

DISCRETION AND LAW IN THE BRITISH AND IRISH SOCIAL WELFARE SYSTEMS

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Law and Discretion

The debate on whether a welfare system imposes either a rule based or discretionary system, while appearing a simple academic study at first, is one of enormous significance for the many hundreds of thousands of people who rely on social welfare payments each week to maintain subsistence. Imagine the decision of whether a person could eat, cloth herself or pay the rent being held by one individual. Imagine further, a person who does not reach the required legislative requirements for a given welfare payment, suffering insurmountable hardship because of this legislative provision. Both these examples are at the extremes of the discretion versus law debate; however it serves to remind us that one, without the other, may have potential disastrous consequences for an individual. This paper shall outline the arguments for and against both systems, and give examples of how relying on either law or discretion independently has resulted in perplexing results.

Discretion and Theory

“Where law ends discretion begins, and the exercise to discretion may mean either beneficence or tyranny, justice or injustice, either reasonableness or arbitrariness”¹.

Titmuss regards a complete reliance on discretion in welfare law as a “reversion to a mass ‘poor law’ age”² but maintains the necessity of discretion as essential to give

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¹ Davis, D *Discretionary Justice: A Preliminary Inquiry* (Greenwood Press, 1980, London) p. 3.

² Titmuss, R. “Welfare ‘Rights’ Law and Discretion” in *The Philosophy of Welfare: Selected Writings of Richard M. Titmuss* (Allen and Union, London, 1987) p. 233

flexible responses to the myriad of individual circumstances. Titmuss sees the essential issue in welfare systems as getting the right balance between rules and law on the one hand and discretion on the other. However Donnison views discretion as “a rank weed”³ that submerges the welfare service. He feels that discretion leaves claimants uncertain about their welfare entitlements⁴. Donnison regards tightly regulated discretion as the key to dealing with welfare claims and ensuring fairness, consistency and confidence in the welfare system⁵. Alder and Asquith feel that “[L]egal control over the exercise of discretionary powers....ignore the relationship....[with] the wider social, political and economic order”⁶. Both see discretion as having problems of arbitrariness, inequality and, at times, failing to meet the most basic requirements of justice. However, they note that a strict adherence to rules gives rise to inflexibility, insensitivity and rigidity as to individual circumstances.

Dworkin sees the institution of rights as representing “the majorities promise to the minorities that their dignity and equality will be respected”⁷. Gilligan argues that the “very coinage of rights is debased by discretion”⁸. However, Harris approaches the question from the view that some discretion “must inevitably characterise welfare provision”⁹, given the fact that the denial of a payment may be of such a serious matter for the individual involved, to ensure the necessary flexibility which strict rules

³ Donnison, D *The Politics of Poverty* (London: Oxford Verbatim Ltd., 1982) p. 90. David Donnison was Chairman of the Supplementary Benefits Commission in the United Kingdom (U.K) from 1972 until it was abolished in 1980.

⁴ *Ibid.* p. 91

⁵ *Ibid.* p. 98

⁶ Alder, M & Asquith, S (Editors) “Discretion and Power” in *Discretion, Justice and Poverty* (London: Heinemann Educational, 1981) p.10

⁷ As quoted in Harris, N *Social Security Law in Context* (Oxford University Press, New York, 2000), p. 34.

⁸ *Ibid.* p. 35

⁹ *Ibid.* p. 36

cannot provide. However the underlying emphasis of the “rules” versus “discretion” conflict remains, namely, nobody can claim as a right that a discretionary power should be exercised in his favour. With such conflicting views from eminent welfare academics, the question of interaction of law and discretion is one that must be considered. In Ireland, there has been little discussion on the use of discretion regarding the discretionary payment of supplementary welfare allowance. However, in Britain a far more wide ranging debate, has taken place on the inter play between law and discretion in welfare provision. The U.K. has experimented with the varying extremes of rules and discretion and in this regard, can act as a comparator with the less transformative Irish welfare system.

II Discretion and Law: The British Experience

In the United Kingdom (U.K.) a far more wide ranging debate has taken place on the inter play between law and discretion. The U.K. moved from rule guided discretionary system and while shifting towards a rigid, rule based structure, experimented with absolute discretion, until finally settling on a discretionary, rule based and cash limited welfare system.

Supplementary Benefit: Discretion, Discretion, Discretion?

Prior to 1980, the Supplementary Benefit Commission (SBC) paid Supplementary Benefit (SB)¹⁰ as a matter of discretion. Basic supplementary benefit was paid to those who did not satisfy contributions or other conditions for insurance based

¹⁰ As outlined in the Ministry of Social Security Act 1966 (as amended), Supplementary Benefit consisted of social assistance payment, corollary to Ireland’s unemployment assistance, Emergency Need Payments (ENP) and Emergency Circumstance Additions (ECA), which are corollary to Ireland’s Supplementary Welfare Allowance (SWA) under sections 180-182 of the Social Welfare (Consolidation Act) 1993.

benefits. Along with this, almost half of all SB claimants were also entitled to Emergency Need Payments (ENP), or Emergency Circumstance Additions (ECA)¹¹. The power to award ENP and ECA were discretionary in nature and the uses of the grants were defined by regulation. ENP included payments for clothes, bedding, fridges etc. while ECA paid for heating costs, special dietary requirements, travel costs etc. “[I]ndividual hardship and need” along with “reasonability” were the criteria for the granting of an award¹². In *Supplementary Benefits Commission v. Clewer*¹³ Stabb J. stated that there is no precise definition of the word “need” but “exceptional need” must be one to avoid hardship and each case must be examined as to the particular circumstances of the applicant.

Donald Donnison, the then Chairman of the SBC, stated that the adequacy of the basic allowances should be examined given the huge numbers requiring ENP¹⁴. Donnison saw the growing reliance on discretionary add-on payments by recipients, within the United Kingdom Supplementary Benefit payments system, as arising out of the moral judgements made by welfare officers to the neediness of the cases at hand¹⁵.

Donnison also noted the growing amount of the SBC budget that had to be spent on administrative appeals for refusal of the add-on payments and ponders whether claimants themselves were happy with the level of discretion that was prevalent in the welfare service¹⁶. Appeals for ENP and ECA were regarded as “something of a lottery”¹⁷.

¹¹ *Supra.* fn. 7 at p. 110

¹² Supplementary Welfare Handbook (1972 edition) paragraph 88

¹³ Queens Bench Division, 17th May 1979, as outlined in Harris *supra.* at p. 109

¹⁴ Donnison D. “Supplementary Benefits: Dilemmas and Priorities” 1976 5(4) *Journal of Social Policy* pp. 337-258 at p. 348

¹⁵ *Ibid.* p. 350

¹⁶ *Ibid.* p. 349

¹⁷ *Supra.* fn. 7 at p.110

The Family Fund: A Discretionary Step Too Far?

The family fund, according to Bradshaw¹⁸ was “an ad hoc response to political circumstances”¹⁹ and this knee-jerk reaction came to be seen as an experiment in welfare administration and discretion. The Conservative government allowed the Joseph Rowntree Memorial Trust to govern this innovative new scheme so as to enable the fund to be “generous and imaginative”²⁰. What made the Family Fund so unique and exciting was that it was operated by professional social workers who used their judgement flexibly to benefit as far as possible families with disabled children. Social workers, as well as being the ultimate decision makers in relation to the resources allocated to a family, found themselves acting as advocates on behalf of the families and encouraged them to think of innovative ways to relieve the burdens of caring for a severely disabled child.

The generosity and individual uniqueness of some of the grants called into question the equitable nature of the Fund. Bradshaw states that evidence was produced to show that more articulate families received larger grants than those families whose aspirations were low²¹. To ensure the continued operation of the system, “individual and private discretion”²² had to be constrained. While the Fund did not become “rule based” it did become more “rule guided”. The Family Fund Panel, who reviewed the decisions of social workers, began to decide on what could and could not be given.

¹⁸ Bradshaw, J. “From Discretion to Rules: The Experience of the Family Fund” in *Discretion, Justice and Poverty* pp. 135-147

¹⁹ *Ibid.* p. 139- A number of British newspapers had begun to highlight the plight of the Thalidomide babies and daily struggles of their family which led to the setting up of the Family Fund.

²⁰ *Ibid.* p 137

²¹ This would seem to suggest, although rather cryptically, that middle class families benefited much more than those who were working class.

²² *Ibid.* p. 147

This limited the Fund's staff in allocating innovative grants or aids. At the same time, given the large volume of cases that had to be processed, the more "routine cases" were passed on to administrative staff rather than social workers to deal with. To maintain public confidence, internal guidelines were developed to ensure a degree of fairness and equity in the system. Finally, and perhaps most importantly, the level of discretion within the system was constrained due to budget limitation.

With the increasing rigidity of the system, social workers began to leave and the uniqueness of the Family Fund diminished. As a result the innovativeness and creativity of the Fund was diminished. The failure of this initiative pointed out the stark realities of unfettered discretion. It may have been this failure that led to subsequent curtailing of discretion in other areas of British welfare law.

Goodbye Tyranny; Hello Rules: The Social Security Act, 1980

After a review of the social security system the Conservative government brought in the Social Security Act 1980, which enumerated every circumstance, to which additions could be made to single weekly payments and when once off payments could be granted. In response to criticisms of SB, the SBC was abolished and the Social Security Act 1980 introduced numerous detailed and regulatory provisions, which gave payments as a right and enumerated the exact conditions of payment. Entitlement to 'single payments' (which replaced ENP) and exact conditions for additions to weekly benefit were enumerated in legislation and regulation. However Posser questioned whether the discretion that existed in the SBC really allowed for "individualised justice" given the "highly restrictive and complex body of rules" that existed²³. Lustgarten surmises that the bureaucratic SBC "operated by prescribing

²³ Posser, T. "The Politics of Discretion" in *Discretion, Justice and Poverty*, 149

rules of varying flexibility and applying them in appropriate instances”²⁴. This led to a degree of control in the expenditure, and attempted to ensure territorial uniformity.

The 1980 Regulations broke down a beneficiary’s requirements into those that were “normal”²⁵, “additional”²⁶ and “housing”²⁷. Strict formulae were set out ²⁸ in order for a claimant to be legally entitled to receive the payments. Only slight residual discretion remained²⁹. The primary reason for the introduction of the Social Security Act, 1980, was to curb welfare expenditure, which the Thatcher government partly blamed on the level of discretion within the supplementary benefits system³⁰. As it turned out, this move was to be a magnificent failure. Between 1980 and 1986 there was a 538% increase in single payments³¹.

In response to the unsatisfactory nature of the 1980 Act and the projected benefit that failed to materialise from a regulated, as opposed to a discretionary system, the Conservative government abolished supplementary benefit and the Social Fund was introduced.

The Discretionary Social Fund: Discretion, Rules and Budgets: All just a little bit of history repeating?

Berthound has described the discretionary social fund as “long on desirable objectives- help, sympathy, flexibility and so on- but very short on methods of

²⁴ Lustgarten, L. “The New Legislation-II: Reorganising Supplementary Benefit” January 22nd, 1981 *New Law Journal* pp. 95-97 at p. 95

²⁵ This is the basic scale rate applying to those not in employment and without insurance contributions.

²⁶ This would have being ENP under the 1966 legislation and regulations.

²⁷ This refers to rent or mortgage interest repayments.

²⁸ Supplementary Benefit (Requirements) Regulations 1980 (S/I 1980/1299)

²⁹ Under the 1980 Act a single payment could have been made in order to avoid a “serious risk” to an individual’s health and safety.

³⁰ The late 1970’s was also a time of a severe economic crisis and the Tory government needed to maintain fiscal policy. This was achieved by cutting social security benefits. Throughout this period tabloid newspapers in Britain, like the Daily Mail and The Sun, ran stories of the unemployed ‘living in luxury’ on state support. It is perhaps interesting to note that these two papers continue to write stories on the alleged life of luxury of those who need social security, however in the 21st century, asylum seekers and refugees are the targets.

³¹ Mullen, T. “The Social Fund – Cash Limiting Social Security” [1989] 52 *M.L.R.* 64 at p. 66

achieving those objectives”³². Some saw the Social Fund as representing “a redrawing of the line between regulation and discretion”³³. Rowe regarded this cash-limiting policy as sitting “comfortably within the New Right philosophy of markets, flexibility and choice”³⁴ arguing that the language of used in the social fund, which emphasises budgetary limits as being that familiar to economists and not welfare activists. The fixed budget placed on the fund would “act as a real constraint on the exercise of creative discretion”³⁵.

The Social Security Act 1986 introduced Income Support, which was to cover basic minimum cost of living for a claimant who did not have any other income. Other fixed and regulated social fund payments outlined by statute remained- maternity expenses, funeral expenses³⁶ and cold weather heating expenses³⁷, were payable as a right and not subject to the constraints of the discretionary social fund. The discretionary fund could be described as an exercise in budget limitation given that two out of the three payments it provided were in the form of repayable loans rather than grants. Community Care Grants are awarded in only four situations³⁸ mainly involving resettlement into a community of prisoners, the mentally ill or disabled or for relieving exceptional pressures. This grant can only be paid to those individuals who receive income support and this grant does not have to be repaid. Evidence suggests that the main recipients of the grant are the elderly and old age pensioners rather than lone parents or the unemployed. Rahilly questions whether this is because

³² Berthoud, R. “The Social Fund- Is it Working?” 1991 12(1) *Policy Studies* pp 4-25 at p. 11

³³ Rowe, M. “Discretion and Inconsistency: Implementing the Social Fund” 2002 Oct-Dec *Public Money & Management* pp. 19-24 at p. 20

³⁴ *Ibid.* p. 19

³⁵ *Supra.* per Harris fn.7 at p. 133

³⁶ Social Fund Maternity and Funeral Expenses Regulations 1987

³⁷ Social Fund Cold Weather Payment (General) Regulations 1988

³⁸ *Supra.* per Harris fn. 7 pp. 132-133

Social Fund Officers (SFO) are using their discretion in making moral distinctions between those who they deem “deserving” and those who are “undeserving” and who may be deemed as “scroungers”³⁹. Crisis Loans are paid in emergency situations, where it is not necessary to be receiving income support and mainly to cover situations arising from flood, fire or natural disasters. The final payment, Budgeting Loans were introduced to iron out the supposed inequity in that those who work have to take out loans to buy items like fridges, beds etc. while those on welfare are provided with them without charge. Discretionary social fund decisions can only be appealed by way of an internal office review and then finally to a Social Fund Inspector (SFI). In the year 1998-1999, 60% of original decisions were confirmed, while 38% were substituted for a verdict in favour of the welfare beneficiary⁴⁰.

It is worthy to note that there is no legal entitlement to the grant or loans. With regard to the making of the loans the Department of Health and Social Security (DHSS) Office must have regard to the amount of resources that the office has at its disposal, any outstanding loan the applicant may have, the length of time he/she has been on benefit, the size of the family in question and the possibility of loan repayment⁴¹. Lawston and Walker⁴² have pondered the possibility of budget constraints leading to territorial and temporal inequity. Similar applications may be treated differently in offices due to the area that the application has been made in. Those in socially deprived districts may find it hard to get loans due to budgetary constraints, while

³⁹ Rahilly, S. “Social Security, Money Management, and Debt” in Harris, N. *Social Security Law in Context* (Oxford University Press, New York, 2000) pp. 431- 459, 449.

⁴⁰ *Supra*. fn. 39 at p.456-457

⁴¹ s. 71 Social Security Act 1998

⁴² Walker & Lawton “The Social Fund as an Exercise in Resource Allocation” [1989] 67 *Public Administration* pp. 295-317

those in more affluent areas may not have such problems⁴³. Similarly, at different times of the year, offices may be hard pressed to give loans or grants to deserving applicants due to budgetary constraints. As has been noted⁴⁴ under a purely discretionary system, neither extent of need nor overall expenditure can be known. The result of such a budgetary constrained discretionary system can be hostile and unresponsive to applicants needs. As Rowe⁴⁵ suggests, all the discretionary fund is attempting to do is mediate between competing claims and exercise their discretion (or moral judgement?) as to who may be deserving of relief. Given the evidence that the unemployed and lone parents are most likely to be reliant on loans, it is alarming to think that a person may be excluded from receiving a loan due to their inability to repay.

The British experimentation between law and discretion at various extremes of the welfare system shows the inherent difficulty in striking the correct balance. Rahilly notes with regards to the current system “[T]he framework of discretion and fixed budgets results in unfairness...whilst the inadequacy of benefits merely extends the indebtedness of those who are successful”⁴⁶ Walker and Lawton feel that the result of a discretionary system of supplementary benefit from the 1960’s to the highly legalese regulations of the 1980 Act back to a discretionary based but budgetary controlled system has “transformed a scheme posited on creative justice into one of proportional justice”⁴⁷.

⁴³ *Supra*. fn. 31. Mullen, who at page 79 gives the example of Bognor Regis who received 166% of its previous expenditure under the 1980 Act and Bathgate, a socially deprived community, who got 34% of their previous expenditure.

⁴⁴ *Supra*. fn. 41 at p. 300

⁴⁵ *Supra*. fn. 33 at p. 22

⁴⁶ *Supra*. fn. 39 at p. 459

⁴⁷ *Supra*. fn. 41 at p. 313

III

Discretion and Law: The Irish Experience

The Irish Welfare System: Discretionary Beginnings⁴⁸

The Irish welfare system has its origins in the British Poor Law. The Poor Law was established nation wide by mid-1840 and provided cash supports, benefits-in-kind, soup kitchens and workhouses to those in dire need, however was unable to prevent the Great Famine of 1845-1850. With the establishment of Home Rule, the Local Government (Temporary Provisions) Act, 1923 transposed the British Poor Law system, with slight modifications, onto the Irish Free State. Local Authorities were to establish nationwide schemes to provide support for those who could not provide for themselves. The Poor Law adopted the guise of “Home Assistance” under the Public Assistance Act, 1939, but in substance, it had not changed.

The Poor Law was based on absolute discretion. In *O’ Connor v Dwyer*⁴⁹ four paupers sought a declaration that they were entitled as a matter of right to receive from the defendants (who were Guardians of the Poor of the Dublin Union) due relief from poverty. In the High Court, Meredith J. held, that under the Poor Law Acts 1838-1847, the plaintiffs, once they had applied for assistance and were found to be destitute (which was not disputed by the defendants) they had a right of due relief and the Guardians had an obligation to provide it, although the provision of that relief was for the Guardians to decide⁵⁰. However, the Supreme Court, by a 2-1 majority, reversed the High Court decision. The Court held that on the true construction of the Poor Law Acts the Court was not entitled “to reverse a decision *bona fide* arrived at by the Board of Guardians, whether as to the applicants’ right to relief or as to the

⁴⁸ For a full discussion on the historical beginnings of the Irish Welfare System see Cousins, M. *The Birth of Social Welfare in Ireland 1922-1952*, Four Courts Press, Dublin 2003)

⁴⁹ (1932) IR 466

⁵⁰ *Ibid.* p. 477

amount granted”⁵¹. Over the years legislative provisions were set up to provide for many payments as a right, however even today, discretion remains in a modernised, rule guided and more generous form, as supplementary welfare allowance.

Rules and Irish Welfare Payments: We Follow the Law Around Here!

Like all welfare systems, many (if not most) payments are based on fixed rules, set out in legislation or statutory instruments, which tell a recipient what welfare payment (if any) they are entitled to. In this regard, child benefit⁵² is the one universal payment that exists for all parents of a child or children. However, the universal nature of the child benefit payment is not reflected in any other social welfare provision. Payments like unemployment benefit⁵³ and unemployment assistance⁵⁴ family income supplement⁵⁵ and one parent family payment⁵⁶ along with the various strands of disability payments and pensions are subject to regulated criteria and set rates, where if a claimant does not meet the set statutory or regulatory criteria, he will be rejected and no residual discretion exists to grant the payment. These payments strive to ensure a basic minimum income to which all should be entitled. However there is recognition that these payments by themselves may not be adequate given the myriad of circumstances and hurdles faced by a diverse group of individuals in a “one glove fits all” type of scheme. It is for this reason that supplementary welfare allowance exists alongside legislative payments to ensure that all maintain an income above a certain subsistence level.

⁵¹ *Ibid.* p. 491

⁵² Social Welfare (Consolidation) Act 1993, ss. 192-196 (hereinafter the 1993 Act or SW(C)A 1993)

⁵³ SW(C)A 1993 ss. 42-48

⁵⁴ SW(C)A 1993 ss. 119-126

⁵⁵ SW(C)A 1993 ss. 197-203

⁵⁶ Social Welfare Act 1996 s. 17 which inserted ss. 157-162 into the SW(C)A 1993

Discretion in Ireland: Supplementary Welfare Allowance

Supplementary Welfare Allowance (SWA) is administered by the Health Boards on behalf of the Department for Social and Family Affairs (DSFA). Internal guidelines of the DSFA outline the rationale behind SWA⁵⁷ as providing a residual and support role within the overall income maintenance structure, to provide immediate and flexible assistance to those in need who do not qualify for other state schemes, to guarantee a basic minimum income and to provide those with low incomes support to meet their needs on a day to day basis or in emergency situations.

Subject to specific exceptions⁵⁸, “every person in the State whose means are insufficient to meet his needs and the needs of any adult or child dependant of his shall be entitled to supplementary welfare allowance”⁵⁹. The SWA (which has always been budget constrained) is subject to a means test⁶⁰ and can be *inter alia* a weekly payment⁶¹, a weekly or monthly supplement⁶², a rent supplement⁶³ or a mortgage interest supplement⁶⁴. The amount that a person is “entitled” to “is the amount by which his means fall short of his needs”⁶⁵ subject to the needs and maximum payment formula set out in the 1993 Act and Regulations. Before SWA is granted, a person must be living in the State and the health board, if it wishes, *may* require a person to be registered for employment⁶⁶ and/or have made an application for other social

⁵⁷ See <http://www.welfare.ie/foi/swa.html> (Last viewed on February 28th, 2005)

⁵⁸ Students, those in full time remunerative employment and those involved in trade disputes are excluded from claiming SWA. However s.183 of the 1993 Act provides that an emergency payment may be made to any of the above categories in exceptional circumstances.

⁵⁹ s. 171 SW(C)A 1993

⁶⁰ Part III of the Third Schedule of the 1993 Act

⁶¹ s. 178 SW(C)A 1993

⁶² s. 179 SW(C)A 1993

⁶³ Social Welfare (Consolidated Social Welfare Acts) Regulations 1995, Article 3

⁶⁴ *Ibid.* Article 10. Schemes such as the Back to School Allowance and asylum seeker direct provision payment are also paid out under the SWA scheme.

⁶⁵ s. 177 SW(C)A 1993

⁶⁶ s. 176(a) SW(C)A 1993

welfare benefits that they may be entitled to⁶⁷ but that person does not have to seek out charitable assistance. The health board may, in any case it considers reasonable, pay SWA to any person by way of a single payment to meet an exceptional need⁶⁸. Departmental guidelines give examples of special clothing, cooking utensils or costs relating to funerals or visiting relatives in hospitals or prisons as constituting exceptional need⁶⁹. Section 182 of the 1993 Act gives the health board the residual power to disregard the section 171 and 172 exclusions and pay SWA in an urgent case. This right may apply to those who suffer flooding or domestic fires and applies also to those not normally entitled to SWA. Benefits can also be paid in kind “wherever it appears to the health board by reason of exceptional circumstances the needs of a person can be best met by the provisions of goods or services...the health board may determine that such goods or services be provided for him under arrangements made by the board”⁷⁰. Section 267 of the 1993 Act⁷¹ provides a method of appealing against a negative determination by the health board. The usual procedure is to get a health board official (other than the official who decided upon the first determination) to review the case. The SWA Appeals Regulations⁷² are silent as to the right of an oral appeal. Decisions on the SWA payment and supplements (sections 177-179 of the 1993 Act) can be appealed to the Social Welfare Appeals Office⁷³. The right of appeal does not extend to exceptional needs payments. Cousins states that this is due to their discretionary nature⁷⁴.

⁶⁷s. 176(b) SW(C)A 1993

⁶⁸s. 181 SW(C)A 1993

⁶⁹Cousins, M. *Social Welfare Law* (Thomson Roundhall, Dublin, 2002) at p.153

⁷⁰s. 180 SW(C)A 1993

⁷¹Supra. fn. 69 pp. 333-335 for a full examination of the SWA appeals system.

⁷²Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment) (Determination and Appeals) Regulations 1998 (S/I No. 107 of 1998)

⁷³s. 30 Social Welfare Act, 1996.

⁷⁴Supra. fn. 69 at p. 334

Administrative law protects the exercise of health board discretion and this discretion must be exercised freely and without interference, real or perceived, from any outside individual or body⁷⁵. In the *State (Kershaw) v. Eastern Health Board*⁷⁶ a ministerial circular purported to exclude all those on “temporary unemployment benefits” from receiving fuel allowance under SWA. Finlay P. held that while the Minister for Social Welfare had authority to make regulations under the Social Welfare Acts, the absolute exclusion of a whole category of people in the prosecutrix’s position without consideration of her means was *ultra vires* the Minister and not provided for under social welfare legislation. The Minister had unlawfully fettered the discretion of the health board.

However, although a Minister may not fetter the Health Boards discretion, it appears that a Health Board itself may limit the use of its discretion as it sees fit. In *Murphy v Eastern Health Board*⁷⁷ the applicant’s claim for SWA was refused. Ms. Murphy had not been in receipt of any income for a three-year period. Eventually, she was given an amount of SWA less than the maximum. The health board had refused to pay the applicant SWA because she had voluntarily left her job and had not registered as able to take up employment. The health board had decided that the fact that Ms. Murphy had left her job to look after both of her elderly parents was not a consideration to be factored in making their decision. Section 206 of the Social Welfare (Consolidation) Act 1981⁷⁸ said the health board *may* refuse an applicant who had not registered for employment. O’ Hanlon J. held that the health board had no option but to refuse the

⁷⁵ In general see Morgan, D & Hogan, G *Administrative Law in Ireland* (Roundhall Sweet and Maxwell, Dublin, 1998)

⁷⁶ (1985) ILRM 235

⁷⁷ An ex tempore decision given by O’ Hanlon J. reported in the *Irish Independent*, 4th August 1988 as outlined in Whyte, G. *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Institute of Public Administration, Dublin, 2001) p. 157

⁷⁸ Now s. 176 of SW(C)A 1993

application. Whyte regards this as a “questionable interpretation of legislation”⁷⁹ and opines that since Ms. Murphy did not have an independent source of income for three years, the exercise of health board discretion should have been regarded as unreasonable. Whyte regards this decision as being “unduly differential to the position of the welfare authorities”⁸⁰ in the exercise of their discretionary powers.

IV Conclusion

In both the Irish and British welfare systems, the theory that applies to both law based and discretionary income maintenance schemes is that “no merit is seen in provisions that maintain people at more than a subsistence level”⁸¹. The welfare system, neither in Britain nor Ireland, rarely concerns itself with being innovative or creative, whether the system is rule based or discretionary. Any scheme that has shown pioneering and inventive zeal, found itself continually constrained by legal rules, self-imposed bureaucratic guidelines or budget constraints. The right of appeal as regards discretionary payments is of a limited nature. As Titmuss outlines, “law and discretion are not separated by a sharp line but by overlapping zones”⁸². One thing is apparent, a measure of both discretion and welfare is a necessity in a modern day welfare system but ensuring the correct balance between rules and discretion is not always easily done and may simply be an unreachable aspiration.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Bryson, L. *Welfare and the State: Who Benefits* (Macmillan: Hampshire, 1992) at p. 56. For real to life examples of this see Kitty Holland “Fran tries to keep smiling on €153 for family of seven” *Irish Times*, October 16th 2004. Fran, in this extract, explains what she buys her 7 year old daughter as a treat “She likes the brown bread, I suppose it’s the different taste ya see, but its 79 cent for a small loaf where you get a large white slice in Aldi for 33 cent”.

⁸² *Supra.* fn. 2 p. 238