THE SUPREME COURT

Keane C.J.
Murray J.
McGuinness J.
Fennelly J.
McCracken J.

39 & 53/04

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS,

IRELAND AND THE ATTORNEY GENERAL

APPELLANTS

AND

ILONA LEONTJAVA

RESPONDENT

AND

DISTRICT JUDGE MARY COLLINS
AND DISTRICT JUDGE BROPHY

NOTICE PARTIES

[1. Judgment of the Court delivered by Keane C.J. on Constitutional issue. 2. Judgments delivered by Keane C.J. & Fennelly J. All members of the Court concurred with Keane C.J. Fennelly J. dissenting on point of detail as to power conferred by S. 5(i) to made Orders. Murray J. agreed with Fennelly J. on this point.]

JUDGMENT of the Court delivered pursuant to Article 34.4.5º of the Constitution on the 23rd day of June, 2004, by Keane C.J.

Introduction

This is the judgment of the court on the claim by the respondent that s. 2 of the Immigration Act, 1999 (hereafter "the 1999 Act") is invalid having regard to the provisions of the Constitution. The factual background to the proceedings is fully set out in the judgments already delivered on the other issues arising in the proceedings.

As already noted, the provision in question was enacted following the decision of the majority of this court in ***Laurentiu –v- Minister for Justice*** [1999] 4 IR 26 that s. 5(1)(e) of the Aliens Act, 1935 (hereafter "the 1935 Act") was inconsistent with Article 15.2.1º of the Constitution and had not survived its enactment. It provides that

> *"(1) Every order made before the passing of this Act under s. 5 of [the 1935 Act] other than the orders or provisions of orders specified in the Schedule to this Act shall have statutory effect as if it were an Act of the Oireachtas.*
>
> *(2) If sub-section (1) would, but for this sub-section, conflict with the constitutional right of any person, the operation of that sub-*

section shall be subject to such limitation as is necessary to secure that it does not so conflict but shall be otherwise of full force and effect."

The Schedule is in the following terms:

"SCHEDULE

Article 13 of the Aliens Order, 1946 (S.R. & O., No. 395 of 1946). Aliens (Visas) Order, 1999 (S.I. No. 25 of 1999)."

In her judgment, the learned trial judge, having noted that the provision benefits from the presumption of constitutionality, identified the primary challenge on behalf of the respondent to it as follows:

"… it purports to give to the substantive provisions of the Aliens Order, 1946 (other than Article 13) legal status as if in an Act of the Oireachtas without such provisions being contained in a Bill initiated and passed or deemed to have been passed by both Houses of the Oireachtas in accordance with Article 20 and without being contained in a Bill signed by the President, promulgated as a law, the text of which is enrolled in the Supreme Court in accordance with Article 25 and without such provisions

having been capable of being referred by the President to the Supreme Court in accordance with Article 26."

She went on to refer to authorities relied on on behalf of the Attorney General, i.e. ***M^{c}Daid –v- Judge Sheehy*** [1991] 1 IR 1 and an ex-tempore judgment by Abbott J. in the High Court in ***H.K. –v- Garda Commission & Ors*** (unreported; judgment delivered 27th March, 2003). She considered the former decision as distinguishable on two grounds, i.e. that no issue arose as to the constitutionality of the provision under challenge in that case and that, in any event, the arguments addressed to the High Court and in this court in the instant case were not addressed to either court in that case. As to the second authority, the trial judge said that she took a different view from that adopted by Abbott J. in that case.

The trial judge went on to find that, while the sole and exclusive power of making laws for the State was vested in the Oireachtas by Article 15.2, this was a power which was *"procedurally constrained"* and could only be exercised by the enactment by the Oireachtas of an Act, initiated as a Bill, which was then passed or deemed to be passed by both Houses and signed by the President and promulgated as a law. She said that this conclusion followed from the provisions of Article 15.2, Article 20 and Articles 25.1, 25.4.1º, 25.4.2º, 25.4.3º and 25.4.5º.

The trial judge said that there did not appear to her to be anything in the Constitution which authorised or permitted the Oireachtas to determine that a provision which was and continued to be secondary legislation made by a person other than the Oireachtas should thenceforth be treated in the legal order of the State as if it were an Act of the Oireachtas. She was of the view that the only provisions which could be treated as a *"law"* within the meaning of Article 15 and have the legal status attributable to such a law were laws consisting of provisions contained in a Bill passed or deemed to be passed by both Houses, signed by the President and promulgated as a law. She was also of the view that the nature of this constitutional scheme was further confirmed by the reference procedure provided for in Article 26.1.1º, since the Aliens Order, 1946 not being a *"specified provision"* of the Bill when it was passed by both Houses of the Oireachtas could not be regarded as a *"specific provision"* within the meaning of Article 26.1.1º of the Constitution and, accordingly, could not be referred by the President to this court for an opinion as to its constitutionality.

The trial judge, accordingly, concluded that s. 2 of the 1999 Act was invalid having regard to the provisions of the Constitution. From that decision, the appellants have now appealed to this court.

Submissions of the parties

On behalf of the appellants, Mr. Paul Gallagher S.C. submitted that, since the Oireachtas had the sole and exclusive law-making power in the State pursuant to Article 15.2.1º of the Constitution, it followed that it had power to provide by legislation that any provision of the common law or of a statutory instrument should have the force of statute. That was, he said, the exercise by the Oireachtas of a decision with regard to what would or would not constitute law or have the force of law within the State: it was the 1999 Act which gave the relevant orders the force of statute.

Mr. Gallagher further submitted that the conclusions of the trial judge failed to take account of the constitutionally mandated separation of powers between the legislature, the executive and the courts. There was no express prohibition in any of the constitutional provisions referred to by the trial judge which prevented the enactment of legislation of this nature and any implied prohibition would be inconsistent with the express terms of Article 15.2.1º.

Mr. Gallagher further submitted that the form or style of any legislation was exclusively a matter for the Oireachtas, while the validity

of any such law was a matter for the High Court and, on appeal, the Supreme Court. The form which legislation took was peculiarly a matter for decision by the Oireachtas which, if dissatisfied with any aspect of a Bill initiated in either House, could amend or reject the Bill.

It was not surprising that the Constitution did not spell out in detail the form which legislation might take, since that would be inappropriate in a document such as a written constitution: he cited in support the observations of Marshall C.J. in ***M^c^Culloch –v- Maryland*** (17 U.S. 316) (1819).

Mr. Gallagher said that the 1999 Act followed in its entirety the procedure prescribed by the Constitution for the passing of a Bill by both Houses of the Oireachtas, its signature by the President and its promulgation by her as a law.

In support of his submissions as to the significance in our law of the separation of powers enjoined by the Constitution, Mr. Gallagher referred to the decisions of this court in ***Boland –v- An Taoiseach*** [1974] IR 338, ***Attorney General –v- Hamilton (No. 1)*** [1993] 2 IR 250, ***Sinnott –v- Minister for Education*** [2001] 2 IR 545 and ***T.D. –v- Minister for Education*** [2001] 4 IR 259.

Mr. Gallagher further submitted that the trial judge appeared to have proceeded on the erroneous assumption that the Oireachtas had allowed a subordinate body, i.e. the Minister for Justice, to usurp its law-making role and that the Oireachtas was unaware of, or did not engage in a proper review of, the orders to which it gave legislative approval. He submitted that there was no warrant for the assumption that the Oireachtas had merely *"rubberstamped"* the legislation of a subordinate body, citing in this context the decision of this court in ***M^{c}Daid –v- Judge Sheehy*** that the Oireachtas was entitled to give statutory effect to a number of orders specified in the Schedule which were not set out in the Act itself.

Mr. Gallagher further submitted that the trial judge was in error in treating a *"law"* within the meaning of the relevant provisions of the Constitution as being a Bill passed or deemed to have been passed by both Houses and signed by the President. He said it was clear that statutory instruments validly made subsequent to the enactment of the Constitution constituted a *"law"* for the purposes of Article 15.4 of the Constitution, citing the decision of this court in ***The State (Gilliand) –v- Governor of Mountjoy Prison*** [1987] IR 2001.

Mr. Gallagher further submitted that, while this was certainly an instance of *"legislation by reference"*, that was a perfectly normal and accepted method of legislation, of which many examples were to be found, including, in particular, statutes giving effect in domestic law to international conventions, the text of which was sometimes, but not always, set out in a schedule to the Act. In some cases, he pointed out, it was made clear by the enactment that the text of the Convention was merely set out *"for convenience of reference"* in a schedule.

Mr. Gallagher further submitted that the power of the President to refer a specified provision of a bill was left unaffected by the form that this legislation took: there was nothing whatever to prevent the President from referring s. 2(1) of the 1999 Bill to this court as *"a specified provision"* of the Bill, if she was of the opinion that any one or more of the orders thereby given statutory force were invalid having regard to the provisions of the Constitution.

On behalf of the respondent, Mr. Gerard Hogan S.C. submitted that a number of consequences would follow, if the submissions advanced on behalf of the Appellants were correct, which could not be reconciled with the procedures established under the Constitution for the enactment of legislation by the Oireachtas. The statutory instrument to which validity

would be given would be no longer dependant on a parent act for its status and could not be challenged on grounds such as *ultra vires*. Nor could it be invalidated on the ground that it was an unreasonable exercise of a statutory discretion on the part of the Minister who promulgated it, as had happened in ***Cassidy –v- Minister for Industry & Commerce*** [1978] IR 297 and ***Doyle –v- An Taoiseach*** [1986] ILRM 693. Moreover, the 1946 Order would now enjoy the presumption of constitutionality based on the respect which one great organ of government owes to another organ, although the rational basis for this presumption, i.e. the progress of the enactment in the ordinary way through both Houses of the Oireachtas, did not exist. Nor would the customary annulment powers conferred on the Oireachtas in respect of statutory instruments be available in the case of the 1999 Act. The giving of statutory force to the 1946 Order, if valid, would also have the effect of impliedly repealing s. 5(7) of the 1935 Act entitling the Minister to revoke or amend an Aliens Order.

Mr. Hogan submitted that all these consequences were entirely at odds with the framework for the enactment of legislation ordained by the Constitution and which necessitated the due consideration by the Houses of the Oireachtas of draft legislation before it became law.

Mr. Hogan further submitted that ***The State (Gilliand) –v- Governor of Mountjoy Prison*** relied on by the Appellant was solely concerned with the interpretation of the word *"law"* as it appeared in Article 40.4.3º and Article 34.4.5º and that it had nothing to say to the contention advanced on behalf of the Appellant in this case that the legislative function of the Oireachtas could be carried out in the mode adopted in s. 2 of the 1999 Act.

Mr. Hogan further submitted that the Appellant's argument did not derive any support from legislation which gave effect in domestic law to international conventions. They were in an entirely different category from subordinate legislation such as the 1946 Order and had been the subject of a specific international machinery before attaining the status of a convention.

Mr. Hogan urged that, while it was accepted on behalf of the respondent that the President could have referred s. 2(1) of the Immigration Bill, 1999 to the court pursuant to Article 26.1.1º, it was also the case that the Aliens Order, 1946 could not have been referred to the Supreme Court by the President at the date when that Bill was presented to her for her signature. It followed, he said, that s. 2(1) was unconstitutional to the extent that it empowered the Oireachtas to give a

statutory instrument the same effect as an act of the Oireachtas, even though it could not have been referred by the President under Article 26. That was clearly to circumvent the safeguards contained in the Article 26 procedure. He further submitted that the Aliens Order, 1946, could not have been the subject of an Article 26 reference by the President, since it was not a *"provision"* of such a Bill.

Mr. Hogan further submitted that the fact that there was no express prohibition in the Constitution of legislation of this nature was immaterial. The same could be said of the absence of an express prohibition of the enactment of laws interfering with pending litigation, the extension of the voting franchise for Dáil elections or the disclosure in all circumstances of cabinet discussions, although in each instance – ***Buckley –v- Attorney General*** [1950] IR 67, ***Re. Article 26 of the Electoral (Amendment) Bill, 1983*** [1984] IR 268 and ***Attorney General –v- Hamilton (No. 1)*** [1992] 2 IR 250 - this court found that there was an implied prohibition derived from the structure and language of the Constitution. If the approach urged on behalf of the appellants were to be adopted, it might be said that the mere fact that the Constitution did not prohibit the President from exercising a form of veto over legislation was a ground for supposing such a power to exist. Similarly, the absence of a prohibition might, on that view, mean that there was nothing to prevent

legislation taking the form of a resolution of one House. The fact that Marshall C.J. in ***M^c^Culloch –v- Maryland*** outlined the necessarily general and non-specific nature of a Constitution merely lent weight to the proposition that there were many matters prohibited by implication by the Constitution rather than supporting the arguments on behalf of the appellants.

The applicable law

Two principles relevant to the determination of the issue arising on this appeal have been clearly laid down in a number of decisions of this court. First, when the court has to consider the constitutionality of an Act passed by the Oireachtas, it must be presumed to be constitutional unless and until the contrary is clearly established. Secondly, where, in respect of the provision in question, two or more constructions are reasonably open, one of which is constitutional and the others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction. It is only when there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be constitutionally invalid.

Article 15.2.1º of the Constitution provides that

"The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

Article 20 provides *inter alia* that

"1. Every Bill initiated and passed by Dáil Éireann shall be sent to Seanad Éireann and may, unless it be a Money Bill, be amended in Seanad Éireann and Dáil Éireann shall consider any such amendment. …

3. A Bill passed by either House and accepted by the other house shall be deemed to have been passed by both Houses.

Article 25 provides *inter alia* that

"1. As soon as any Bill, other than a Bill expressed to be a Bill containing a proposal for the amendment of this Constitution, shall have been passed or deemed to have been passed by both houses of the Oireachtas, the Taoiseach shall present it to the President for his signature and for promulgation by him as a law in accordance with the provisions of this Article …

4.1º Every Bill shall become and be law as and from the day on which it is signed by the President under this Constitution and shall, unless the contrary intention appears, come into operation on that day.

2º. Every Bill signed by the President under this Constitution shall be promulgated by him as a law by the publication by his direction of a notice in the Iris Oifigiuil stating that the Bill has become law …

3º. Every Bill shall be signed by the President in the text in which it was passed or deemed to have been passed by both Houses of the Oireachtas …

5º. As soon as may be after the signature and promulgation of a Bill as a law, the text of such law which was signed by the President or, where the President has signed the text of such law in each of the official languages, both the signed texts shall be enrolled for record in the office of the Registrar of the Supreme Court and the text, or both the texts, so enrolled shall be conclusive evidence of the provisions of such law."

While Article 11.1 provides that all questions in each House are, save as otherwise provided by the Constitution, to be determined by a majority of the votes of the members present and voting other than the

Chairman, there is a notable absence of any detailed requirements as to the form which legislation is to take or the manner in which legislation is to be dealt with by either House. Subject to the overriding prohibition on the enactment of unconstitutional legislation contained in Article 15.4, it was clearly envisaged that the Oireachtas were to be their own masters so far as both the substance and form of the legislation were concerned. This approach is also reflected in Article 15.10 providing that

"Each House shall make its own rules and standing orders, with power to attach penalties for their infringement …"

This is also in accord with the celebrated characterisation of the nature of a written constitution in the judgment of Marshall C.J. in ***M^{c}Culloch –v- Maryland***:

> *"A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outline should be marked, its important objects designated and minor*

ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution is not only to be inferred from the nature of the instrument but from the language …In considering this question, then, we must never forget that it is a Constitution we are expounding."

This passage has been expressly approved of by this court: see the judgment of O'Flaherty J. in ***Riordan –v- An Tanaiste*** [1997] 3 I.R. 502 at p. 508.

Thus, none of the details of the legislative process in each house – the first and second reading, the committee stage and the report stage – achieve even a mention. The role of political parties and of the leader of the opposition, the committee system and the distinctions between public and private bills, government bills and bills initiated by deputies or senators, are nowhere mentioned. It was obviously envisaged by the framers of the Constitution that, as in 1922, all these matters could be left to be determined by the Oireachtas.

One of the legislative techniques which was in existence in 1937 was the practice of incorporation of provisions in a statute by reference.

While, according to the fourth edition of Bennion on Statutory Interpretation, at p. 648, the incorporation by reference of earlier statutory provisions has attracted much judicial criticism and is less used in the United Kingdom today, its constitutional validity in this jurisdiction has never been questioned. The learned author also refers (at p. 649) to another form of incorporation by reference as follows:

> *"An enactment sometimes incorporates into the Act a whole body of law as it existed at a given time ('the relevant date'). This may include the practice prevailing on the relevant date, as well as the substantive law in force at that time … The technique is called archival drafting because it requires persons applying the Act after a considerable period has elapsed since the relevant date to engage in historical research in order to find out what the law thus imported amounts to".*

The practice of incorporation by reference is not peculiar to the United Kingdom or this jurisdiction. In the Canadian decision of ***R. –v- Sims and Others*** (2000 B.C.C.A., 437), the Court of Appeal for British Colombia said:

"In legislative drafting, incorporation by reference to an external source is a well recognised, although sometime criticised, device … Material other than statutes may also be incorporated by reference."

The practice of incorporation by reference has also been adopted in the case of international conventions. An example to which the court was referred was the Jurisdiction of Courts (Maritime Conventions) Act, 1989, s. 4 of which provides that

"(1) Subject to the provisions of this part, the Convention shall have the force of law in the State and judicial notice shall be taken of it.

(2) The text of the convention in the English language is set out for convenience of reference in the First Schedule to this Act."

Other examples cited in the course of the arguments were the International Carriage of Goods by Road Act, 1990, the Arbitration (International Commercial) Act, 1998 and the Contractual Obligations (Applicable Law) Act, 1991.

Other than in the unreported and *ex tempore* High Court decision already referred to in which a challenge to the constitutional validity of

the provision now under consideration was rejected by Abbott J. the practice of giving statutory force to statutory instruments adopted in this case does not appear to have been the subject of any consideration in any decision. A not dissimilar procedure – of confirming by statute the validity of delegated legislation – came before the High Court, and this court, however, in ***M^{c}Daid –v- Sheehy***.

In that case, the applicant had been convicted of an offence of using hydrocarbon oil in the fuel tank of a vehicle in respect of which the relevant excise duty had not been paid. The duty had been imposed under an order purportedly made under s. (1)(d) of the Imposition of Duties Act, 1957. The applicant having sought an order of *certiorari* by way of judicial review, it was held by Blayney J. in the High Court that the provisions of the Act of 1957 giving the government power to impose customs and excise duties on imported goods constituted an impermissible delegation of the legislative powers of the Oireachtas, as the powers so delegated were more than a mere giving effect to principles and policies contained in the Act itself, there being no policies contained therein. Section 46 of the Finance Act, 1976, however, provided that

> *"The Orders mentioned in the table to this section are hereby confirmed."*

One of the orders mentioned was the 1975 Order.

Rejecting a submission that s. 46 of the 1976 Act should be interpreted as having no effect, because the 1975 Order was invalid, Blayney J. said

> *"There can be no doubt that the intention of the Oireachtas was that the Order should be part of the law of the State. The confirmation of the Order was a clear expression of that intention. At the time it was believed that the order was valid but that confirmation was necessary so that it would continue to have statutory force after the end of 1976. It would have ceased to have effect at the end of that year if it were not confirmed. So the intention in confirming it was to give it the status of a permanent statutory provision deriving its validity as from the end of 1976 from s. 46 and it seems to me perfectly reasonable to interpret s. 46 as giving effect to that intention."*

That view of the law was unanimously upheld by this court (Finlay C.J., Griffin J., Hederman J., M^{c}Carthy J., and O'Flaherty J.).

A form of legislative incorporation by reference of secondary legislation more akin to the provision under examination in the present case was considered by the House of Lords in ***Institute of Patent Agents and Others –v- Lockwood*** (1894) AC 347. The relevant legislation in that case – the Patents, Designs and Trademarks Act, 1883, – enabled the Board of Trade under s. 101 to make general rules regulating the practice of registration under the Act. It further provided that such rules were *"to be of the same effect as if they were contained in this Act"*. Any such rules were to be laid before both Houses of Parliament and could be annulled by resolution of either House within the specified time, in which case they were to be *"of no effect"*. A subsequent Act of 1888 which dealt with the registration of persons as patent agents, enabled the Board of Trade to make general rules for giving effect to the section. It further said that

> *"The provisions of s. 101 of [The Act of 1883] shall apply to all rules so made as if they were made in pursuance of that section."*

The Board of Trade made certain rules which were laid before parliament and which were not annulled within the specified period. The respondent was prosecuted for continuing to practice as a patent agent after his name had been erased for failing to pay the prescribed annual

fee. He then contended that the rules in question were *ultra vires* the powers of the Board of Trade. Lord Herschell LC, having found the rules to be in any event *intra vires*, went on to consider the effect of the provision that the rules were to be "*of the same effect as if they were contained in this Act*". He said

> *"I own I feel very great difficulty in giving to this provision that they 'shall be of the same effect as if they were contained in this Act' any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act … The words to which I have referred are really meaningless unless they have the effect which I have described and they seem to me to be the apt and appropriate words for bringing about the effect which I have described. They are words, I believe, to be found in legislation only in comparatively recent years and it is difficult to understand why they have been inserted unless with the object I have indicated."*

Finally, the relevant provision of Article 26 of the Constitution, on which the respondent also relied, should be set out. Article 26.1.1º provides that

"The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question of whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof." **(Emphasis added)**

Conclusion

Since there is no provision in the Constitution which expressly prohibits the Oireachtas from enacting legislation in the form of s. 2 of the 1999 Act, the onus rested on the respondent to establish clearly that it was invalid having regard to the provisions of the Constitution.

It is beyond argument that, if the provisions of the orders made under the 1935 Act to which the Oireachtas wished to give statutory effect had been set out *in extenso* in the Act itself, the enactment could not have been successfully challenged on the ground that it was purporting to convert a statutory instrument into an Act of the Oireachtas. The respondent's case, accordingly, depends on the proposition that the form of incorporation by reference adopted by the Oireachtas in this case was by implication repugnant to the Constitution.

It is manifest from what has already been said that the Constitution affords a strikingly wide latitude to the Oireachtas in adopting whatever form of legislation it considers appropriate in particular cases. Under Article 15 it enjoys the sole and exclusive power of making laws for the state and where, as here, it has expressed its clear and unequivocal intention that particular instruments should have the force of law in the State, it is difficult to see on what basis it can be asserted that it has exceeded or abused its exclusive legislative role. In the view of the court, the choice by the Oireachtas to incorporate the instruments in question by reference rather than by setting out their text verbatim in the body of the Act was one which they were entitled to make, unless it can be clearly established that the result was in conflict with specific provisions of the Constitution.

That conclusion is supported by the decision of the High Court and this Court in ***M^{c}Daid –v- Sheehy***. While that was a case in which the secondary legislation was purportedly given statutory effect by a confirming Act rather than by incorporation by reference and the constitutional arguments addressed in this case do not seem to have been advanced, it is clear that Blayney J., in a judgment unanimously upheld in this Court, was satisfied that, where the intention of the Oireachtas to give a particular statutory instrument the force of law in the State was clear,

that intention should be given effect to by the courts. Similarly, for the Court in this case to conclude that s. 2 of the 1999 Act should be treated as invalid because it did not set out *in extenso* the provisions of the relevant Orders, would be to frustrate the clearly and unambiguously expressed intention of the Oireachtas that the provisions in question should be given statutory effect.

As has already been emphasised, there is no prohibition of the practice of incorporation by reference of other instruments in a bill in the Constitution. Nor is there any reason to imply such a prohibition. It cannot be assumed that, because the incorporated provision is not set out in the text of the Act proper, it was not the subject of the appropriate degree of legislative scrutiny before it was passed. Any such assumption would be at variance with the respect which each of the three great organs of State owes to the others: see the judgment of the former Supreme Court in ***Buckley and Others –v- Attorney General*** [1950] I.R. 67 at p. 81. The instruments in question were orders which, at the time s. 2 of the 1999 Act was enacted had been made under the 1935 Act and their contents were ascertainable by reference to the officially published texts of the instruments.

The proposition that the requirements of Article 4 as to the signature, promulgation and enrolling of legislation were not complied with because the statutory procedure of incorporation by reference was adopted is, in the view of the court, wholly unsustainable. These articles appear in the Constitution because of the importance of ensuring that an official and authoritative text of every Act passed by the Oireachtas and signed by the President is permanently available in the office of the Registrar of this court. Those requirements have been met in this case and the fact that the enactment incorporates by reference other legal instruments in accordance with well established legislative procedures cannot deprive it of the character of an Act passed by both Houses, signed by the President and duly promulgated and enrolled in accordance with the Constitution.

The case advanced on behalf of the respondent, would, moreover, have the remarkable consequence that the procedure normally adopted for incorporating international conventions by reference would be invalidated in its entirety. As the examples cited demonstrate, the relevant legislation in the case of such conventions typically does no more than provide that they are to have the force of law in the State, subject to whatever modifications are considered necessary. If the respondent's submissions were well founded, one would expect to find the individual provisions of

the convention set out *in extenso* in the body of the Act itself. As has already been noted, the normal procedure is to set out the English text of the convention (and in at least one case the Irish text) in a schedule, expressly for convenience of reference only. If in any case a dispute arose as to whether the text of the English version of the convention was accurately reproduced in the official volume of statutes published by the stationary office, that dispute could not be resolved by reference to the text of the Act as enrolled in the Office of the Supreme Court: it could only be resolved by reference to the signed and authenticated text of the convention itself as deposited with whichever of the contracting parties is nominated as the depository of the instrument in accordance with normal procedures in public and private international law.

This court cannot accept the proposition that the framers of the Constitution in 1937, while conferring on the Oireachtas the exclusive role of making laws for the State, intended to limit their powers to legislate by prohibiting them from incorporating other instruments, such as secondary legislation and treaties, in an Act and giving them the force of law without setting out their provisions *in extenso*. As the decision of the House of Lords in ***Institute of Patent Agents –v- Lockwood*** demonstrates, that precise form of statutory incorporation by reference was already established towards the end of the nineteenth century and

there is nothing in the Constitution to indicate that the choice of the Oireachtas to legislate in that rather than another form was in anyway inhibited.

The court is satisfied that this view of the law is in no way affected by the provisions of Article 26.1.1º enabling the President to refer a Bill to this court for a decision as to whether the Bill or any specified provision or provisions thereof is or are repugnant to the Constitution. If the President, after consultation with the Council of State, was of the view that a reference was desirable because one or more of the provisions contained in the Orders being given statutory effect were of questionable constitutional validity, there was nothing to prevent her from referring s. 2 of the Bill to this court for a decision as to its constitutionality. That would be the reference of a *"specified provision"* within the meaning of Article 26.1.1º and the fact that only part of the specified provision was, in the view of the President, of questionable validity would not in the slightest degree affect her power to make such a reference. Holders of the office of President have, in the past, referred an entire bill to this court for a decision as to its constitutionality, although it was inconceivable that every single provision in the bill was regarded as of questionable validity: see, for example, ***Re Article 26 and The Employment Equality Bill*** [1997] 2 I.R. 321.

The court is satisfied that the respondent failed to discharge the onus resting on her of establishing clearly that s. 2 of the 1999 Act is invalid having regard to the provisions of the Constitution. The appeal, will, accordingly, be allowed, the Order of the High Court set aside and an order substituted therefor dismissing the respondent's claim.

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NOTICE PARTY

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NOTICE PARTY

JUDGMENT delivered the 23rd day of June, 2004, by Keane C.J.

Introduction

The factual background to these two cases is as follows.

The first named applicant is a Latvian national. She was arrested on the 5th June, 2003 and brought before the District Court. She was there charged with the offence of remaining in the State after the time set for her departure contrary to what was alleged to be a condition imposed on her as an alien when she was given leave to land in the State. On 30th June, 2003, she was given leave to apply by way of an application for judicial review for *inter alia* the following reliefs:

(i) An order of prohibition prohibiting her trial in Kilmainham District Court and prohibiting the respondents from further pursuing the prosecution in respect of the charge;

(ii) A declaration that Article 5(6) of the Aliens Order, 1946 as inserted by Article 3 of the Aliens (Amendment) Order, 1975 (under which the condition in question was purportedly imposed) is *ultra vires* s. 5(1) of the Aliens Act, 1935 (hereafter "the 1935 Act");

(iii) A declaration, if necessary, that s. 5(1) of the 1935 Act is inconsistent with the Constitution and invalid;

(iv) A declaration, if necessary, that s. 2(1) of the Immigration Act, 1999 is repugnant to the Constitution and invalid.

It was further ordered that the proceedings before the District Court be stayed pending the determination of the application for judicial review.

The second named applicant is a Chinese national. He was remanded in custody on the 2nd May, 2003 by the notice party at Trim District Court to answer a charge that he, being an alien, had failed to produce to a member of An Garda Síochána his registration certificate, a valid passport, or a document satisfactorily establishing his identity, he

not having satisfactorily explained the circumstances (if any) which prevented him from doing so.

On the 26th May, 2003, the second named applicant was given leave to apply by way of judicial review for *inter alia* the following reliefs:

(i) An order of prohibition by way of judicial review prohibiting his trial in Trim District Court and prohibiting the respondents from further pursuing the prosecution in respect of the above charge;

(ii) A declaration that Article 15 of the Aliens Order, 1946 as amended is *ultra vires* s. 5(1) of the 1935 Act;

(iii) A declaration, if necessary, that s. 5(1) of the 1935 Act is inconsistent with the Constitution and invalid;

(iv) A declaration, if necessary, that s. 2(1) of the Immigration Act, 1999 is repugnant to the Constitution and invalid.

It was ordered that the proceedings before the District Court be stayed pending the determination of the application for judicial review.

Statements of opposition having been delivered on behalf of the respondents, the substantive hearing of both applications came on before Finlay-Geoghegan J. In a reserved judgment delivered on the 22nd January, 2004 the learned trial judge found that the applicant in each case was entitled to the order of prohibition sought. In the case of the first named applicant, she found that she was entitled to a declaration that Article 5(6) of the Aliens Order, 1946 was *ultra vires* s. 5(1) of the 1935 Act and to a declaration that s. 2 of the Immigration Act, 1999 was repugnant to the Constitution and invalid. In the case of the second named applicant, she found that he was entitled to a declaration that s. 5(1)(h) of the 1935 Act was inconsistent with the Constitution and invalid, a declaration that Article 15 of the Aliens Order, 1946 was invalid and a declaration that s. 2 of the Immigration Act, 1999 was repugnant to the Constitution and invalid.

The respondents in both cases have now appealed to this court from the judgment and order of the High Court granting these reliefs.

The first named applicant has served a notice of cross-appeal (*recte* a notice to vary) in respect of the refusal by the learned trial judge to grant a declaration that s. 5(1)(b) of the 1935 Act was inconsistent with

the Constitution and ceased to have effect in the law by virtue of Article 50.

This judgment deals with the findings of the learned trial judge other than her finding that s. 2 of the Immigration Act, 1999 (hereafter "the 1999 Act") is invalid having regard to the provisions of the Constitution.

The statutory framework

The regulation under which the first named applicant was prosecuted is Article 5 of the Aliens Order, 1946 (hereafter "the 1946 Order") as inserted by Article 3 of the Aliens (Amendment) Order, 1975 (hereafter "the 1975 Order"). The relevant provisions are as follows:

> *"5(1) An alien coming from a place outside the State other than Great Britain or Northern Ireland shall, on arrival in the State, present himself to an immigration officer for leave to land.*
>
> *(6) An immigration officer may attach conditions as to the duration of stay and the engagement in business permitted to an alien granted leave to land, and the alien shall comply with the conditions."*

Those provisions were made in purported pursuance of s. 5(1) of the 1935 Act which provides that

> *" The Minister [for Justice] may, if and whenever he thinks proper, do by order (in this Act referred to as an aliens order) all or any of the following things in respect either of all aliens or of aliens of a particular nationality or otherwise of a particular class, or of particular aliens, that is to say:-*
>
> *(a) prohibit the aliens to whom the order relates from landing in or entering into Saorstát Eireann;*
>
> *(b) impose on such aliens restrictions and conditions in respect of landing in or entering into Saorstát Eireann, including limiting such landing or entering to particular places or prohibiting such landing or entering at particular places …"*

The regulation on foot of which the second named applicant was prosecuted is Article 15 of the 1946 Order which provides that

"(1) Every alien shall produce on demand, unless he gives a satisfactory explanation of the circumstances which prevent him from so doing, either -

(a) in case he is registered or deemed to be registered under this Order, his registration certificate, or

(b) in any other case, a valid passport or some other document satisfactorily establishing his nationality and identity.

(2) In this Article the expression 'on demand' means on demand made at any time by any immigration officer or member of the Garda Síochána.

(3) The provisions of this Article shall not apply to -

(a) an alien under the age of 16 years, or

(b) an alien who was born in Ireland, or

(c) an alien woman who is married to or is the widow of an Irish citizen."

These provisions were also purportedly made pursuant to s. 5(1) of the 1935 Act which, in addition to the provisions already mentioned, enabled the Minister in sub-paragraph (h) to

" require such aliens to comply, while in Saorstát Eireann, with particular provisions as to registration, change of abode, travelling, employment, occupation, and other like matters."

A majority of this court concluded in ***Laurentiu –v- Minister for Justice, Equality and Law Reform & Anor***, [1999] 4 IR 26, that s. 5(1) of the 1935 Act was inconsistent with the Constitution and had not survived the enactment of the Constitution insofar as it empowered the Minister, under sub-paragraph (e) to

" make provision for the exclusion or the deportation and exclusion of such aliens from Saorstát Eireann and provide for and authorise the making by the Minister [for Justice] of orders for that purpose …"

Following that decision, s. 2 of the 1999 Act was passed which provides that

"(1) Every order made before the passing of this Act under section 5 of the Act of 1935 other than the orders or provisions of orders specified in the Schedule to this Act shall have statutory effect as if it were an Act of the Oireachtas.

(2) If subsection (1) would, but for this subsection, conflict with a constitutional right of any person, the operation of that subsection shall be subject to such limitation as is necessary to secure that it does not so conflict but shall be otherwise of full force and effect."

The orders set out in the Schedule are Article 13 of the 1946 Order (which provides for the deportation of aliens) and the Aliens (Visas) Order, 1999 (S.I. No. 25 of 1999).

The High Court judgment

In her judgment, the learned trial judge considered first the question as to whether Article 5(6) of the 1946 Order, as amended, was *intra vires* s. 5(1)(d) or 5(1)(h) of the 1935 Act. She concluded that the "*restrictions and conditions*" referred to in s. 5(1)(d) were clearly intended to apply to the actual landing or entering into the State of an alien. She was also of the view that none of the remaining sub-paragraphs of s. 5(1) indicated an intention on the part of the Oireachtas that the Minister could authorise an immigration official to determine the time for which an alien might be permitted to remain in the State and thereafter to require the alien to comply with such a condition. She

accordingly concluded that Article 5(6) of the 1946 Order was *ultra vires* s. 5(1) of the 1935 Act.

The learned trial judge then went on to consider whether Article 15(1) of the 1946 Order was *intra vires* s. 5(1)(h) of the 1935 Act. Having noted that the sub-section expressly authorised the Minister to make an order requiring aliens to comply, while in the State, with particular provisions as to "*registration, change of abode, travelling, employment, occupation and other like matters*", she concluded that this gave the Minister "*a very broad authorisation*" as to the provisions which he might specify with which an alien might be required to comply. She was also of the view that the requirement to produce identity documents was sufficiently related to the matters expressly specified in paragraph (h) to come within the generic description of "*other like matters*". She accordingly concluded that Article 15 of the 1946 Order was *intra vires* s. 5(1) of the 1935 Act.

In the light of her conclusion that Article 5(6) of the 1946 Order was *ultra vires* s. 5(1) of the 1935 Act, the trial judge was of the view that it was not appropriate for her to consider whether the parent provision, s. 5(1)(b) of the 1935 Act, was inconsistent with the Constitution and hence had ceased to be part of the law when the Constitution was enacted. While the notice to vary (described as a "*notice of cross-appeal*") invited

this court to hold that she was wrong in that determination and to grant the declaration sought, I am satisfied that, if the trial judge was correct in finding that Article 5(6) of the 1946 Order was *ultra vires*, she was also correct in concluding that it was unnecessary for her to consider whether the parent statute was inconsistent with the Constitution. Since, however, the respondents relied on the provisions of s. 2 of the 1999 Act as giving statutory effect to Article 5(1), notwithstanding its being *ultra vires* the 1935 Act, she went on to consider the submission on behalf of the first named applicant that this provision was invalid having regard to the provisions of the Constitution and, as already noted, concluded that it was. She accordingly granted the first named applicant the relief to which I have already referred, including an order restraining the continuance of the prosecution.

In the case of the second named applicant, the trial judge, having concluded that Article 15 of the 1946 Order was *intra vires* s. 5(1)(h) of the 1935 Act, went on to consider whether the enabling provision was inconsistent with the Constitution and in particular Article 15.2 thereof. Having referred to the decisions of this court in ***Cityview Press Ltd. – v- An Chomhairle Oiliúna*** [1980] IR 381 and ***Laurentiu***, she concluded that s. 5(1)(h) of the 1935 Act did not set out any "*policies and principles*" according to which the power given to the Minister to require

aliens to comply while in the State in relation to the matters therein should be exercised. She accordingly concluded that s. 5(1)(h) was inconsistent with Article 15.2 of the Constitution and had not survived the enactment of the Constitution. As already noted, she was also of the view that s. 2 of the Immigration Act, 1999 was invalid having regard to the provisions of the Constitution and that, in the result, it had not given statutory force to the provisions of Article 15 of the 1946 Order. She accordingly granted that second named applicant the reliefs already referred to, including an order restraining any proceedings against him in the District Court.

Submissions of the parties

On behalf of the appellants, Mr. Paul Gallagher S.C. submitted that the power to make an order authorising an immigration officer to attach conditions as to the duration of stay and engagement in business permitted to an alien granted leave to land and requiring the alien to comply with those conditions was necessarily implied in the statutory delegation of powers to the Minister pursuant to s. 5(1) of the 1935 Act and, in particular, sub-paragraphs (b) and (d) thereof. He cited in support of this the decision of this court in ***Cassidy –v- Minister for Industry & Commerce*** [1978] IR 297. He further submitted that the Minister had a reasonable degree of latitude in making orders designed to achieve a

statutory objective in accordance with the Act of the Oireachtas, citing observations of Murphy J. in ***O'Neill –v- Minister for Agriculture & Food*** [1997] 1 IR 539.

As to the finding by the trial judge that s. 5(1)(h) of the 1935 Act was inconsistent with Article 15.2.1 of the Constitution, Mr. Gallagher submitted that, in contrast to s. 5(1)(e) of the Act, which the court had held to be inconsistent with that Article in ***Laurentiu***, s. 5(1)(h) did contain sufficient principles and policies for the purpose of guiding and constraining the exercise by the Minister of his power to make secondary legislation. He said that such an approach was entirely consistent with the necessity for the Minister to have a discretion to make decisions within the ambit of the statute, citing in support the observations of Fennelly J. in ***Maher –v- Minister for Agriculture, Food & Rural Development*** [2001] 2 IR 139.

On behalf of the first and second named applicants, Mr. Gerard Hogan S.C. submitted that it was beyond dispute that s. 5(1)(b) did not expressly authorise the Minister to impose conditions by regulation as to the duration of stay of aliens or obliging them to comply with such conditions: still less did it authorise an immigration officer to impose such conditions on aliens. In these circumstances, while the appellants

were driven to argue that the power of the Minister or the immigration officer to attach such conditions was "*necessarily implied*" having regard to the provisions of s. 5(1), it was clear that there was no such necessary implication. Such a power could only be implied in exceptional cases and it would be extremely unlikely that the Oireachtas had intended to confer them in a criminal case such as the present. He cited in support the decisions of the High Court in ***An Blascaod Mór Teo. –v- Commissioners for Public Works in Ireland*** (unreported, Kelly J., judgment delivered December 19th, 1996) and ***Howard –v- Commissioners for Public Works in Ireland*** [1994] 1 IR 101. He submitted that, accordingly, the finding of the trial judge that Article 5(6) was *ultra vires* was correct.

Mr. Hogan further submitted that the trial judge was in error in concluding that Article 15 was *intra vires*: while the section enabled the Minister to make regulations as to registration, it was silent on the question as to whether an alien could be required to produce his identity documents. In the absence of any express power enabling an immigration officer, under pain of a criminal sanction to demand that an alien produce his documentation, there was no basis for treating s. 5(1)(h) as conferring such a power by implication.

Mr. Hogan further submitted that if, contrary to his submission, Article 5(6) was *intra vires*, it followed inevitably that s 5(1)(b) was inconsistent with the Constitution, since it left the Minister totally at large as to the imposition of conditions on aliens landing or entering the State. If the section was to be further construed, as contended for on behalf of the appellants, so as to give the Minister an untrammelled discretion to limit the duration of a stay, it would clearly fail the "*principles and policies*" test laid down in ***Cityview Press Ltd.*** and ***Laurentiu***. He further submitted that the same considerations applied to s. 5(1)(h) where the Minister was totally at large in respect of matters such as registration, change of abode, travelling, employments and occupation. Nor was there any guidance as to what the legislature had in mind when providing that the Minister could require aliens to comply with "*particular provisions*" as to such matters. He submitted that it followed that s. 5(1)(h) was also inconsistent with the Constitution as failing the "*principles and policies*" test.

Conclusion

I consider first the finding by the trial judge that Article 5(6) of the 1946 Order was *ultra vires* s. 5(1) of the 1935 Act.

It is clear that where, as here, the legislature has by statute delegated to a Minister or other body the power to enact subordinate

legislation, the latter will be *ultra vires* the parent statute if it is not, in the words of Henchy J., speaking for this court in ***Cassidy –v- Minister for Industry & Commerce***,:

> *"within the limitations of that power as they are expressed or necessarily implied in the statutory delegation."*

In the present case, the power conferred on the Minister by the legislature was to impose by order on aliens

> *"restrictions and conditions in respect of landing in or entering into Saorstát Eireann, including limiting such landing or entering to particular places or prohibiting such landing or entering at particular places …"* **(Emphasis added)**

It is no doubt the case that the Minister was not confined by the wording of s. 5(1)(b) to making regulations specifying the particular places at which an alien could enter the State or prohibiting the alien from entering the State at particular places. The use of the word "*including*" would seem to suggest that his power to impose restrictions and conditions on aliens in respect of their landing in or entering into the State was not intended to be so confined. It was obviously envisaged, for

example, that the regulations would provide for the interviewing by immigration officers of aliens entering the State.

Article 5(6), however, goes considerably further. It deals, not merely with the entry by an alien into the State: it purports to empower the imposing of a condition requiring the alien to leave the State after the expiration of a specified time. There is no indication in the wording of s. 5(1)(b) that the Oireachtas intended the Minister to enjoy such a power not did the granting of the power actually conferred carry with it any necessary implication that it would also extend to limiting the duration of stay of the alien. Even if s. 5(1)(b) could be read as conferring such a power either expressly or by implication, there is no indication of any intention on the part of the legislature to confer the power on any person other than the Minister, e.g. an immigration officer.

That conclusion is unaffected by the provisions of s. 5(1)(d) of the 1935 Act which empowers the Minister to

> *"impose on such aliens restrictions and conditions in respect of leaving Saorstát Eireann including limiting such leaving to particular places or particular means of travelling or prohibiting*

such leaving from particular places or by particular means of travelling."

Again, there is no indication of any intention on the part of the legislature to impose conditions requiring aliens to leave on the expiration of specified time or to confer on immigration officers powers of the kind actually granted by Article 5(6).

I am satisfied that the decision of the trial judge that Article 5(6) of the 1946 Order was *ultra vires* s. 5(1)(b) and (d) of the 1935 Act was correct. It is, accordingly, unnecessary to consider whether s. 5(1)(b) and (d) were in any event inconsistent with the Constitution and did not survive its enactment.

I am also satisfied that the trial judge was correct in holding that Article 5(15) of the 1946 Order requiring an alien to produce on demand his registration certificate (where applicable) or a passport or other document establishing an alien's nationality and identity was *intra vires* the provisions of s. 5(1)(h) of the 1935 Act. While that sub-paragraph does not expressly refer to requirements as to the production of a passport or other document establishing his nationality and identity, it is quite clear, in my view, that the expression "*other like matters*" in s. 5(1)(h)

would extend to the production of documents enabling the immigration authorities to establish the nationality and identity of an alien while in the State.

There remains the question as to whether s. 5(1)(h) is inconsistent with the Constitution and did not survive its enactment.

The test to be applied in resolving that issue is to be found in the well-known passage from the judgment of O'Higgins C.J. speaking for this court in ***Cityview Press –v- An Chomhairle Oiliúna***, i.e.

> *"…whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power."*

In ***Laurentiu***, where the constitutional validity of s. 5(1)(e) was in issue, the majority were of the view that, in delegating to the Minister the exclusive power of making provision for the exclusion or deportation of aliens (including aliens of a particular nationality), the legislature had abdicated its policy making rule in the entire area of exclusion and deportation to the Minister. In my judgment in that case, I emphasised that the provision under attack could not be construed as a formulation of the policy of the State in relation to the exclusion and deportation of aliens, leaving the detailed aspects of the policy to be filled in by subordinate legislation. Since the right to exclude and deport aliens derived from the character of Saorstát Eireann as a sovereign state, it was not vested in the State by virtue of the 1935 Act. It followed that the only policy being implemented by the 1935 Act and the delegated legislation purportedly made thereunder was the regulation of the exercise of that sovereign power by the executive. Conferring the exclusive right so to regulate its exercise on the Minister was not the choice of a particular policy by the legislature: it was the assignment to the executive by the legislature of exclusive responsibility for determining policy in that specific area, including decisions as far reaching as the exclusion from the State of all persons of a particular nationality.

No such considerations, in my view, arise in the case of s. 5(1)(h). The policy enunciated is plain: the desirability of regulating the registration, change of abode, travelling, employment and occupation of aliens while in the State and the further desirability of regulating "*other like matters*". The use of the expression "*particular provisions*" in this context is, in my view, unexceptionable: it was entirely appropriate for the legislature to specify the matters which they considered required regulation, while leaving it to the Minister to put in place specific regulatory provisions. Similarly, the use of the expression "*other like matters*" is what one would expect in a provision conferring a power of delegated legislation: the use of the phrase "*other like matters*" is peculiarly appropriate where the broad scope of the envisaged regulations is being set out in statutory form. To require the legislature either to specify the "*particular provisions*" or the "*other like matters*" in the parent legislation itself would be to negate the whole purpose of the power admittedly enjoyed by the Oireachtas to provide for delegated legislation. As Fennelly J. observed in ***Maher –v- Minister for Agriculture***:

> *"This type of delegated legislation is, by common accord, indispensable for the functioning of the modern state. The necessary regulation of many branches of social and economic*

activity involves the framing of rules at a level of detail that would inappropriately burden the capacity of the legislature. The evaluation of complex technical problems is better left to the implementing rules. They are not, in their nature such as to involve the concerns and take up the time of the legislature. Furthermore, there is frequently a need for a measure of flexibility and capacity for rapid adjustment to meet changing circumstances."

I would accordingly allow the appeal to that extent and set aside the decision of the trial judge that s. 5(1)(h) was inconsistent with Article 15.2 of the Constitution and had not survived the enactment of the Constitution.

It follows that in the case of the second named applicant there should be substituted for the order of the High Court an order dismissing his claim for relief by way of judicial review.

Since, however, I am satisfied that the trial judge was correct in the case of the first named applicant in finding that Article 5(6) of the 1946 Order was *ultra vires* s 5(1)(b) and (d) of the 1935 Act , it follows that in her case, in my view, the court must consider whether s. 2 of the Immigration Act, 1999 is invalid having regard to the provisions of the Constitution.

THE SUPREME COURT

Keane C.J.
Murray J.
M[c]Guinness J.
Fennelly J.
M[c]Cracken J.

BETWEEN

39 & 53/04

ILONA LEONTJAVA

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DISTRICT JUDGE MARY COLLINS

NOTICE PARTY

BETWEEN

40 & 52/04

LIU CHANG

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DISTRICT JUDGE BROPHY

NOTICE PARTY

JUDGMENT delivered the 23rd day of June 2004, by Fennelly J

I fully agree with the orders proposed by the Chief Justice and with his reasoning in all matters save one point of detail. This concerns the reason for concluding that Article 5 of the Aliens Order, 1946 as inserted by Article 3 of the Aliens (Amendment) Order, 1975 is *ultra vires* the power conferred on the Minister by section 5(1) of the Aliens Act, 1935.

The section authorised the Minister by order to do *"all or any of the following* [listed] *things in respect either of all aliens or of aliens of a particular nationality or otherwise of a particular class, or of particular aliens…"* Article 5(1) purported to confer a number of powers on an immigration officer. Nothing in the authorising section entitled the Minister to delegate his powers in this way. For this reason, I agree with the Chief Justice that the Article 5(6) is *ultra vires* the section.

I part company with the Chief Justice's judgment in relation to one point only. I believe that it was within the power conferred by the section to make orders authorising the imposition of conditions affecting the length of stay of aliens. Section 5(1)(b) speaks of *"restrictions and conditions in respect of landing in or entering into Saorstát Eireann..."* I believe that it is inherent in the very notion of authorising an alien to land in the State that provision be made for the duration of his permitted stay. It is something that arises so naturally from the very fact of entering a foreign country that it did not need to be spelled out. The first type of condition that would spring to mind, where an alien is given permission to enter the State is one relating to the duration of his or her permitted stay.

However, as I have already indicated, the Minister was not entitled to delegate this power to immigration officers, which is sufficient to invalidate the provision.