposition that when reviewing a complaint of interference with a property right under Article 1 of Protocol 1, it is not enough for a Court to find simply that that interference is in the public interest, the Court must balance that conclusion against the complainant's right to peaceful enjoyment of his possessions as required under the Convention. In this case therefore, it is submitted that the Court should weigh any justification offered by the defendants for the deprivation of the plaintiff's SPC against the impact of such deprivation on the plaintiff, in order to ascertain whether or not the section is proportionate to its objects.

40. Finally, in the context of Article 14, in fulfilment of his obligation to the Court, counsel drew to the Court's the attention two decisions of the ECtHR which deal with precisely the same issues that arise in this case. Those are the cases of *Szrabjer v. United Kingdom* (App. No. 27004/95) [1998] Pens. L.R. 281 and *Szraber and Clarke v. United Kingdom* (App. No. 27011/95 and 27004/95) (Unreported, European Court of Human Rights, 23rd October, 1997). It is submitted by the plaintiff however that these cases have been overtaken by subsequent decisions of the ECtHR, although counsel acknowledged that those subsequent cases do not involve precisely the same issue.

European Prison Rules
41. The plaintiff also relies upon the European Prison Rules, Adopted on 11th January, 2006 by the Committee of Ministers of the Council of Europe and in particular the following principles thereof:-

> "2. Persons deprived of their liberty retain all rights that are not lawfully

taken away by the decision sentencing them or remanded them in custody.

3. Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed…

5. Life in prison shall approximate as closely as possible the positive aspects of life in the community.

6. All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty."

42. It is submitted on behalf of the plaintiff that the commentary on the 2006 Rules notes that Rule 2 emphasises that the loss of the right to liberty should not lead to an assumption that prisoners automatically lose other political, civil, social, economic and cultural rights, so that restrictions should be as few as possible. It is also argued that it is well established that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty and specific reliance is also placed upon the following rules:

"102.1 In addition to the rules that apply to all prisoners, the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime free life.

102.2 Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment…

105.2 Sentenced prisoners who have not reached the normal retirement age may be required to work, subject to their physical and mental fitness as determined by the medical practitioner."

The Defendant's submissions

SPC is a statutory right only

43. The defendant denies that the plaintiff became entitled to payment of the SPC as a matter of right; the case pleaded by the defendant is that the plaintiff became entitled to the SPC upon his obtaining the age of 66, in accordance with the conditions laid down in the 2005 Act. It is submitted on behalf of the defendant that the SPC is a benefit enjoyed pursuant to a wider social security and social assistance scheme, regulated by an Act of the Oireachtas. The scheme is in the general public interest and is motivated by the exigencies of the common good, subject to change, and subject to the entitlement of the Oireachtas to legislate and distribute public resources. Entitlement to a social welfare benefit is a statutory right and does not attain the status of a property right under either the Constitution or the Convention. The defendants in this regard rely on the authorities of *State (Pheasantry) v. Donnelly* [1982] I.L.R.M. 512 and Maher v. Minister for Agriculture [2001] 2 IR 139. Such statutory rights are not absolute or unfettered; there is no forfeiture of a vested right, as there was never any entitlement under the scheme to receive payments of the SPC while imprisoned. Furthermore, it is submitted that disqualification from the SPC, during a term of imprisonment, constitutes a legitimate and proportionate restriction of the plaintiff's statutory rights. The impugned provision is an express legislative provision temporarily disqualifying the plaintiff from receipt of the pension, for the duration of his sentence of imprisonment. The defendants distinguish Cox v. Minister for Education on the basis that Cox involved a unilateral and permanent interference with the plaintiff's contractual rights that led to

an unjust invasion of property rights and the right to earn a livelihood.

44. It is submitted on behalf of the defendant that s. 249(1)(b) of the Act of 2005 forms part of a detailed series of temporary disqualifications and exceptions to benefits otherwise payable under the Act of 2005 contained in that section, as amended. These qualifications and exceptions apply to persons absent from the State, and to persons imprisoned or detained in legal custody, and are applied to various social welfare schemes. It is the defendant's case that the provision generally ensures that certain persons who do not need the benefits (by virtue of being absent from the State, or by being imprisoned), are not paid the benefits during the period of absence or of imprisonment. Furthermore, it is argued that the disqualifications further ensure that those who are imprisoned are not unjustly enriched, and do they profit from their wrong by accumulating a substantial cash sum while having their needs met by the State. The defendants submit that the purpose of the SPC is to meet living costs, and that this is evidenced from increases in the SPC to pensioners with greater needs. The principle of social solidarity, to which the legislature can have regard, would be undermined by the unjust enrichment of wrongdoers. It is the defendant's submission that the disqualifications contained in section 249(1) are legitimate and objectively justified social policy choices, made by the Oireachtas in the lawful exercise of its discretion concerning the distribution of limited State resources.

45. The defendant also submits that subsections (6), (6A), and (17) of s. 249 replicate the same disqualification in respect of other benefits provided for under social welfare legislation including: jobseeker's allowance, disability allowance and farm assist. Subsections (9) and (10) also provide for disqualification on foot of imprisonment from the SPNC and widow/widower's (non-contributory) pension; deserted wife's allowance and prisoner's wife's allowance. Counsel for the defendants drew the Court's attention to the use of the word "disqualified" in respect of maternity benefits in circumstances where the beneficiary returns to work, and to the fact that that word appears no less than 163 times in the act of 2005 so as to prevent claimants, in specified circumstances, from receiving benefits to which they would otherwise be entitled under the act of 2005. The defendants submit that if the relief sought by the plaintiff was granted, the finding of unconstitutionality would not be confined to the SPC, but would apply to all benefits.

Distributive Justice
46. The defendants also contend that the Court cannot grant the relief sought, namely an order directing the Oireachtas to legislate for payment of the SPC to the plaintiff. Counsel for the defendants submits that should the Court take this course, it would be engaging distributive justice, which is in the exclusive domain of the Oireachtas, and relies in this regard on the authority of *O'Reilly v. Limerick Corporation* [1989] 1 I.L.R.M. 181.

Presumption of Constitutionality
47. Counsel also submits that the impugned section attracts the presumption of constitutionality, until the contrary is clearly established. It is submitted that the mere fact that a provision in a post-1937 Act can be historically traced to provisions in a pre-1937 Act, does not disentitle that provision to a presumption of constitutionality.

Property Right
48. Counsel submits that the SPC is not a property right vesting in those who have contributed, but rather it is a benefit enjoyed pursuant to a wider social security and social assistance scheme regulated by an Act of the Oireachtas, motivated by the exigencies of the common good and it is subject to change, i.e. the right is merely a statutory right. It is argued that the Oireachtas lays down the qualifying conditions under which a person may be entitled to such a benefit i.e. the pensionable age and the amount of the contributions to be made. Such conditions are inherently open to

variation, as they are subject to the financial position of the State and the policy priorities of Government.

49. The defendant relies on the decision of the European Court of Human Rights (hereafter "ECtHR") in the case of *Andrejeva v. Latvia* (App. No. 55707/00) (2010) 51 EHRR 28, which it is submitted is authority for the proposition that while citizens may have a pecuniary interest in entitlement to social security benefits, this is so provided that claimants meet the criteria set down by national law. Counsel also relies on *Szraber and Clarke v. United Kingdom* (App. No. 27011/95 and 27004/95) (Unreported, European Court of Human Rights, 23rd October, 1997) as authority for the argument that the plaintiff has no pecuniary or proprietary interest in the SPC while imprisoned.

50. In the alternative, if a property right does exist, it is a limited right subject to regulation by the Oireachtas, and the impugned interference in the plaintiff's case is in the interests of the common good and justified in the public interest in this regard the defendants rely upon the authority Hempenstall v. Minister for the Environment [1994] 2 I.R. 20. In this case the plaintiff claimed a property right in a taxi licence and Costello J. held that:

> "property rights arising in licences created by law (enacted or delegated are subject to the conditions created by law and to an implied condition that the law may change those conditions."

51. The Oireachtas is entitled to abide by the principle of single maintenance, as found in the Act of 2005. It is submitted that while imprisoned, the plaintiff is being maintained by the State at a cost that is approximately 5 times the value of his contributory pension and that objectively, the balance struck by the Oireachtas in s. 249(1) cannot constitute an unjust attack on the plaintiff's constitutional rights. It is argued that the plaintiff's needs are being met in prison. The plaintiff does not have a property right anterior to, or within the Act of 2005; any property right that does exist is limited and subject to change. Where the "right" is infringed, as is alleged in this case, the balance struck by the Oireachtas is not so contrary to reason and fairness to constitute an unjust attack on the plaintiff's "right".

52. It is also submitted on behalf of the defendant that Article 38 of the Constitution and Article 6 of the Convention have no application, because s.249(1) does not constitute a criminal offence. The operation of s. 249(1) is a secondary consequence of imprisonment and is a proportionate measure, because the disqualification ceases when the plaintiff is released from prison. In addition, there is no punitive intent contained in the Act of 2005; the term "disqualification" is used over 163 times in the Act of 2005. Counsel submits that the intent of the Act as a whole is to provide for need.

53. It is submitted that even where the plaintiff's pecuniary interests are involved, as a matter of public law, the rights concerned are not civil in nature and that for this reason, Article 6(1) of the Convention does not apply. Just because economic issues are raised does not mean that they are civil rights for the purposes of Article 6(1) and in this regard the defendants rely upon the cases of *Ferrizzini v. Italy* (App. No. 44759/98) (Unreported European Court of Human Rights, 12th July, 2001) and *Pierre-Bloch v. France* (App. No. 24194/94) (1998) 26 EHRR 202. For the same reason, it is submitted, the plaintiff has no case under Article 13 of the Convention. It is further submitted that the plaintiff's claim under Article 5 of the Convention is "not made out".

Discrimination

54. As to the plaintiff's arguments regarding discrimination, it is submitted on behalf of the defendants that there is no discrimination because s. 249(1) applies to all allowances and benefits and the same policy, through s. 249 as a whole, applies to all

prisoners. There is no difference in treatment. It applies to both categories of pension, the SPC and the SPNC. It is further submitted that if the Court finds that there is a difference in treatment, it is both proportionate and legitimate and within the margin of appreciation recognised by the ECtHR. The defendants rely on the case of *Stummer v. Austria* (App. No. 37452/02) (2012) 54 EHRR 11.

55. It is submitted that the purpose of the SPC is to provide qualified persons with their minimum living costs, and that since it is a necessary consequence of imprisonment that a person will be maintained by the State, it is proportionate that such persons are not entitled to receive the benefit for the duration of their imprisonment.

Personal Autonomy

56. It is also denied that the plaintiff's right to personal autonomy and to freedom from degrading and humiliating treatment are in any way infringed by s. 249(1). It is submitted that the right to personal autonomy is not a socio-economic right which, if granted, might well put prisoners in a better position than people of lesser means, who are not convicted of crimes. Insofar as that the plaintiff relies on the case of Creighton v. Ireland [2010] IESC 50 the defendants submit that that case involved the safety of prisoners and the duty of the State to protect those in custody to a reasonable extent, and is not authority for the proposition that a prisoner be granted extra means from the State so that, for example, a prisoner may choose clothing other than that supplied by the State.

57. It is also submitted that it is not correct to say that some prisoners, who have the means to do so, are allowed the freedom to live in the same way as they would outside of prison. All prisoners are in this respect subject to limitations imposed by the prison authorities to prevent unfairness amongst the prison population.

Legislative Framework

Background

58. Provision for payment of an old pension was first introduced in Ireland under the Old Age Pension Act 1908, which was of a British statute. This provided for payment of a non-contributory pension, payable on a means-tested basis. The disqualification from eligibility for payment of pension, about which the plaintiff complains in these proceedings, has its origins in the 1908 Act, section 3(2) of which provided as follows:-

> "Where a person has been before the passing of this Act, or is after the passing of this Act, convicted of any offence, and ordered to be imprisoned without the option of a fine or to suffer any greater punishment, he shall be disqualified from receiving or continuing to receive an old age pension under the Act while he is detained in prison in consequence of the order, and for a further period of ten years after the date on which he is released from prison."

59. Prior to independence, the Act of 1908 was amended in 1911 and again in 1919, and section 3(3) of the Old Age Pensions Act 1919 amended section 3(2) of the Act of 1908 by removing the provision relating to disqualification from receipt of the pension for the period of ten years following the date of release from prison. Subsequent to independence, there were numerous amendments made to the Act of 1908, which remained part of Irish law until its repeal upon the enactment of the Social Welfare (Consolidation) Act, 1981. However, significant amendments of relevance to these proceedings had been made to the Act of 1908 in the intervening period. The Social Welfare Act, 1952, established for the first time a Social Insurance Fund to be funded by contributions made from employers, employees and monies provided by the Oireachtas. The Act of 1952 also made provision for payment of voluntary contributions to the fund by persons who had not yet attained pensionable age and/or the requisite number of

contributions to receive payments from the fund. Section 39(9)(a) expressly provided that where the income of the fund in any financial year is less than its expenditure, the shortfall would be paid out of monies provided by the Oireachtas.

60. Section 31 of the 1952 Act continued the disqualification from receiving benefit for any period during which a person is absent from the State or is undergoing penal servitude, imprisonment or detention in legal custody.

61. The Act of 1952 provided for payment of a range of benefits from the fund, specifically: Disability Benefit; Unemployment Benefit; Marriage Benefit; Maternity Benefit; Widows (Contributory) Pension; and Orphans (Contributory) Allowance. Provision for payment of an Old Age (Contributory) Pension was not introduced until 1960, through the passing of the Social Welfare (Amendment) Act 1960, which amended the 1952 Act through the addition of the Old Age (Contributory) Pension (as one of the benefits payable under the 1952 Act). Payment of that benefit remained subject to the same disqualification provisions as contained in section 31 of the Act of 1952.

62. In 1981, 1993 and 2005, the Oireachtas passed related Acts which carried forward the provisions relating to the fund, the Old Age (Contributory) Pension and the disqualification from an entitlement to receive such pension by reason of absence from the State, or by reason of the claimant undergoing penal servitude, imprisonment or detention in legal custody. The reference to penal servitude was subsequently removed and the Old Age (Contributory) Pension was renamed as the State Pension (Contributory) in 2006.

Present position

63. The legislation currently governing payment of the State Pension (Contributory) is the Social Welfare (Consolidation) Act of 2005, and as with the previous legislation governing benefits payable out of the fund, that Act sets out the criteria for eligibility to receive payment of the SPC. As has been seen, it is not disputed that the plaintiff met the criteria for payment of the SPC upon reaching the prescribed age (66 years) and that, prior to his imprisonment, he was in receipt of payment of the SPC at the highest rate. The Court was informed that the maximum rate of the SPC payable to the plaintiff currently stands at €230.30 per week. The maximum rate payable in respect of the SPNC currently stands at €219.00 per week.

Analysis and Conclusions

The Presumption of Constitutionality

64. It is appropriate to start this analysis with arguments made on behalf of the plaintiff in relation to the presumption of constitutionality. In their written submissions, counsel for the plaintiff submitted that the presumption should have no application in this case because of the provenance of s. 249(1) and in particular that its origins can be traced back to a pre-1937 statute. In the course of oral submissions however, counsel for the plaintiff accepted that while the presumption is applicable, that the Court should not afford s. 249(1) the presumption of a constitutionality or if it does not it should not afford it the same weight as the Court is normally obliged to do, by reason of the provenance of the section. This argument would be more persuasive were it not for the fact that the disqualification provisions have been repeated on at least four occasions post-1937, in s. 31 of the Social Welfare Act 1952; s. 129 of the Social Welfare Consolidation Act 1981; s. 211 of the Social Consolidation Act 1993; and s. 249(1) of the Act of 2005. It seems to me to be highly unlikely that at no time during its legislative history was consideration given to the purpose and need for such a provision or its impact upon those affected by it, and that on each of these occasions the Oireachtas merely replicated a section from a 1908 statute without giving it any or any adequate consideration. The section was in fact amended in 2006 to delete reference to

penal servitude, which serves to demonstrate attention by the Oireachtas to the legislation, and specifically to this section. The section is, in my opinion entitled to the full benefit of the presumption of constitutionality, and not some watered down version of the presumption as argued on behalf of the plaintiff.

Is the SPC a property right?

65. Since the legal character of the SPC and in particular the question as to whether or not entitlement to payment of the same, upon compliance with all statutory preconditions as to payment, is a property right protected by the Constitution and the Convention, is central to just about every element of the plaintiff's claim, I will start this analysis with consideration of that issue.

66. The plaintiff's claim that entitlement to payment of the SPC (once all conditions as to payment have been met) is a property right is grounded upon the simple, if attractive, proposition that the entitlement to payment of the SPC has been purchased through payment of social insurance contributions, and that once the requisite number of contributions have been made, and the specified age attained, the right to payment pursuant to the scheme then accrues, crystallises and becomes a property right.

67. This very issue was considered by the Supreme Court of the United States as far back as 1960, in the case of *Flemming v. Nestor* 363 U.S. 603 [1960]. Mr. Nestor was a Bulgarian immigrant who arrived in the United States in 1918 and paid social security taxes from 1936, the year the system began operating, until he retired in 1955. In 1954, the United States Congress passed a law stating that any person deported from the United States should lose his or her social security benefits. Mr. Nestor was deported from the United States on the basis of his membership of the Communist Party between 1933 and 1939, despite the fact that during that period such membership was not illegal and nor was such membership a statutory ground for deportation. As a consequence of his deportation, Mr. Nestor's old age social security benefits were terminated. He issued proceedings seeking judicial review of that administrative decision and was initially successful in the District Court, which held that he had been deprived of an accrued property right in violation of the due process clause of the 5th Amendment of the US Constitution. The Supreme Court disagreed, and overturned that decision. In delivering the majority decision of that Court, Mr. Justice Harlan, citing Mr. Justice Cardozo in the earlier case of *Helvering v. Davis*, 301 U.S. 619 stated:

> "The Social Security system may be accurately described as a form of social insurance, enacted pursuant to Congress' power to "spend money in aid of the general welfare," Helvering v. Davis, supra at 640, whereby persons gainfully employed, and those who employ them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents. Plainly the expectation is that many members of the present productive workforce will in turn become beneficiaries rather than supporters of the programme. But each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments."

68. He continued:

> "It is hardly profitable to engage in conceptualizations regarding "earned rights" and "gratitude's". *Cf., Lynch v. United States* 292 US 571, 576-577. The "right" to social security benefits is in one sense "earned," for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy made

> justly call upon that economy, in their later years, for protection from "the rigors of the poor house as well as from the haunting fear that such a lot awaits them when their journey's end is near." *Helvering v. Davis,* supra. at 641. But the practical effectuation of that judgment has of necessity called forth a highly complex and interrelated statutory structure. Integrated treatment of the manifold specific problems presented by the Social Security programme (sic) demands more than a generalization. That program was designed to function into the indefinite future, and its specific provisions rest on predications as to expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the nation's resources which evolving economic and social conditions will of necessity in some degree modify.
>
> To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands. … It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it "the right to alter, amend or repel any provision" of the Act.
>
> We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of "accrued" interests violative of the Due Process clause of the 5th Amendment."

69. However, this decision was not unqualified. Mr. Justice Harlan went on to say:
> "This is not so say, however, that Congress may exercise its power to modify the statutory scheme free from all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary government action afforded by the Due Process Clause. … We must recognise that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification. Such is not the case here."

70. The Court considered the fact of a beneficiary's residence abroad to be of obvious relevance to the question of eligibility for the benefit and that accordingly, the provision of the Act could not be condemned as so lacking in rational justification so as to offend due process. The majority judgment makes no comment at all about the circumstances by which Mr. Nestor came to be resident abroad, and while those circumstances serve to remind us of a sad chapter in American history, they have no bearing upon the rationale of the court in determining that contributions paid into a social security system do not result in the accrual of a property right. While Flemming v Nestor has been criticised in some quarters over the years, its rationale has proved robust, and the decision remains undisturbed.

71. In the case of *Szrabjer and Clarke v. United Kingdom* (App. Nos. 27004/95 and 27011/95) [1998] Pens. L.R. 281 the European Commission of Human Rights was required to consider a very similar provision in the law of the United Kingdom as contained in the Social Security Contributions and Benefits Act, 1992 and the Social Security (General Benefit) Regulations 1982, the effect of which was, inter alia, to disqualify persons undergoing imprisonment, or detention in custody, from receiving a State pension, both Contributory and Non-Contributory. The applicants argued that this disqualification was a violation of their rights under Article 1 of Protocol No. 1 of the Convention. The applicants submitted that, having qualified for an earnings related pension by their contributions over the years, which contributions were calculated by reference to their income, that they had a "possession" within the meaning of Article 1, Protocol No. 1; and there was no reason to deprive them of that vested property right

whilst they were in prison. They claimed that the disqualification from the entitlement had no legitimate aim; that the aim could not be to avoid "double expenditure" as the earnings related element of the pension (unlike the basic flat rate of pension) was not a social welfare benefit but an accrued property entitlement, depending on a pensioner's past financial contributions, rather than his or her present needs. The applicants further submitted that the aim could not be to punish, as it would then penalise only those prisoners who had made steady contributions to the state pension scheme, rather than all those convicted of an offence. If the aim was to punish, it would have the effect of imposing a second penalty on those who have already been sentenced for an offence. The applicants further argued that disqualification from their statutory entitlement to a pension, to which they had contributed all their working lives, was disproportionate to any aim that might be legitimate and was disproportionate and/or unfairly punitive.

72. The respondents argued that the earnings related element of the pension did not constitute a "possession" for the purposes of Article 1, Protocol No. 1 of the Convention. They argued that the earnings related element was part only of the State Pension which was financed not from a fund in which the applicants had an identifiable share, but mostly from contributions and taxation transfers made during the same year in which benefits are paid out. Furthermore, it was argued that, the national insurance fund, from which pensions were paid, was funded largely by contributions from employers and general taxation, not purely from contributions made by the applicants and fellow employees.

73. The respondents further argued that even if the earnings related element of the pension constituted a possession for the purposes of Article 1, Protocol 1 of the Convention, the suspension of payment amounted to a control of property that struck a fair balance between the general interests of the community and the requirements of the protection of the individual's fundamental rights. The respondents also argued that the deprivation of a pension formed part of the punishment of imprisonment for a criminal offence and that as long as the prisoner was maintained at public expense there was no need for him to receive a state pension of any kind.

74. In its decision, the Commission considered that in circumstances where the pension payments were suspended only during imprisonment and recommenced upon release (at the appropriated updated level) it could be:

> " the public interest that during a period of imprisonment, when prisoners are kept at the expense of the state, a state pension, including an earnings related element of the pension, is suspended. To do otherwise would leave the prisoner in an advantageous situation of benefiting from accumulating a lump sum by receiving a regular pension, without having any outgoing living expenses."

75. In the case of *Carson and others v. United Kingdom* (App. No. 42184/05) (2010) 51 EHRR 13 the ECtHR considered a complaint that the refusal of the authorities in the United Kingdom to up-rate the claimants' pensions in line with inflation, by reason of the fact that the claimants were not resident in the United Kingdom, constituted a contravention of Article 1 of Protocol No. 1 taken alone and in conjunction with Article 14, as well as Articles 8 and 14 of the Convention taken together. The plaintiffs' case failed in the High Court, the Court of Appeal and the House of Lords. In the course of his judgment, Lord Hoffmann stated:-

> "Social security benefits are part of an intricate and interlocking system of social welfare which exists to ensure certain minimum standards of living for the people of this country. They are an expression of what has been called social solidarity or fraternité; the duty of any community to help those of its members who are in need ….

> The main reason for the provision of state pensions is the recognition that the majority of people of pensionable age will need the money. They are not means tested, but that is only because means testing is expensive and discourages take-up of the benefit even by people who need it. So State pensions are paid to everyone whether they have adequate income from other sources or not. On the other hand, they are subject to tax so that the State will recover part of the pension from people who have enough income to pay tax and thereby reduce the net cost of the pension. On the other hand, those people who are entirely destitute would be entitled to income support, a non-contributory benefit. So the net cost of paying a retirement pension to such people takes into account the fact that the pension will be set off against their claim against income support."

76. In a section under the heading "state and private pensions" Lord Hoffmann made particularly interesting observations which I think are worth setting out in full:

> "It is, I suppose, the words 'insurance' and 'contributions' which suggest an analogy with a private pension scheme. But, from the point of view of the citizens who contribute, national insurance contributions are little different from general taxation which disappears into the communal pot of the consolidated fund. The difference is only a matter of public accounting. And although retirement pensions are presently linked to contributions, there is no particular reason why they should be. In fact (mainly because the present system severely disadvantages women who have spent time in the unremunerated work of caring for a family rather than earning a salary) there are proposals for change. Contributory pensions may be replaced with a non-contributory 'citizen's pension' payable to all inhabitants of this country of pensionable age. But there is no reason why this should mean any change in the collection of national insurance contributions to fund the citizen's pension like all the other non-contributory benefits. On Ms. Carson's argument, however, a change to a non-contributory pension would make all the difference. Once the retirement pension was non-contributory, the foundation of her argument that she had "earned" the right to equal treatment would disappear. But she would have paid exactly the same national insurance contributions while she was working here and her contributions would have had as much (or as little) causal relationship to her pension entitlement as they have today."

77. The ECtHR also held against the applicants, finding that because they lived outside the United Kingdom, in countries that were not party to reciprocal social security agreements with the United Kingdom, there was no difference between the treatment of persons in relevantly similar situations, which is a condition for an issue to arise under Article 14 of the Convention. In its decision, the Court stated:-

> "National Insurance Contributions have no exclusive link to retirement pensions. Instead, they form a source of part of the revenue which pays for a whole range of social security benefits, including incapacity benefits, maternity allowances, widow's benefits, bereavement benefits and the National Health Service. Where necessary, the National Insurance fund can be topped up with money derived from the ordinary taxation of those residents in the United Kingdom, including pensioners. The variety of funding methods of welfare benefits and the interlocking nature of the benefits and taxation systems have already been recognised by the Court. This complex and interlocking system makes it impossible to isolate the payment of National Insurance contributions as a sufficient ground for equating the position of pensioners who receive up-rating and those, like the applicants, who do not."

The Court also noted that:-

> "Social security benefits, including state pensions, were part of a system of social welfare which existed to ensure certain minimum standards of living for UK residents."

The Court noted, with approval, the dictum of Lord Hoffmann to the effect that National Insurance Contributions are little different from general taxation which disappears into the communal pot of the consolidated fund.

78. As has been seen above, the Court in *Carson* referred (with approval) to the case of *Stec v. United Kingdom* (App No.65731/01) (2006) 43 EHRR 47 In Stec, the ECtHR had the following to say regarding measures of economic or social strategy in the context of the welfare system generally:-

> "…a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".

Finally, since the applicants complain about inequalities in a welfare system, the Court underlines that Art. 1 of Protocol No. 1 does not include a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a state does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention.

This theme was further developed in the case of *Andrejeva v. Latvia* (App. No. 55707/00) (2010) 51 EHRR 28. In that case the Court added as follows to what was said in Stec.

> "If, however, a contracting state has in force legislation providing for the payment as of right of a welfare benefit - whether conditional or not on the prior payment of contributions - that legislation must be regarded as generating a pecuniary interest falling within the ambit of art. 1 of Protocol No. 1 for persons satisfying its requirements …"

79. This principle was further endorsed by the ECtHR in the case of *Stummer v. Austria* (App. No. 37452/02) (2012) 54 EH RR 11 a decision of the ECtHR of 7th July, 2011. In that case the Court, having cited with approval *Stec, Andrejeva and Carson* went on to say:

> "Moreover, in cases such as the present one, concerning a complaint under art. 14 of the Convention taken in conjunction with art. 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by art. 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question."

80. In *Stummer* the applicant who had been in prison in Austria for more than 28 years, had been refused (following his release from prison) an early retirement pension because he had not accumulated the necessary 240 insurance months while working in prison. Under Austrian law, the applicant had been required to work in prison and to pay 75% of his earnings towards the cost of his keep in prison. This deduction meant that he did not have adequate funds to make the contributions required to qualify for the pension. The claimant complained that his rights under Article 14, and Article 1 of the first Protocol to the Convention were violated by reason of the fact that prisoners were not affiliated to the old age pension system. The ECtHR noted that the matter was of some complexity. It reiterated its well established position that prisoners in general

continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty. The Court again referred to the wide margin of appreciation enjoyed by States in matters of social policy as reflected in the social security system. The Court found that the system of prison work and the social cover associated with it, taken as a whole, was not "manifestly without reasonable foundation". Accordingly, the Court concluded that the exclusion of the applicant from the old age pension system, which was linked to the applicant's status as a prisoner, did not infringe the rights protected by Article 14 and Protocol 1 of the Convention. This was so, notwithstanding that by reason of *Stec* and *Andrejeva*, the applicant would, prima facie, have a proprietary right to participate in the pension system; in the view of the Court, his exclusion from the system was not by reason of any discrimination, but rather there was an objective and reasonable justification for the difference in treatment of prisoners and this difference was within the margin of appreciation enjoyed by contracting states.

81. In the Irish context, the Court was not referred to any authorities that determined the legal characteristics of the SPC, and in particular, whether or not it confers a proprietary or property right upon persons who have made social insurance contributions. The plaintiff does place reliance upon the cases of *Cox v. Ireland* [1992] 2 I.R. 503 and *Lovett v. Minister for Education* [1997] 1 I.L.R.M. 89. As has been seen, the former case involved provisions relating to the forfeiture of any office, employment or pension entitlements remunerated out of monies provided by the Oireachtas, and the latter case involved forfeiture of a pension which Kelly J. described as being a contributory one. In each of those cases the Court found that the impugned legislation interfered with an existing constitutional right. In Lovett, that right was the right to receive a pension from a scheme into which Mr. Lovett had contributed. The distinction between Lovett and this case is that in Lovett the pension scheme was one with defined benefits, entitlement to which formed part of his contract of employment. However, these proceedings centre around the plaintiff's PRSI contributions (which presumably Mr. Lovett would have paid in addition to his pension contributions) and not contributions to a pension scheme.

Finding on the Property Right Issue

82. In the *Health (Amendment) (No. 2) Bill 2004* [2005] 1 IR 105 the Supreme Court stated:-

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

83. In these proceedings the plaintiff claims that he has a property right in the SPC by reason of (1) payment of the requisite number of social insurance contributions, and (2) having attained the specified age of 66 years. Payment of his contributions therefore and the legal consequence of those payments, lie at the very heart of his claim.

84. The Oireachtas has chosen to fund the SPC and other social welfare entitlements by collecting contributions from employers and employees, and by funding any shortfall from funds raised by the exchequer. While it might be said that funds raised through employee contributions are "ring fenced" for social welfare purposes, and are therefore not the same as funds raised through taxation, the reality is that the Oireachtas could just as readily abolish employee contributions and raise the same funds through income tax, and the effect would be just the same. In that scenario the plaintiff's claim, to the

extent that it is based upon his contributions, would wither away. I agree with the comment of Lord Hoffmann in Carson when he said that "*national insurance contributions are little different from general taxation which disappears into the communal pot of the consolidated fund. The difference is only a matter of public accounting*." For this reason alone, it is difficult to see how payment of PRSI contributions could be said to give rise to a property right.

85. Moreover, the plaintiff's claim in this regard, were it to succeed, would offend the principle of distributive justice enunciated by Costello J. in *O'Reilly & anors. v. Limerick Corporation* [1989] 1 I.L.R.M 181 wherein he stated:-

> "But it cannot be said that any of the goods held in common (or any part of the wealth raised by taxation) belong exclusively to any member of the political community. An obligation in distributive justice is placed on those administering the common stock of goods, the common resource and the wealth held in common which has been raised by taxation, to distribute them and the common wealth fairly and to determine what is due to each individual. But that distribution can only be made by reference to the common good and by those charged with furthering the common good (the Government); it cannot be made by any individual who may claim a share in the common stock and no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he deprived of what is his due."

86. The words of Mr. Justice Harlan in Flemming v. Nestor in relation to the issues raised by these proceedings, remain worthy of consideration today. To hold that PRSI contributions give rise to a property right would be to deprive the social welfare system of the flexibility to which he referred, and which flexibility is required in order to maximise the potential of the social welfare system to meet the needs of the vulnerable in society at any moment in time. In the context of pensions, this was never more true than today, when predictions of a rapidly aging population demographic pose significant challenges for the State in the years ahead. To hold that those who qualify for and are eligible to receive the SPC, for the remainder of their days, could well fetter in a significant way the discretion of the Oireachtas in making vital decisions affecting the welfare of all those in need of State support.

87. The importance of this flexibility has also been recognised by the ECtHR, in decisions such as Stec where the Court affirmed that a wide margin is usually afforded to states under the Convention when it comes to general measures of economic or social strategy. For all these reasons I hold that the plaintiff does not have a property right in the SPC, in the context of either the Constitution or the Convention.

88. However, that is not the end of the matter. *Flemming v. Nestor* recognised that "*The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause."* Similarly, it was held by the ECtHR (in *Andrejeva)* that individuals do have a pecuniary right in welfare benefits, once they satisfy the requirements of the legislation, and that right is protected by Article 1 of Protocol No. 1 of the Convention. In *Stummer* it was established that conditions excluding individuals from benefits to which they would otherwise be eligible, must be scrutinised to ensure that they are neither discriminatory nor arbitrary and that they have an objective and rational justification. I am satisfied that such a test is also appropriate in the constitutional context in this jurisdiction, in order to ensure that a measure which disqualifies a person from a benefit to which he or she would otherwise be entitled, is, when challenged, subject to scrutiny to ensure its consistency with Bunreacht na hÉireann, and in particular Article 40 thereof. I address this question below, where I deal with the discrimination argument

advanced on behalf of the plaintiff.

Is the Disqualification a Punishment?

89. I now turn to address the other elements of the plaintiff's case, chief among which, is the claim that the deprivation of the SPC following the plaintiffs' imprisonment amounts to an additional punishment imposed not by the Courts, but by the Oireachtas, contrary to Articles 34 and 38 of the Constitution.

90. It is submitted on behalf of the plaintiff that the disqualification from receipt of SPC during the term of his imprisonment constitutes an extra penalty, additional to the punishment imposed by a Court. It is well settled that it is the role of the Courts, and not that of the legislature, to determine the appropriate penalty to be applied following upon a conviction. This is subject only to those offences in respect of which the legislature has prescribed fixed penalties or mandatory sentences. This was clearly recognised by the Supreme Court in the case of *Deaton v. The Attorney General* [1963] 1 I.R. 170 in which Ó Dálaigh CJ. stated:-

> "The individual citizen needs the safeguard of the Courts in the assessment of punishment as much as on his trial for the offence. The degree of punishment which a particular citizen is to undergo for an offence is a matter vitally affecting his liberty; and it is inconceivable to my mind that a Constitution which is broadly based on the doctrine of the separation of powers - and in this the Constitution of Saorstát Éireann and the Constitution of Ireland are at one - could have intended to place in the hands of the Executive the power to select the punishment to be undergone by citizens. It would not be too strong to characterize such a system of government as one of arbitrary power."

91. There is no dispute between the parties that *Deaton* still represents the law in this regard; the disagreement between the parties is that in the defendants' submission, the disqualification of the plaintiff from receiving SPC for the duration of his imprisonment cannot be considered to be a penalty or an extra-judicial sentence for a crime. The defendants submit that it is a legitimate consequence, entirely separate to the criminal offence itself, and that it is too remote in character to be taken into account in sentencing. It is further submitted that it is a proportionate consequence because it lasts only for as long as the plaintiff is imprisoned. In this regard, the defendants rely on the cases of *Conroy v. Attorney General* [1965] I.R. 411; *The State (Pheasantry Ltd.) v. Donnelly* [1982] I.R.L.M. 512 and *Enright v. Ireland* [2003] 2 I.R. 321. Conroy concerned the mandatory disqualification from holding a driving licence following a conviction for the offence of driving a mechanically propelled vehicle while under the influence of intoxicating liquor, or a drug, to such an extent as to be incapable of having proper control of the vehicle, contrary to s. 49 of the Road Traffic Act 1961. In upholding the impugned legislation, Walsh J. observed that the right to a driving licence, which is conferred by statute, is protected by requiring a judicial determination, before it can be lost by disqualification. He stated:-

> "A disqualification whether imposed by a Court or otherwise may result in considerable hardship for some people and in little more than a recreational inconvenience for others. It may well be … that to some people a driver's licence may be just as valuable as a licence to engage in an occupation or profession. That, however, does not determine the matter. In the opinion of this Court, so far as punishment is concerned, the punishment which must be examined for the purpose of gauging the seriousness of an offence is what may be referred to as "primary punishment." That is the type of punishment which is regarded as punishment in the ordinary sense and, where crime is concerned, is either the loss of liberty or the intentional penal deprivation of property whether by means of fine or other direct method of deprivation. Any conviction

> may result in many other unpleasant and even punitive consequences for the convicted person. By the rules of his professional association or organisation or trade association or any other body of which he is a member he may become liable to expulsion or suspension by reason of his conviction on some particular offence or perhaps on any offence. His very livelihood may depend upon the absence of a conviction in his record. These unfortunate consequences are too remote in character to be taken into account in weighing the seriousness of an offence by the punishment it may attract."

92. Later he said:-

> "In so far as it may be classed as a punishment at all it is not a primary or direct punishment but rather an order which may, according to the circumstances of the particular individual concerned, assume, though remotely, a punitive character."

93. *Pheasantry* involved the loss of a wine retail licence consequent upon convictions in relation to the conduct of business on the premises not by the owner (the appellant in the proceedings) but by its tenant. Carroll J. found that the rationale of Walsh J. in Conroy applied also to the forfeiture of an intoxicating liquor licence in such circumstances, although she noted that there was a distinction between the two cases, in that the declaration of disqualification from holding a driving licence is a judicial act under the Road Traffic Acts, but the forfeiture of an intoxicating liquor licence is not a judicial act; it is as in this case, a statutory consequence resulting from a conviction for an offence.

94. In *Enright v. Ireland* [2003] 2 I.R. 321, Finlay-Geoghegan J. was required to consider whether the provisions of the Sex Offenders Act 2001 (which came into effect long after the plaintiff's conviction for sexual offences in 1993), which required persons convicted of offences specified in the Act, upon release from prison, to notify the garda authorities of their name, address and date of birth, constituted a penalty. Following a review of the relevant authorities (which included Conroy, Pheasantry and Cox), the Court held that in order that a disability or restriction imposed by statute on convicted persons be considered to be part of the criminal penalty for the offence, "*such restriction or forfeiture must be considered to be punitive in intent and effect. However, the fact that it has a punitive or deterrent element does not of itself mean that it should be considered to be a penalty for the criminal offence."* Following examination of the relevant provisions of the legislation, the Court concluded that the Act did not evince any clear intention that the impugned provision was punitive and, following an approach taken by the United States Supreme Court, she then moved to consider whether the provisions were " *'so punitive either in purpose or effect', that it should be considered to constitute punishment".* Finlay Geoghegan J. applied a test adopted by the United States Supreme Court in the case of *Kennedy v. Mendoza-Martinez* (1962) 372 U.S. 144 which involves consideration of seven factors. To the extent that these are relevant, I think it is helpful to consider these factors in this case also. They are:

> 1. *Whether the sanction involves an affirmative disability or restraint*? At first glance the depreviation of the SPC appears as a disability or restraint but this needs to be considered in light of the purpose assigned to the provision to which I return below.
>
> 2. *Whether it has historically been regarded as a punishment?* There is nothing to indicate one way or another whether or not deprivation of either SPC or SPNC during a term of imprisonment has been regarded as a punishment. It is however noteworthy, that the original disqualification as enacted in section 3(2) of the Old Age Pension Act, 1908, continued for a period of ten years after the date on which the person is released from prison, and this extended disqualification period was removed as early as 1919. There could hardly be any doubt that the deprivation of pension, whether SPC or SPNC, to which a person would otherwise be entitled,

following the release of that person from prison, was penal in intent. The fact of the revocation of this provision tends to suggest an intent, historically at least, to remove any penal element from the provision;

3. *Whether it comes into play only on a finding of Scienter*? This question is of no assistance in this case since the impugned provision can only apply following conviction of a criminal offence;

4. *Whether its operation will promote the traditional aims of punishment - retribution and deterrence?* Having regard to the maximum penalties applicable to the offences with which the plaintiff was charged i.e. life imprisonment upon a conviction for rape and fourteen years imprisonment for sexual assault on a minor, and ten years otherwise, it seems very unlikely that the additional consequence of disqualification from the SPC could be regarded as promoting retribution or deterrence in this instance. That said there was no discussion or argument on this point and so it is not open to the Court to draw any conclusions in this regard.

5. *Whether the behavior to which it applies is already a crime?* S.249(1) applies to persons convicted of a crime, but also applies to persons who are absent form the State, which suggests it is not intended as a punishment, but is intended to serve another purpose, such as that suggested on behalf of the defendants.

6. *Whether an alternative purpose to which it may rationally be connected is assignable to it?* The defendants argue that the purpose of the provision is to avoid the plaintiff receiving a benefit which is designed to maintain a person whose living costs are not being met by the State, and to avoid an unjust enrichment of the plaintiff. There is certainly a rational connection between s. 249(1) of the Act and such a purpose, particularly in view of my finding that the plaintiff does not enjoy a property right in the SPC and also having regard to the fact that the pension is re-instated following the release of the prisoner; and

7. *Whether it appears excessive in relation to the alternative purpose assigned?* This could only be so if it seemed likely that the cost of maintaining oneself is demonstrably and considerably less than the value of the SPC. No evidence was adduced to this effect and indeed counsel for the plaintiff appeared to concede that, at best, the plaintiff could, through very frugal living, have available a very modest sum for expenditure on non-essential items.

Finding on the question of the disqualification being a punishment

95. Having regard to all of the above, I have come to the conclusion that the disqualification from eligibility for the SPC as provided for in s. 249(1) could not be regarded as a penalty or punishment or an extra judicial sentence and consequently, the section does not give rise to an infringement of the plaintiff's rights under Articles 34.1 or 38.1 of the Constitution. I have come to this conclusion for the following reasons:-

1. Even taking the plaintiff's case at its height, it is clear that the primary penalty envisaged by the Oireachtas for the offence of which he was convicted is imprisonment.

2. When the cost of a single person maintaining him or herself is considered, the plaintiff's argument that he will suffer a fine or loss in excess of €100,000.00 as a result of disqualification from SPC falls away.

While there was no evidence led as to the cost of maintenance of a single person, it is reasonable to infer that a person would not have very much, if anything, left over from €230 per week and the plaintiff's counsel acknowledged as much in the course of argument. It is arguable therefore, that he suffers little or no financial loss at all, in circumstances where his basic living needs are provided by the State for the duration of his incarceration;

3. The section contains no words of punitive intent, either expressly or impliedly, and indeed the fact that the disqualification also applies while a person is resident outside of the State tends to support the view that the section is not intended to be punitive or deterrent in its effect; although it must be acknowledged that there must be different reasons for disqualifying a person from the benefit while in prison on the one hand and while resident outside the State on the other.

4. The plaintiff's, entitlement to payment of the benefit resumes upon release from prison. This is entirely consistent with the argument advanced by the defendants that the disqualification is directly linked to the period during which the plaintiff is maintained by the State.

5. The reasons advanced by the defendants for the disqualification are rational and objective, and serve a legitimate purpose.

Personal Autonomy

96. The plaintiff argues that he has been left destitute in prison, thereby violating his right to personal autonomy. He does not argue or purport to make a case that there is anything wrong with his prison conditions as such and it would be difficult for him to do so on circumstances where he is detained in a modern prison with modern facilities, and in which he is provided with a nourishing diet, recreation facilities, the opportunity to work (which he cannot currently avail of for health reasons) and access to a high standard of dental and medical care. His argument under this heading centres around the fact that he has very little income of his own by which he may create a personal space for himself within which he may make choices, and most especially chose his own clothing. It is claimed that this places him on hazard of institutionalisation and that this will undermine his ability to rehabilitate upon his release.

97. There may well be some substance in this point, but that is not a matter that can be determined in these proceedings, as the plaintiff has not sought to impugn the prison regime in any way. This point is, in essence, a collateral attack on the prison regime, and cannot sustain an argument for an entitlement to a payment which the plaintiff is not otherwise entitled to receive. The point made by the defendants in this regard, i.e. that the right to personal autonomy is not a socio-economic right to have the judicial branch ensure a minimum level of economic provision by other branches of government is in my view well made.

98. Moreover, the cases relied upon by the plaintiff in support of this argument have very materially different facts, involving as they do significant issues concerning the health and welfare of the prisoners concerned. *Creighton v. Ireland* [2010] IESC 50; involved a claim for damages arising out of injuries sustained by the plaintiff in a violent attack by another prisoner *Governor of X Prison v. PMcD* [2015] IEHC 259; was concerned with the entitlement of the respondent to refuse food (the respondent was on hunger strike in protest at his conditions of detention) and *Nash v. Chief Executive of the Irish Prison Service* [2015] IEHC 504 concerned a claim by the plaintiff that his detention in a particular prison (Arbour Hill) was unlawful because of threats received

from other prisoners. In *Nash*, Kearns P., in dismissing the plaintiff's application endorsed in strong terms the authority of the prison service when he stated:-

> "Any suggestion that a prisoner can or should be detained in the prison of their own choosing or avail of hunger strike or suicide threats to secure their own objectives, would create chaos in prisons and fatally compromise the proper administration of our prison system."

99. Imprisonment will impact upon prisoners in different ways. In this case the plaintiff has no income at his disposal other than that which he receives from the prison authorities. That payment currently stands at €11.90 per week although it is open to the plaintiff to make applications to the prison hardship fund as he has done on one occasion. Clearly if the plaintiff had more income at his disposal he could alleviate the effects of his imprisonment but that fact by itself is not in my view sufficient to establish a breach of his right to personal autonomy.

Discrimination

100. The plaintiff argues that s. 249(1) is discriminatory in its effect, firstly because it does not apply to prisoners who may be in receipt of private pensions and secondly because no other category of prisoner is required to pay for, or contribute to, the cost of their own incarceration.

101. As regards the comparison drawn with those in receipt of private pensions, this is not comparing like with like. Entitlement to a private pension is quite clearly a property right, liability for payment of which rests not with the State but with whatever institution the contributor has invested his or her contributions and/or purchased the relevant pension product. The State could have no entitlement to direct the discontinuation of payments due under a private pension during the term of a person's incarceration, any more than it would be entitled to direct the discontinuation or confiscation of the proceeds of any other source of income during the term of a person's imprisonment. It might be able to do so in the context of a formal scheme that requires prisoners to contribute to the costs of their own incarceration, but no such scheme exists.

102. Moreover, it is quite likely that a person who has built up a private pension will also have been a contributor to the fund during the course of his or her employment. In such circumstances, such a person might be, as the plaintiff is, eligible to receive the SPC but for his or her imprisonment, but, as with the plaintiff, is disqualified from any such entitlement during the term of the same. In other words, the disqualification from entitlement to receive SPC applies equally to all citizens during the term of their imprisonment. Furthermore, as has been set out above, the disqualification applies to all social welfare benefits and not just to the SPC.

103. Insofar as the plaintiff argues that he is being required to contribute to the cost of his own imprisonment, whereas others are not, this may be one way of looking at the issue, but it is not the justification advanced by the defendants for s. 249(1). Notwithstanding that the SPC is paid to all who are eligible regardless as to whether or not they need it, the defendants argue that, in general terms, the purpose of the SPC is to assist persons in retirement to meet the cost of their basic living needs, and that being the case, the State is entitled to withhold the benefit during a period of imprisonment, while those very needs are otherwise being met by the State. Apart from other arguments on this point, in view of the fact that the section enjoys the benefit of the presumption of constitutionality, it is the interpretation argued on behalf of the defendants which the Court must accept.

104. As stated above, there is no scheme in operation in the State to require a prisoner to contribute to the cost of his or her own maintenance, such as came under scrutiny in *Stummer*. I am satisfied that s. 249(1) is not intended to operate as such a scheme and

that the justification advanced by the defendants is indeed the purpose of s. 249(1). In my view, the fact that entitlement to SPC is not needs based or subject to any means test is irrelevant. As Lord Hoffmann pointed out in *Carson* the State does claw back, through taxation, some of the benefit paid to those who are not in need. There can be no doubt in my view that in general terms, the purpose of the SPC is to provide a very basic standard of living in retirement to the majority of the population without which many would otherwise be left destitute. That being the case, it seems to me that it is objectively rational and proportionate to suspend payment of the SPC during a period when the very needs that it is designed to meet are otherwise being met by the State, while the individual is imprisoned.

105. It might be otherwise if the value of the SPC clearly exceeded the basic cost of living, but counsel for the plaintiff fairly acknowledged that, at best, the plaintiff might be able to save a very modest sum weekly out of the SPC, when he is not imprisoned and has to meet his own living expenses. For these reasons therefore, I consider that s. 249(1) does not operate in a discriminatory manner or breach the plaintiff's rights to equal treatment either under the Constitution or the Convention.

The Convention Arguments:

Article 3
106. While it is true that the plaintiff is suffering from a degree of financial hardship while imprisoned, it is difficult to see how that could amount to inhuman or degrading treatment or punishment. The plaintiff's central complaint is that he cannot afford the small luxuries which make life in a prison more tolerable, and in the case of prison issue clothing, he argues that the requirement to wear such clothing is humiliating and degrading. He makes no complaint at all however, about his living conditions, the quality of food, the standard of medical care afforded to him or the prison facilities in general. The undisputed evidence of the defendants is that the plaintiff is detained in a well-run modern prison with good facilities and that has a high standard of care for inmates. While the plaintiff's complaints are understandable, they fall a long way short of establishing anything like inhuman or degrading treatment.

(ii) Article 5
107. It is argued that s. 249(1) operates in an arbitrary manner and as a consequence the plaintiff is being deprived of his liberty otherwise than in accordance with procedures prescribed by law. It is argued that it is arbitrary because it affects some prisoners, but not others. This would be so if the section had no rational basis or was not connected to a rational objective. It is clear from the authorities of the ECtHR to which the Court has been referred, that the State enjoys a very wide margin of appreciation in making decisions in matters of economic or social strategy and specifically so in the context of social welfare entitlements. While in Andrejeva it was established that legislation providing for payment as of right of a welfare benefit generates a pecuniary interest in the benefit, it was established in Stummer that a prisoner may be excluded from enjoying a particular benefit, provided that the grounds put forward for his exclusion are reasonable and objective. This was in the context of Article 14 and Protocol 1 of the Convention, but it seems to me that this principle applies with equal force to the argument made on behalf of the plaintiff in this case under Article 5 of the Convention. Accordingly, since I have already held that there is a rational and objective reason for s. 249(1), I do not think that any claim under Article 5 of the Convention can succeed.

(iii) Article 6
108. The arguments made on behalf of the plaintiff as regards the application of Article 6 of the Convention to a significant extent depend upon the legal characterisation of the disqualification from entitlement to receive the SPC. I have already held that the disqualification does not constitute a penalty, punishment or fine, and nor does it

constitute an interference with a property right. For that reason alone I do not think that the plaintiff can succeed under Article 6 of the Convention.

109. Additionally however, in *Ferrazini*, the ECtHR determined that merely showing that a dispute is "pecuniary" in nature is not in itself sufficient to attract the applicability of Article 6 (1) under its "civil" head and that there may exist pecuniary obligations vis-à-vis the State or its subordinate authorities which, for the purposes of Article 6 (1) are to be considered as belonging exclusively to the realm of public law and accordingly are not covered by the notion of civil rights and obligations, for the purposes of Article 6.

110. This, it seems to me, is apposite in this case. Moreover, it could scarcely be the case that the State, in the legitimate exercise of its discretion within the wide margin of appreciation acknowledged by the ECtHR in pecuniary matters, could then be confounded in so doing through the invocation of another Article of the Convention.

(iv) Article 8

111. Counsel for the plaintiff argues that s. 249(1) breaches the plaintiff's rights to respect for his private life, his personal autonomy, bodily integrity, independence and dignity as protected under Article 8 of the Convention. In support of this argument the plaintiff relies upon the decision of the ECtHR in the case of *Sidabras and Dziautas v. Lithuania* (App. No. 55480/00 and 59330/00) (2006) 42 EHRR 6. In that case two former KGB officers were subjected to a ban from taking up employment in a range of occupations in the private sector, including in the legal profession, in banks or other credit institutions, as teachers or other educators and in security companies, on the grounds that their previous occupation as KGB officers created a doubt over their loyalty to the State and the restriction was necessary in the interests of national security. While there were a range of exemptions from the ban, the applicants were ineligible to avail of the same. The ban became operative following the passing of legislation some thirteen years after one of the applicants had left the KGB, and some nine years after the other applicant did so. The Court considered this delay in the imposition of the ban to be a relevant factor in the application, although not decisive.

112. Referring to previous decisions of its own, the Court reiterated that the term "private life" is a broad term not susceptible to exhaustive definition. It noted that Article 8 protects the moral and physical integrity of the individual and secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality. The Court noted that the ban imposed upon the applicants created serious difficulties for them in terms of earning a living, with obvious repercussions for the enjoyment of their private lives.

113. The Court then went on to consider whether or not the impugned legislation was in breach of Article 14, in conjunction with Article 8. It noted that a difference of treatment is discriminatory if it "*has no objective and reasonable justification*" that is, if it does not pursue a "legitimate aim" or if there is not a "*reasonable relationship of proportionality between the means employed end pursued".* The Court acknowledged the legitimate aims of the legislation, but held that the means of achieving the aims, in particular the restrictions upon finding employment within the private sector were disproportionate and could not be justified. The Court found that it was impossible to ascertain any reasonable link between the positions concerned and the legitimate aims sought by the ban on holding those positions and furthermore found that the scheme must be considered as lacking "*the necessary safeguards for avoiding discrimination and for guaranteeing an adequate and appropriate judicial control of the imposition of such restrictions."*

114. As regards the applicability of Article 14, the Court found that the applicants had been treated differently from other persons in Lithuania, who had not worked for the

KGB, and who as a result had no restrictions imposed on them in their choice of professional activities. The Court considered that to be the appropriate comparison for the purposes of Article 14. For these reasons, the Court found that there had been a violation of Article 14 of the Convention, when taken in conjunction with Article 8. By reason of this finding, the Court did not consider whether there had been a violation of Article 8 taken alone.

115. Since the plaintiff in these proceedings also claims a breach of Article 14 of the Convention, I will deal with that separately below. As regards the plaintiff's claim that his rights under Article 8 of the Convention have been breached, it seems to me that this argument depends upon the plaintiff establishing that he has a an antecedent property right in the SPC, and that as a result of the breach of that right, his rights under Article 8 of the Convention have been breached. The plaintiff has not purported to make the argument that the prison regime *simpliciter* operates in breach of his rights under article 8 of the Convention. His argument is that a disqualification from the SPC deprives him of certain comforts that help to make prison life more bearable and, more fundamentally in the case of clothing, deprives him of a choice of clothing which would serve to minimise the risk of his institutionalisation. But these arguments depend upon his establishing either a property right in the SPC or alternatively the deprivation of a pecuniary right of the kind described in *Andrejeva*, without objective and reasonable justification.

116. I have already found that there is no property right in the SPC and there is a reasonable and objective justification for s. 249(1) such as to entitle the defendants to disqualify the plaintiff from entitlement to receive SPC for the duration of his incarceration. That being the case the plaintiff cannot sustain a claim to a breach of his rights under Article 8 of the Convention.

(v) Article 14

117. It is well established that Article 14 of the Convention has no independent existence and has effect solely in relation to the rights and freedoms safeguarded by other substantive provisions of the Convention and its protocols. Accordingly; the plaintiff invokes Article 14 in support of his claims as to other breaches of his rights under the Convention, Article 14 protects individuals in similar situations from being treated differently without justification in the enjoyment of their convention rights and freedoms.

118. In *Szrabjer* the impugned UK legislation also created a structure whereby contributors and their employers could, to an extent, contract out of the State Contributory Pension Scheme through participation in Occupational Pension Schemes. This legislation also provided for the suspension of payments to contributors during a period of imprisonment in the context of these schemes, but in that event, the payment could be made to one or more of the pensioners' dependants as the trustees of the scheme. The applicants argued that this difference in treatment amounted to discrimination and further argued that the suspension of the earnings related element of their pensions during imprisonment amounted to discrimination on the basis of their status as prisoners, all of which they claimed was contrary to Article 14 of the Convention, when taken together with Article 1 of Protocol No. 1.

119. The Commission held that Article 14 afforded protection against discrimination, that is treating differently, without an objective and reasonable justification, persons in "relevantly" similar situations and that the comparison between prisoners and non-prisoners was a comparison of two different factual situations and as such there was no discrimination under Article 14 of the Convention.

120. As regards the complaint that the applicants were treated less favourably than

other prisoners who had paid into a Occupational Pension Scheme, the Commission held that the fact such schemes in certain circumstances may have offered more advantageous conditions with regard to the suspension and returns to pensioners, could not constitute discrimination by the government against the applicants. The Commission noted that payments into occupational schemes by employees and employers would have varied between different occupational schemes, and thus, there could be no direct comparison with either the levels or the terms of the pension returns under the State scheme and occupational pension schemes. Accordingly, the Commission considered this element of the complaint to be a comparison between two different factual situations (each involving prisoners) that disclosed no discrimination under Article 14 of the Convention.

121. In *Sidabras and Dziautas* the Court found that the applicants were treated differently from other persons in Lithuania who had not worked for the KGB. In the case of *Thlimmenos v. Greece* (App. No 34369/97), (2001) 31 EHRR 15 a case upon which the plaintiff also relies, the applicant advanced a claim that his rights under Article 14 of the Convention, taken in conjunction with Article 9 (which declares the right to freedom of thought, conscience and religion) had been breached by reason of a decree which had the effect of rendering ineligible for appointment as a chartered accountant a person who had been convicted of a serious crime. The applicant, a Jehovah witness, had been convicted of insubordination for having refused to wear a military uniform at a time of general mobilisation. The applicant refused to do so on the grounds that he was a conscientious/religious objector. In considering the application of Article 14 the Court said:-

> *"The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."*

122. In the circumstances of the case, the Court held that Article 14 of the Convention was of relevance to the applicant's complaint and applied in that case in conjunction with Article 9 thereof. While accepting that States have a legitimate interest to exclude some offenders from the profession of chartered accountant, the Court considered that, unlike other convictions for serious criminal offences, a conviction for refusing, on religious or philosophical grounds, to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise the profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified. The defendant argued that persons who refused to serve their country must be appropriately punished. However, the Court noted that the applicant had served a prison sentence in respect of his refusal to wear the military uniform, and the Court concluded that imposing a further sanction upon the applicant was disproportionate to the aim of the legislation. The Court found therefore, that there was no objective and reasonable justification for not treating the applicant differently from others convicted of a serious crime. In failing to introduce appropriate exceptions to the rule barring persons from admission to the profession of chartered accountant, the State violated the applicant's rights under Article 9 of the Convention, and the Court concluded that there therefore had been a violation of Article 14 of the Convention taken in conjunction with Article 9.

123. In *Sidebras* the Court found that Article 14 applied because the applicant was

treated differently to other Lithuanians; in Thlimmenos the Court found that Article 14 applied because the Court failed to introduce an exception to a rule that applied to the population generally.

124. In this case, the impugned provision applies to the population generally, and more specifically it applies to all persons who are entitled to receive the SPC. It applies to social welfare benefits generally, and not just the SPC. The plaintiff complains that it does not apply to those who have a private pension, other sources of income or a semi-state pension, but as I have already held, this is not comparing like with like. No argument has been advanced, and it does not appear as though any could be made, as to why the plaintiff should be treated differently from the rest of the population as regard the application of s. 249(1). Moreover, if there has been any difference in treatment of the plaintiff with others in analogous situations (and it follows from the above that I do not consider this to be so), this does not give rise to a breach of Article 14 in circumstances where there is a reasonable and objective justification for section 249(1). For these reasons, I do not consider that there has been any violation of the plaintiff's rights under Article 14, taken in conjunction with any other article of the Convention.

Article 1, Protocol Number 1

125. The question as to whether or not the suspension of a State pension, due in a period of incarceration, violates rights under Article 1, Protocol No. 1 of the Convention was considered in *Szrabjer*. In that case the Commission concluded that such a measure was in the public interest because prisoners should not be in a position to accumulate a lump sum by reason of being paid a State pension, at a time when they are being maintained by the State. It is submitted on behalf of the plaintiff in these proceedings that *Szrabjer* has been overtaken by subsequent authorities of the ECtHR such as *Stec, Andrejeva* and *Stummer*. However, these cases do no more than establish that once a State legislates for payment of a welfare benefit, citizens who meet the eligibility criteria for that benefit have a pecuniary interest in the benefit that is protected by Article 1, Protocol 1 of the Convention. The eligibility requirements themselves must be reasonable and not arbitrary. But significantly, those authorities stop short of holding that a citizen has a property right in such benefits, arising by reason of contributions made and in the context of the claim made in these proceedings by the plaintiff, the conclusions reached in *Szrabjer* remain undisturbed.

European Prison Rules

126. While submissions were made in relation to the legal effect of the European Prison Rules, it is unclear as to how it is alleged by the plaintiff that the plaintiff's conditions of detention are in violation of these rules. The closest the arguments on behalf of the plaintiff come to such an allegation is in effect made under the heading of personal autonomy.

Summary

127. The plaintiff claims that he has a constitutionally protected property right to receive payment of the state pension contributory by reason of his having made the requisite number of PRSI contributions during his working years. He also claims that this same right is a property right protected by Article 1, Protocol 1 of the Convention. Analysis of authorities in this jurisdiction, the United States, the United Kingdom and the European Court of Human Rights demonstrates that in those jurisdictions, no such property right accrues. In my view it is no different in this jurisdiction. The right to receive payment of the SPC or indeed any other social welfare benefit is a statutory right only and is subject to such conditions as to eligibility as are laid down by the Oireachtas from time to time.

128. In both the Irish constitutional context and in the context of established convention law, the Oireachtas has a wide margin of appreciation in establishing criteria for

eligibility of any social welfare benefit, but must ensure that such criteria are rational, objective and in pursuit of a legitimate aim, and that they are in no way arbitrary or discriminatory. The SPC forms part of what the defendants have referred to in their submissions as a scheme of single maintenance meaning that the State should not pay more than once for the maintenance of an individual. The purpose of the SPC is to maintain or to assist in the maintenance of an individual in his/her years of retirement. The fact that the benefit is not needs based is not relevant or determinative of the issues raised in these proceedings.

129. Section 249(1) does no more than suspend payment of the benefit in certain circumstances, including a period during which a person who is otherwise eligible to receive the benefit is maintained at the cost of the State while imprisoned. Since the purpose of the benefit in the first place is to assist in the maintenance of the individual, it is perfectly rational that the benefit should not be paid when that person is otherwise being maintained by the State. Moreover if the benefit were paid during a period of incarceration, a person would have the ability to accumulate a lump sum which he would not accumulate but for his incarceration. The section therefore has a rational and objective basis, and equivalent United Kingdom legislation has been acknowledged as such by the ECtHR.

130. The section is not punitive in its intent, and this is demonstrated by the fact that it applies also to persons who are resident outside of the jurisdiction as well as by the fact that payment of the benefit resumes upon release from prison. While deprivation of the benefit during imprisonment may have well adverse consequences, this does not mean that the section itself constitutes a punishment which may only be administered by a court. It is well established that convictions may have many indirect consequences and vary in the significance of their impact upon those convicted, but it does not follow that because a consequence for an individual is severe, that that consequence is a punishment.

131. Moreover, in considering the consequences of the disqualification of the plaintiff in these proceedings from entitlement to SPC, regard must be had to the costs that he would incur in maintaining himself, but for his imprisonment and when that cost is taken into consideration, it can be seen that the impact upon the plaintiff is reduced very significantly.

132. The plaintiff complains that s. 249(1) operates in a discriminatory manner, contrary to Article 40 of Bunreacht na hÉireann and Article 14 of the Convention. This complaint is made on the basis that the same measure does not apply to others who are in receipt of private pensions or other kinds of public pensions. This contention must fail for a number of reasons. Firstly, the comparison with others in receipt of private pensions or other types of public pension is a comparison of two different factual situations. The ECtHR has held repeatedly that Article 14 applies when States treat differently persons in analogous situations. There is a fundamental difference between a private pension or a public service pension payable in accordance with the terms of a public service superannuation scheme (such as in Lovett) and the SPC and so the comparison advanced by the plaintiff is one of two different factual situations that does not give rise to discrimination for the purposes of Article 14 of the Convention. In the context of Article 40.1 of Bunreacht na hÉireann, it has been held that when comparing the different treatment of persons, it is important not simply that the persons can be said to be similar or even the same in some respect, but they must be the same for the purposes in respect of which the comparison is made (*M.R. & D.R. (suing by their father and next friend O.R.) and others v. An T-Ard-Chláraitheoir*). In comparing himself to others in receipt of private pensions or other public service pensions, the plaintiff is not comparing like with like. Section 249(1) applies to all prisoners who otherwise meet the criteria for eligibility to the SPC, including those who may also be in receipt of private

pensions or other public service pensions. More than that, it applies to all social welfare benefits. For these reasons the section does not result in discrimination of the plaintiff's right to equal treatment under either the Constitution or the Convention.

133. The State has an express duty to protect as best it may the property rights of every citizen and it is well established that any interference with those rights must be in accordance with the exigencies of the common good and must be warranted by and proportionate to the objectives sought to be secured. All of that depends upon the existence of a property right in the first place, and since I have held that the plaintiff does not have a property right in the SPC, the need to analyse the section to see that it meets these criteria is limited. However, it is necessary to the extent that statutory provisions which disqualify persons from receiving benefits to which they would otherwise be entitled must be rational, objective and in pursuit of a legitimate objective. The objectives of avoiding double maintenance and the accumulation of a lump sum that would not be accumulated, but for a person's imprisonment (and the consequent maintenance of that person at the expense of the State) in my view meet those requirements..

134. The plaintiff claims that as a result of s. 249(1) he has been left destitute and that in turn this has resulted in a violation of his constitutional right to personal autonomy as well as his rights under articles 3 (freedom from degrading and humiliating treatment), 8 (respect for his private life, personal autonomy, bodily integrity, independence and dignity) of the Convention. But the plaintiff makes no complaint about the prison regime itself. While the plaintiff has established that by reason of his personal circumstances he is reliant exclusively upon the income that he receives from the prison authorities, and that he suffers a degree of frustration and hardship as a result, I am not satisfied that the complaints he makes are of a sufficiently serious nature to establish a violation of his right to personal autonomy.

135. As regards the other Convention arguments, I have found as a matter of fact that there has been no breach of the plaintiff's rights under Article 3 of the Convention as he is detained in a well run modern prison with good facilities and a high standard of care for inmates. In fact he does not appear to argue otherwise. In relation to the application of Article 8 of the Convention, while the ECtHR has established in its jurisprudence that Article 8 is broad in its application and may extend to measures which impact upon a person's ability to earn a living (because of the obvious repercussions for the enjoyment of one's private life), I do not think that it is of application in this instance because in my view in order to succeed with an argument under this heading he would have had to establish that he had a property right in the SPC in the first place, and since he had failed to do so, he must also fail with his arguments under Article 8.

136. For all of these reasons I dismiss the proceedings.

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