THE SUPREME COURT

No. 40/99

Hamilton C.J.
Denham J.
Barrington J.
Keane J.
Lynch J.

BETWEEN

SORIN LAURENTIU

APPLICANT/RESPONDENT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS/APPELLANTS

[Judgments by Denham J., Barrington J. (Dissenting), Keane J. and Lynch J. (Dissenting); Hamilton C.J. agreed with Denham J. and Keane J.]

Judgment of Denham J. delivered on the 20th day of May, 1999.

This is an appeal by the Respondents (hereinafter referred to as the State) against the decision of the High Court, Mr. Justice Geoghegan, delivered on the 22nd January, 1999. The Learned High Court Judge granted a declaration that Section *5* (l)(e) of the Aliens Act, 1935 was not carried over by Article *50* of the Constitution of Ireland, was inconsistent with. Article *15.2* of the Constitution of Ireland and does not form part of Irish law. The Learned High Court Judge also made consequential declarations that Article 13 (1) of the Aliens Order, 1946 and the Deportation Order regarding the Applicant/Respondent in this case were invalid.

The case turns on the issue as to whether the legislature could, in the terms of Section *5(1)(e)* of the Aliens Act, 1935 delegate to the Minister the power to deport aliens, or whether it is an impermissible delegation of legislative power contrary to Article 15.2.1 of the Constitution of Ireland.

SUBMISSIONS

Mr. John Finlay, S.C., on behalf of the State, submitted that *s.5(1)(e)* of the Miens Act, 1935 and Regulation 13 of the Aliens Order, 1946 are valid. He submitted that the right of the State to control the entry of aliens, their activity in the State and their departure, is part of the sovereign rights of the State. The exercise of that control is primarily an executive and administrative function. The entitlement of aliens is dependent on the consent of the appropriate authority. If that consent is refused or withdrawn the alien has no right to stay in the State. He submitted that what the Minister did was within the four corners of the Aliens Act, *1935.* He submitted that the policy of the Act is clear: aliens are only allowed into the State and to remain in the State with the permission of the Minister for Justice. The relevant

jurisprudence, he submitted, is to be found in ***Cityview Press Limited v. An Chomhairle Oiliúna*** [1980] IR 381 which was developed and supplemented in ***Harvey v. The Minister for Social Welfare*** [1990] 2 IR 232. He submitted that the appropriate methodology is to see if the enabling legislation, that is, Section *5* of the Aliens Act, *1935,* makes it inevitable and necessary that the Minister in making regulations under the Act would breach Article 15.2.1 of the Constitution. He submitted that applying that test the Act did not fail. He supported his argument by reference to the judgment of Keane J. in ***Carrigaline Community Television Broadcasting Co. Ltd. v. Minister for Transport, Energy and Communications*** [19971 1 ILRM 241.

Mr. Gerard Hogan, S.C., Counsel for the Applicant, submitted that s.5(1)(e) of the Aliens Act, 1935 gave excessive legislative powers to the Minister for Justice in that it effectively left the Minister at large insofar as the making of a Ministerial Order was concerned and it did not set out principles and policies upon which deportation orders were to be made; consequently, it did not survive the enactment of the Constitution. Further, he submitted that Article 13 of the Aliens Order, 1946 is a form of legislation outside the powers of legitimate delegation and contrary to Article 15.2.1 of the Constitution of Ireland. In oral argument he considered that there were three issues for the Court:

1. What is the proper test to apply in relation to Article 15.2.1 of the Constitution of Ireland? Is it the ‘principles and policies’ test of ***Cityview*** or has that been qualified by ***Harvey***?

2. Is the executive power of the State to deport an alien free-standing or can it be exercised only though legislation?

3. Given that the Oireachtas has legislated, does Section *5(1)(e)* of the Aliens Act, *1935* meet the appropriate test, which he submitted is the principles and policies test set out in Cityview?

Relevant Constitutional Articles

The relevant constitutional articles are:

Article 5

"Ireland is a sovereign, independent, democratic state."

Article 6

"1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."

Article 15.2.1

"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 28.2

"The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government."

Article 29.4.1

"The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government."

Article 34.1

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

The Statutory Scheme

The statutory scheme is the Aliens Act, *1935* (No. 14 of 1935) hereinafter referred to as 'the Act'. The long title of the Act described it as:

> "An act to provide for the control of aliens and for other matters relating to aliens."

The term 'alien' was defined as meaning:

> "a person who is not a citizen of Saorstát Eireann."

Section *5* set out provisions for the control of aliens. S.5(1) provides, inter alia:

> "The Minister may, if and whenever he thinks proper, do by order (in this Act refer 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:-
>
> (e) 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 of orders for that purpose."

As a consequence of that legislation the Minister for Justice enacted the Aliens Order, 1946, (5 .R. & 0. 395 of 1946). Regulation 13 thereof stated:

"(1) Subject to the restrictions imposed by the Aliens Act, 1935 (No. 14 of *1935),* the Minister may, if he deems it to be conducive to the public good so to do make an order (in this Order referred to as a deportation order) requiring an alien to leave and to remain thereafter out of the State.

(2) An Order made under this Article may be made subject to any conditions which the Minister may think proper.

(3) An alien with respect to whom a deportation order is made shall leave the State in accordance with the order, and shall thereafter so long as the Order is in force remain out of the State.

(4) An alien with respect to whom a deportation order is made, or a recommendation is made by a court with a view to the making of a deportation order, may be detained in such a manner as may be directed by the Minister, and may be placed on a ship, railway train or road vehicle about to leave the State, and shall be deemed to be in legal custody whilst so detained, and until the ship, railway train or road vehicle finally leaves the State.

(5) The master of any ship arid the person in charge of any passenger railway train or passenger road vehicle bound for any place outside the State shall, if so required by the Minister or by an immigration officer, receive an alien against whom a deportation order has been made and his dependants, if any, on board such ship, railway train or road vehicle and afford him and them proper accommodation and maintenance during the journey.

(6) Where a Deportation Order is made in the case of any alien the Minister may, if he thinks fit, apply any money or property of the alien in payment of the whole or any part of the expenses of or incidental to the transport from the State and the maintenance until departure of the alien and his dependants, if any."

Precedent

There has been significant case law on Article 15.2.1 of the Constitution. The first important analysis was in ***Pigs Marketing Board v. Donnelly (Dublin), Ltd.*** [1939] 1 IR 413. In that case Hanna J. stated at p.421:

> "It is axiomatic that powers conferred upon the Legislature to make laws cannot be delegated to any other body or authority. The Oireachtas is the only constitutional agency by which laws can be made. But the Legislature may, it has always been conceded, delegate to subordinate bodies or departments not only the making of administrative rules and regulations, but the power to exercise, within the principles laid down by the Legislature, the powers so delegated and the manner in which the statutory provisions shall be carried out."

Here, in effect, is the beginning of the principles and policies test. In this case it was alleged that the Pigs and Bacon Acts, *1935* and 1937 were unconstitutional under Article 12 of the 1922 Constitution whereby the legislature was given exclusive power to make laws and also unconstitutional under Article 15 of the Constitution of Ireland, 1937.

The first modem statement of a principles and policy test was in ***Cityview Press Limited v. An Chomhairle Oiliúna*** [1980] 1 IR 381 where at pp. 398-399 O'Higgins C.J. stated:

> "The giving of powers to a designated Minister or subordinate body to make regulations or orders under a particular statute has been a feature of legislation for many years. The practice has obvious attractions in view of the complex, intricate and ever-changing situations which confront both the Legislature and the Executive in modem State. Sometimes, as in this instance, the legislature, conscious of the danger of giving too much power in the regulation or order-making process, provides that any regulation or order which is made should be subject to annulment by either House of Parliament. This retains a measure of control, if not in Parliament as such, at least in the two Houses. Therefore, it is a safeguard. Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated or permitted by the Constitution. In discharging that responsibility, the Courts will have regard to where and by what authority the law in question purports to have been made. In the view of this Court, the test is 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."

This important case was itself based on a situation where, as McMahon J. stated in the High Court,

> "[I]t was agreed by the parties that under the Constitution (in particular Article 6, s.2, and Article *15*, s.2, sub-s.1) there is a limit upon the extent to which legislative power may be delegated to subordinate agencies by the Oireachtas, and that it is not competent for the Oireachtas by such delegation to abdicate its legislative function."

The principles and policies test continued to be applied. Thus, in ***The State (Gilliland) v. The Governor of Mountjoy Prison*** [1987] IR 201 Barrington J., having referred to the ***Cityview.Press*** case, stated at p.222:

> "In the Extradition Act, *1965*, the Oireachtas has laid down certain principles and policies which are incorporated in the law governing extradition in this country. It has also established certain machinery and procedures for controlling applications for extradition. But it has left to the Government the question of whether an extradition treaty should be entered into with a particular country and what additional safeguards should be incorporated in it."

The Learned Judge applied the principles and policies test to the relevant Act. However, the decision as to whether Ireland should enter into an extradition treaty with a particular country and the incorporation of additional safeguards, if any, was left to the Government. It is of relevance to this case to note that the function in issue - to determine whether an extradition treaty should be entered into with a particular country - is a classic example of an executive function. The legislature did not impinge on the executive function. The legislature did not delegate the power to a Minister. The executive, Government, proceeds with its function.

In ***McDaid v. Sheehy*** [1991] 1 IR 1 on the issue of the constitutionality of Section 1 of the Imposition of Duties Act, 1957 (which empowered the government to, by order,

impose, vary or terminate any excise, custom or stamp duty) Blayney J., whilst a judge of the High Court, applied a principles and policy test and stated at p.9:

> "When this test is applied to the provisions of the Act of 1957 giving the Government power to impose customs and excise duties, and to terminate and vary them in any manner whatsoever, I have no doubt that the only conclusion possible is that such provisions constitute an impermissible delegation of the legislative power of the Oireachtas. The question to be answered is: Are the powers contained in these provisions more than a mere giving effect to principles and policies contained in the Act itself? In my opinion they clearly are. There are no principles or policies contained in the Act.... The fundamental question in regard to the imposition of customs or excise duties on imported goods is first, on what goods should a duty be imposed, and secondly, what should be the amount of the duty? The decision on both these matters is left to the Government. In my opinion, it was a proper subject for legislation and could not be delegated by the Oireachtas. I am satisfied accordingly that the provisions of the Act of 1957 which I cited earlier are invalid having regard to the provisions of the Constitution"

Mr. Justice Geoghegan found the above reasoning very helpful.

However, in ***McDaid v. Sheehy*** on appeal, as the Order in question had been validated by a section of the Finance Act, 1976, the Supreme Court did not consider the constitutional issue. Indeed, Finlay C.J. appeared to indicate a warning when he said at p.19:

> "The settled jurisprudence of this Court, to which I have referred, is against deciding the issue of constitutional validity in these circumstances. On the issues potentially arising in the instant case, there are practical considerations strongly supporting that jurisprudence.
>
> Amongst the many issues which could arise in the course of a challenge to the constitutional validity of this section would be questions as to whether in any particular instance, if the delegated legislation were impermissibly wide, that resulted in the annulment of both the statute and the order made pursuant to it, or whether it annulled the order only (c.f ***Harvey v. The Minister for Social Welfare*** [19901 2 IR. 232]"

In ***Harvey v. The Minister for Social Welfare*** at issue was what may be called a Henry VIII clause i.e. a statutory provision which gives authority to an administrative body to make delegated legislation which may amend legislation. Finlay C.J. stated at p.244:

> "The fourth submission made on behalf of the applicant is that the provisions of article 38, as inserted by the. Regulations of 1979, are in direct contradiction to the provisions of s.7 of the Social Welfare Act, 1979, and, as such, are an impemissible intervention by the Minister pursuant to the powers of making regulations vested in him by Section 75 of the Act of 1952, in the legislative function and is, therefore, an unconstitutional exercise of that power which breaches Article 15, s.2 of the Constitution. I accept that this submission is correct.
>
> Quite clearly, for the Minister to exercise a power of regulation granted to him by these Acts so as to negative the expressed intention of the legislature is an unconstitutional use of the power vested in him."

The Courts have held this type of delegated legislation to be unconstitutional, even if it does not create a new principle. This type of delegated legislation is not in issue in this case. Finlay C.J. set out at pp. 240-241 a methodology. He stated:

> "The impugned section having been enacted in 1952 is entitled to the presumption with regard to constitutional validity which has been laid down by this Court, and in particular falls to be construed in accordance with the principles laid down in the decision of this Court pronounced in ***East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General*** [1970] IR 317**.** This means that it must be construed so that as between two or more reasonable constructions of its terms that which is in accordance with the provisions of the Constitution will prevail over any construction not in accordance with such provisions. Secondly, it must be implied that the making of regulations by the Minister as is permitted or prescribed by s. 75 of the Act of 1952 is intended by the Oireachtas to be conducted in accordance with the principles of constitutional justice and, therefore, that it is to be implied that the Minister shall not in exercising the power of making regulations pursuant to that section contravene the provisions of Article 15, s.2 of the Constitution. The Court is satisfied that the terms of s. 75 of the Act of 1952 do not make it necessary or inevitable that a Minister for Social Welfare making regulations pursuant to

> the power therein created must invade the function of the Oireachts in a manner which would constitute a breach of the provisions of Article 15, s. 2 of the Constitution. The wide scope and unfettered discretion contained in the section can clearly be exercised by a Minister making regulations so as to ensure that what is done is truly regulatory or administrative only and does not constitute the making, repealing or amending of law in a manner which would be invalid having regard to the provisions of the Constitution.
>
> Without the necessity, therefore, for the Court to decide whether the terms of the Regulations of 1979, which have been quoted in this decision, do in fact constitute an invasion of the legislative function of the Oireachtas, the Court is satisfied that the applicant has not shown that the provision of s.75 of the Social Welfare Act, 1952, is invalid, having regard to the provisions of the Constitution and will so declare."

This methodology applies the presumption of constitutional validity: the rule of construction that where there are two or more reasonable constructions that which is constitutional will prevail. Specifically, it must be implied that the making of delegated legislation by the Minister is intended by the legislature to be in accordance with constitutional justice. It may be summarised by inquiring if the impugned regulation makes it necessary or inevitable that the Minister making regulations pursuant to the power must invade the power of the legislature contrary to Article *15.2.* This 'necessary or inevitable' test is apt in construing Henry VIII clauses, which was the issue in ***Harvey v. The Minister for Social Welfare***.

European Union

The Oireachtas is no longer the sole and exclusive legislature for the State. European Union Law applies directly to Ireland and membership necessitates certain legislation in Ireland. 5.3(2) of the European Communities Act, 1972 enables Ministers by regulation to implement the law. It was held in ***Meagher v. The Minister for Agriculture*** [1994] 1 IR 329

that the power to make regulations pursuant to s.3(2) of the Act of 1972 is necessitated by the obligations of membership of the State of the European Union and is therefore by virtue of Article 29.4.3, 4 and *5* immune from constitutional challenge. The community law has primacy.

Article *15.2* cannot be read alone. It must be read with Article *29.4.5.* Article 189 of the Treaty of Rome empowers the Council and Commission to, inter alia, make regulations and issue directives. A regulation has general application and is binding in its entirety and directly applicable to States. A directive is binding as to the result to be achieved. Article 189 leaves it to the national authority to chose the form and method for incorporating the European Law into national law. In ***Meagher v. The Minister for Agriculture*** the Minister in his choice had to have due regard to Article 15.2 and *29.4.5.* In that case the Minister made regulations under s.3 of the 1972 Act and this Court applied the principles and policies test. I stated:

> "If the directive left to the national authority matters of principle or policy to be determined then the 'choice' of the Minister would require legislation by the Oireachtas. But where there is no case made that principles or policies have to be determined by the national authority, where the situation is that the principles and policies were determined in the directive, then legislation by a delegated form, by regulation, in a valid choice. The fact that an Act of the Oireachtas has been affected by the policy in a directive, is a 'result to be achieved' wherein there is now no choice between the policy and the national Act. The policy of the directive must succeed. Thus where there is in fact no choice on a policy or a principle it is a matter appropriate for delegated legislation. If the directive or the Minister envisaged any choice of principle or policy then it would require legislation by the Oireachtas."

Thus even where, as in this case, the regulation amended a statute it was not a breach of Article 15.2 because it did not determine principles or policies - rather those principles and policies had been determined in the relevant Council directives, which are binding as to the results to be achieved.

This analysis is of interest to the Henry VIII type clause - but is tangential to this case. However, it does show the strength of the principles and policies test in our jurisprudence.

Comparative Case Law

United States of America

Counsel referred to comparative case law. Cases of the United States of America appear to have exercised an influence on the decision in ***Pigs Marketing Board v. Donnelly (Dublin), Ltd***. It is of importance to note that there is not a great body of jurisprudence in the United States on this aspect of constitutional law.

In ***Panama Refining Co. v. Ryan (1935) 293 U.S. 388*** federal legislation was struck down on the ground of excessive delegation. Chief Justice Hughes, in delivering the opinion of the Court, stated, at p.421:

> "The Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Art.I, § 1. And the Congress is empowered "To make all laws which shall be necessary and proper for carrying into execution" its general powers. Art.I, § 8, par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been

developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

In concluding on this topic the Chief Justice stated at p.430:

"Thus, in every case in which the question has been raised, the Court has recognised that there are limits of delegation which there is no constitutional authority to transcend. We think that **§** 9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress had declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

If **§** 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making functions, the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

In the same year in ***A.L.A. Schechter Poultry Corp. et al v. United States*** (1935) 295 U.S. 495 the Court stated at p.528:

"Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power."

The Court applied the test set out in ***Panama Refining Co. v. Ryan*** and looked to the statute to see if Congress had overstepped these limitations - whether it had itself established the standards of legal obligation, thus performing the essential legislative function or by failure to enact the standards had attempted to transfer the function to others. Whilst neither

decision has been overruled by the Supreme Court there appears to have developed a more relaxed view on the issue of delegated legislation; however, principles are required to be stated by the legislature.

Arising out of concern about sentencing disparities the U.S. Congress passed the Sentencing Reform Act, 1984 which established the United States Sentencing Commission as an independent body in the Judicial Branch with power to create binding sentencing guidelines establishing a range of determinate sentences for all categories of federal offences and defendants according to specific and detailed factors. In ***Mistretta v. United States*** (1989) 488 U.S. 361 the petitioner claimed that the Commission constituted a violation of the separation of powers principle and that Congress had delegated excessive authority to the Commission to structure the Guidelines. It was held that the Sentencing Guidelines were constitutional since Congress neither (1) delegated excessive legislative power to the Commission nor (2) violated the separation of powers principle by placing the Commission in the Judicial Branch, by requiring federal judges to serve on the Commission and to share their authority with non-judges or by empowering the President to appoint Commission members and to remove them for cause. On the delegation of power issue Justice Blackmun in delivering the opinion of the Court stated at p.371:

> "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U.S. Const., Art I. **§** 1, and we long have insisted that "the integrity and maintenance of the system of government ordained by the Constitution" mandate that Congress generally cannot delegate its legislative power to another Branch. *Field v. Clark*, 143 U.S. 649, 692 (1892). We also have recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. In a passage now enshrined in our jurisprudence, Chief Justice Taft, writing for the Court, explained our approach to such cooperative ventures: "In determining what [Congress] may

do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination." *J W Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 406 (1928). So long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorised to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." Id., at 409.

Applying this "intelligible principle" test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. See *Opp Cotton Mills, Inc. v. Administrator, Wage and Hour Div. of Dept. of Labour,* 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy"); see also *United States v. Robel,* 389 U.S. 258, 274 (1967) (opinion concurring in result). "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function." *Panama Refining Co. v. Ryan,* 293 U.S. 388, 421(1935). Accordingly, this Court has deemed it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co.* v. SEC, 329 U.S. 90, 105 (1946).

Until *1935,* this Court never struck down a challenged statute on delegation grounds.

...

In light of our approval of these broad delegations, we harbour no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements. Congress *charged* the Commission with three goals: to "assure the meeting of the purposes of sentencing as set forth" in the Act; to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records ... while maintaining sufficient flexibility to permit individualized sentences", where appropriate; and to "reflect, to the extent practicable, advancement in knowledge of human behaviour as it relates to the criminal justice process." 28 U.S.C. **§** 991(b)(l). Congress further specified four "purposes" of sentencing that the Commission must pursue in carrying out its mandate: "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant"; and "to provide the defendant with needed ... correctional treatment." 18 U.S.C. **§** 3553(a)(2).

In addition, Congress prescribed the specific tool - the guidelines system - for the Commission to use in regulating sentencing. More particularly, Congress directed the Commission to develop a system of "sentencing ranges" applicable "for each category of offense involving each category of defendant". 28 U.S.C. §994(b). Congress instructed the Commission that these sentencing ranges must be consistent with pertinent provisions of Title 18 of the United States Code and could not include sentences in excess of the statutory maxima. Congress also required that for sentences of imprisonment, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." §994(b)(2). Moreover, Congress directed the Commission to use current average sentences "as a starting point" for its structuring of the sentencing ranges. §994(m).

To guide the Commission in its formulation of offense categories, Congress directed it to consider seven factors: the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of the harm. caused by the crime; the community view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a particular sentence may have on others; and the current incidence of the offense. §§994(c)(1)-(7). Congress set forth 11 factors for the Commission to consider in establishing categories of defendants. These include the offender's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon crime for a livelihood. §994(d)(1)-(l 1). Congress also prohibited the Commission from considering the "race, sex, national origin, creed, and socio-economic status of offenders," **§** 994(d), and instructed that the guidelines should reflect the "general inappropriateness" of considering certain other factors, such as current unemployment, that might serve as proxies for forbidden factors, **§** 994(e).

In addition to these overarching constraints, Congress provided even more detailed guidance to the Commission about categories of offenses and offender characteristics. Congress directed that guidelines require a term of confinement at or near the statutory maximum for certain crimes of violence and for drug offenses, particularly when committed by recidivists. §994(h). Congress further directed that the Commission assure a substantial term of imprisonment for an offense constituting a third felony conviction, for a career felon, for one convicted of a managerial role in a racketeering enterprise, for a crime of violence by an offender on release from a prior felony conviction, and for an offense involving a substantial quantity of narcotics. §994(i). Congress also instructed "that the guidelines reflect ... the general appropriateness of imposing a term of imprisonment" for a crime of violence that resulted in serious bodily injury. On the other hand, Congress directed that guidelines reflect the general inappropriateness of imposing a sentence of imprisonment "in cases in which the defendant is a first offender who has not been convicted

of a crime of violence or an otherwise serious offense." §994(j). Congress also enumerated various aggravating and mitigating circumstances, such as, respectively, multiple offenses or substantial assistance to the Government, to be reflected in the guidelines. §§994(l) and (n). In other words, although Congress granted the Commission substantial discretion in formulating guidelines, in actuality it legislated a full hierarchy of punishment - from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives - and stipulated the most important offense and offender characteristics to place defendants within these categories.

We cannot dispute petitioner's contention that the Commission enjoys significant discretion in formulating guidelines. The Commission does have discretionary authority to determine the relative severity of federal crimes and to assess the relative weight of the offender characteristics that Congress listed for the Commission to consider. See **§** §994(c) and (d) (Commission instructed to consider enumerated factors as it deems them to be relevant). The Commission also has significant discretion to determine which crimes have been punished too leniently, and which too severely. §994(m). Congress has called upon the Commission to exercise its judgment about which types of crimes and which types of criminals are to be considered similar for the purposes of sentencing.

But our cases do not at all suggest that delegations of this type may not carry with them the need to exercise judgment on matters of policy. In *Yakus v. United States*, 321 U.S. 414 (1994), the Court upheld a delegation to the Price Administrator to fix commodity prices that "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" to stabilize prices and avert speculation. See id, at 420. In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), we upheld a delegation to the Federal Communications Commission granting it the authority to promulgate regulations in accordance with its view of "public interest". In *Yakus*, the Court laid down the applicable principle:

> "It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework "...only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible ***in*** a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose. ..." 321 U.S., at 425-426.

Congress has met that standard here. The Act sets forth more than merely an "intelligible principle" or minimal standards. One court has aptly put it: "The statute outlines the policies which prompted establishment of the Commission explains what the Commission should do and how it should do it, and sets out

specific directives to govern particular situations." *United States v. Chambless,* 680 F. Supp. 793, 796 (ED La. 1988).

Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labour-intensive task for which delegation to an expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Yakus v. United States,* 321 U.S., at 425-426. We have no doubt that in the hands of the Commission "the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose" of the Act. *Sunshine Coal Co. v. Adkins,* 310 U.S. 381, 398 (1940)."

This judgment sets out clearly the policies established by the legislature of the United States. The Supreme Court of the United States applied the "intelligible principle" test and found the delegation to be sufficiently specific and detailed. It found that Congress had requested the Commission to meet three goals which were spelt out. Further, Congress specified four purposes which the delegated authority must pursue, Congress prescribed the tool for the Commission to use and Congress directed the Commission, as a guide, to consider seven specified factors. In addition, Congress set forth eleven factors for the Commission to consider in establishing categories and the Congress also provided detailed guidance about categories of offences and offender characteristics. This case shows modem legislation in the United States of America giving a delegated discretion yet with detailed principles and standards set out by the legislature.

Australia

Comparative case law was also cited from Australia. ***In Chu Kheng Lim and Ors. v. Minister for Immigration. Local Government and Ethnic Affairs and Another*** (1992) 176 C.L.R. 1, the High Court of Australia considered the nature of the power to deport aliens.

Mason C.J. described (at p.1 0) the authority to deport an alien as “an incident of executive power”. Brennan, Deane and Dawson JJ. in a joint judgment stated at pp. 29-30:

> “The power to exclude or expel even a friendly alien is recognised by international law as an incident of sovereignty over territory. As Lord Atkinson, speaking for a strong Judicial Committee of the Privy Council, said in ***Attorney General (Canada) v Cain and Gilhula*** [1906] A.C. 542, at p. 546*:*
>
> > ‘One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests: Vattel, *Law of Nations,* book 1, s.231; book 2, s.125.
>
> His Lordship added:
>
> > ‘The Imperial Government might delegate those powers to *the governor or the Government* of one of the Colonies, either by royal proclamation which has the force of a statute - Campbell v. Hall - or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. If this delegation has taken place, *the depository or depositories of the executive and legislative powers and authority of the Crown* can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them.’ (Emphasis added).
>
> The question for consideration in ***Attorney General (Canada) v. Cain*** was whether the Canadian statute 60 and 61 Vict. c. 11 had validly clothed the Dominion Government with the power to expel an alien and to confine him in custody for the purpose of delivering him to the country whence he had entered the Dominion. The Judicial Committee concluded that it had. As the emphasised words in the above passage indicate, the power to expel or deport a particular alien, and the associated power to confine under restraint to the extent necessary to make expulsion or deportation effective, were seen as prima facie executive in character.
>
> ...
>
> In this Court, it has been consistently recognized that the power of the Parliament to make laws with respect to aliens includes not only the power to make laws providing for the expulsion or deportation of aliens by the Executive but extends to authorising the Executive to restrain an alien in custody to the extent necessary to make the deportation effective.”

In this case we see the principle that control of aliens is prima facie a matter for the executive. Also touched upon is the matter of the transfer of power to a Dominion and the role of Parliament and the executive. However, the cases do not refer to or relate to a country with a written Constitution where the separation of powers has been established and is relevant to the issue. The cases relate to British constitutional governance with the royal prerogative and parliamentary sovereignty, not a written Constitution with a separation of powers, such as is found in Ireland and the United States of America.

Separation of Powers

This is the first challenge to the Aliens Act, 1935 on Article *15.2* grounds. It is a novel issue upon which to review the Act. As O'Dalaigh C.J. said in ***The State (Quinn) v. Ryan*** [1965] IR 70 at p. 120:

> "... a point not argued is a point not decided; and this doctrine goes for constitutional cases ... as well as for non-constitutional cases

The submission calls up for consideration fundamental concepts as to the separation of powers and the nature of those separated powers.

Article 12 of the Constitution of Saorstát Éireann stated, inter alia, that the sole and exclusive power of making laws for the peace, order and good government of the Irish Free State was vested in the Irish Parliament. This wording had no precedent in any of the dominion constitutions. The reason for this wording given by Leo Kohn in The Constitution of the Irish Free State (London, 1932) at p.181, was:

"Its object was not indeed to fix the position of Parliament in the general framework of the Constitution, but to exclude any form of legislative interference by the British Parliament."

An echo of that wording may be seen in the Constitution of Ireland, 1937. It established clearly that the law-making authority for the State - the sole and exclusive power of making laws for the State - is vested in the Oireachtas.

That legislative power must be seen in the context of the Constitution of Ireland as a whole. The scheme created by the Constitution is based on the separation of powers. Ireland is a democratic State: Article 5. All powers of government, legislative, executive and judicial derive from the people: Article 6.1. These powers are exercisable only by the organs of State established by the Constitution: Article 6.2. In a classic exposition of the separation of powers three branches of government are established. To the legislature is given the sole and exclusive powers of making laws: Article *15.2.1* To the government is given the executive power of the State: Article 28.2 To the judges is given the judicial power: Article 34.1.

Thus, the general structure of the Constitution follows the doctrine of the separation of powers. A similar approach, though not identical, can be seen in the Constitution of the United States of America. The Irish structure is not a simple or clear-cut separation of powers. There is overlapping and impingement of powers. However, in a general sense there is a functional division of power.

Historically, the control of aliens is for the executive. Aliens are not mentioned in the Constitution. However, the executive of a State, as an incident of sovereignty, has power and control over aliens. If this case simply raised the issue of the nature and extent of executive power as to aliens it would be a different matter. It does not.

What is in issue?

The nature of sovereignty is not in issue. Nor is the ambit of the executive powers of the State. At issue is the power of the legislature to delegate. If the Act had never been passed then issues of sovereignty and executive powers would have been relevant. But the legislature having seized itself of the subject, its power to delegate, as it purported to do to the Minister, is the kernel of the case and the issue for decision. The constitutional power of the legislature to legislate being found in Article *15.2,* this case falls to be decided in the light of that Article and relevant case law.

Delegated Legislation

The Oireachtas is the legislative organ of the State. It has the exclusive power to legislate under the Constitution, subject to the European Union which does not arise in this case. However, it must exercise this power in accordance with the Constitution. Article *15.2* means that there are limits on the Oireachtas - while it is given the power to legislate it is the sole body with that power and as such has a duty to legislate and is constitutionally prohibited from abdicating its power. In accordance with the Constitution it is for the Court to determine whether the constitutional framework has been breached.

There are limits to permissible delegation by the organs created by the Constitution. The Oireachtas may not abdicate its power to legislate. To abdicate would be to impugn the constitutional scheme. The scheme envisages the powers (legislative, executive, judicial) being exercised by the three branches of government - not any other body. The framework of the Constitution, the separation of powers, the division of power, retains a system which

divides by function the powers of Government to enable checks and balances to benefit democratic Government. Also, in accordance with the democratic basis of the Constitution, it is the people's representatives who make the law, who determine the principles and policies. The checks and balances work as between the three branches of government - not elsewhere. Thus Article *15.2* must not be analysed in isolation but as part of the scheme of the separation of powers in the Constitution.

According to the Constitution and the law it is for the Oireachtas to establish the principles and policies of legislation. It may delegate administrative, regulatory and technical matters. The principles and policies test has been part of Irish case law since 1939 - as has been set out earlier in this judgment. It is somewhat similar to the case law requiring standards to be set by the legislature, for delegated legislation, in the United States of America.

The principles and policies test must be applied in accordance with constitutional presumptions as to the interpretation of legislation (favouring that which is constitutional) and presuming actions by Ministers and officials will be made in a constitutional fashion. However, none of these presumptions can determine this case. As this is not a Henry VIII clause case I reach no conclusions on that type of delegated legislation. Insofar as Harvey v. The Minister for Social Welfare related to a situation where it was purported to amend legislation by regulation, a special issue not relevant here, I find it neither relevant nor helpful.

There has not been extensive analysis of the principles and policies test. Partly this is because of the very nature of the issue. Each case depends on its own facts and requires that the principles and policies of those matters be set out in the legislation.

Mr. Finlay, S.C. for the State, submitted that the policy created by the legislature was that aliens were only allowed in the State and to remain in the State with the consent of the Minister. It is clear that the Oireachtas intended that aliens would be deported if in the opinion of the Minister the common good so required. However, principles and policies such as those discussed in Cityview and McDaid are not present. Standards, goals, factors, and purposes such as those set out in Mistretta are absent.

Counsel referred to factors which he argued were important in relation to this delegated legislation. Thus, the orders to be made by the Minister under Section 5 are subject to the provisions of Section 5 (8) which require them to be laid before the Houses of Parliament; the powers of the Minister are subject to the provisions of Section *5* (4) and Section *5 (5)* of the Act as well as other legislative measures such as the free movement provisions of European Union law to which effect is given in the State principally through the European Communities (Aliens) Regulations, 1977; the Minister must act in accordance with constitutional justice and fair procedures; although the deportation power is administrative/executive it is accepted that the Minister is subject to review by the Courts in accordance with the principles established in ***The State (Lynch) and Cooney,*** [1982] I.R .337 and ***O'Keeffe v. An Bord Pleanála*** [1993] 1 IR 39 the Minister's powers are subject to the provisions of the Constitution, (see for example ***Fajujonu v. The Minister for Justice*** [1990] 2 IR 151 where the family law principles of the Constitution came into play); the rule-making power in this case is the Minister who is politically accountable to the Oireachtas.

However, the two Houses of Parliament are not the Oireachtas; most of the legislative restrictions on the Minister are post-1935 and are not helpful to the interpretation of *s.5* (l)(e); even though the Minister must act in accordance with the principles of constitutional justice this does not correct the situation if there has been an unconstitutional delegation of

powers. The fact that the Minister is politically accountable to the Oireachtas, although an important factor, would be more relevant if the consideration was as to the exercise of an executive power alone. However, here, because the legislature legislated for the matter it has raised the issue of delegated legislation.

If there had been no legislation the situation would have a parallel to that of the issue of passports. That also is a classic example of an exercise of the executive power of a Sovereign Nation. There has been no legislation on this matter in Ireland. The scheme is run by a Minister of the executive. It must be run in a constitutional and fair manner. However, there is no issue of the constitutional ambit of delegated legislation as the Oireachtas has not sought to give the powers to the Minister.

The inherent authority of the State and The powers of the State incidental to sovereignty are not relevant. The issue in this case is net - the power of the legislature to delegate.

Conclusion

This case turns on Article *15.2* of the Constitution and its interpretation as regards delegated legislation. This raises the principles and policies test. One searches in vain to find principles and policies regarding deportation of aliens in the Act. The legislature grasped the power over aliens from the executive and then delegated inadequately to the Minister. It abdicated its power.

The Act was enacted at a time when the constitutional jurisprudence of the new State was unfolding and authority still being transferred one way or another to the new nation. The 1922 Constitution was in force. The principles test by Hanna J. was yet to be decided and the

formative cases of the U.S.A. Supreme Court referred to herein were decided the year the Act was passed. The Act was passed at the inception of modern case law on the issue of delegated legislation and in a State which was assuming its nationhood. However, the Act must now be reviewed under the 1937 Constitution and the powers of the Oireachtas thereunder, to see if it was carried over by Article *50*.

Analysed in accordance with Article *15.2,* as must be done, the Act was an abdication of the legislature's duty to set policies and principles. The power of the legislature must be protected. The power is for that body for the benefit of democratic government and may not be surrendered.

This case did not raise for decision any issue on the sovereign power of the State nor the inherent powers of the State. Thus, neither have been addressed.

For the reasons set out in the judgment I would dismiss the appeal.

JUDGMENT delivered on the 20th day of May, 1999 by Barrington, J

This appeal raises a net point on the consistency, or otherwise, with the Constitution of Section *5* (1) (e) paragraph (e) of the Aliens Act, *1935.*

The Applicant/Respondent (hereinafter referred to as the Applicant) was the subject of an Aliens Order made by the Minister pursuant to the provisions of Article 13 of the Aliens Order, 1946 (No. 395 of 1946). This Court has already held that Article 13 of the Aliens Order, 1946 is *intra vires* the powers of the Minister under Section *5(1)* (e) of the Aliens Act, 1935. (See Tang v. Minister for Justice [1996] 2 ILRM 46). The question for consideration in this case is whether the general power of deportation contained in Section 5(1) (e) of the Aliens Act, 1935 is itself consistent with the Constitution.

THE ALIENS ACT, 1935.

The Aliens Act, 1935 is described, in its long title, as:-

"An Act To Provide For The Control Of Aliens And For Other Matters Relating To Aliens ".

An alien is defined as a person who is not a citizen of Saorstát Eireann. The Act entitles aliens to hold property and makes them amenable to, and triable under, the law of Saorstát Eireann to the like extent in all respects as a citizen.

What it does not do is to allow to aliens generally any right to be in Saorstát Eireann.

Section *5* of the Act provides accordingly as follows:-

"5.- (1) The Minister 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 ,

(c) prohibit such aliens from leaving Saorstát Eireann and for that purpose prohibit such aliens from embarking on ships or aircraft in Saorstát Eireann;

(d) 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,

(e) 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 of orders for that purpose;

(f) require such aliens to reside or remain in particular districts or places in Saorstát Eireann;

(g) prohibit such aliens from residing or remaining in particular districts or places in Saorstát Eireann;

(h) 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.

(2) An aliens order may contain provisions for all or any of the following purposes, that is to say.-

(a) imposing such obligations and restrictions on the masters of ships entering or leaving Saorstát Eireann, the pilots or other persons in charge of aircraft entering or leaving Saorstát Eireann, railway companies whose railway lines cross the land frontier of Saorstát Eireann, and the drivers or other persons in charge of road vehicles entering or leaving Saorstát Eireann as may, in the

opinion of the Minister, be necessary for giving full effect to or securing compliance with such order;

(b) conferring on the Minister and on officers of the Minister, officers of customs and excise and the military and police forces of the State all such powers (including powers of arrest and detention) as are, in the opinion of the Minister, necessary for giving full effect to or enforcing compliance with such order,

(c) determining the nationality to be ascribed to aliens whose nationality is unknown or uncertain,

(d) in the case of an aliens order which provides for the exclusion or the deportation and exclusion of aliens, continuing the operation of such order and every order made thereunder notwithstanding any change in the nationality of the aliens or the alien to which such order or the order made thereunder relates;

(e) requiring hotelkeepers and innkeepers and other persons providing for reward on premises owned or occupied by them lodging or sleeping accommodation to keep registers of persons lodging or sleeping in such hotel, inn, or premises and to permit officers of the Minister and members of the police forces of the State to inspect and take copies of or extracts from such registers.

(3) If in any proceedings, whether civil or criminal, any question arises under or in relation to an aliens order or an order made under an aliens order whether any person is or is not an alien, or is or is not an alien of a particular nationality or otherwise of a particular class, or is or is not a particular alien specified in such order, the onus of proving (as the case may require) that such person is not an alien, or is not an alien of a particular nationality or of particular class, or is not such particular alien, shall lie on such person.

(4) An aliens order shall not apply to any of the following persons, that is to say. -

(a) the head of any diplomatic mission duly accredited to Saorstát Eireann, the members of the household of such head, and every member of the diplomatic staff of such mission whose appointment as such has been officially notified to the Minister for External Affairs or is otherwise entitled to diplomatic immunities and the spouse and child of such member,

(b) the consul-general and any consul or vice-consul in Saorstát Eireann of any other country and the spouse and child of such consul-general, consul or vice-consul,

(c) any persons to whom neither of the proceeding paragraphs of this sub-section applies who is declared by an order made by the

Minister for External Affairs to be an official representative in Saorstát Eireann of the Government of another country.

(5) An alien who is ordinarily resident in Saorstát Eireann and has been so resident for a period (whether partly before and partly after the passing of this Act or wholly after such passing) of not less than five years and is for the time being employed in Saorstát Eireann or engaged in business or the practice of a profession in Saorstát Eireann shall not be deported from Saorstát Eireann under an aliens order or an order made under an aliens order unless-

(a) such alien has served or is serving a term of penal servitude or of imprisonment inflicted on him by a Court in Saorstát Eireann, or

(b) the deportation of such alien has been recommended by a Court in Saorstát Eireann before which such alien was indicted for or charged with any crime or offence, or

(c) three months' notice in writing of such deportation has been given by the Minister to such alien.

(6) Every order made under the Aliens Restriction Acts, 1914 and 1991, and in force at the date of the passing of this Act may be amended or revoked by an aliens order, and until so revoked, and subject to any such amendment, shall continue in force and be deemed to have been made under this Act, and shall be an aliens order within the meaning of this Act.

(7) The Minister may, at any time, by order revoke or amend an aliens order previously made.

(8) Every aliens order and every order revoking or amending an aliens order shall be laid before each House of the Oireachtas as soon as may be after it is made, and, if a resolution is passed by either House of the Oireachtas within the next subsequent twenty-one days on which such House has sat after such order is laid before it annulling such order, such order shall be annulled accordingly, but without prejudice to the validity of anything previously done under such order.

(9) Whenever an order made under an aliens order is made in respect of aliens of a particular class, such order shall be published in the Irish Ofigiúil as soon as may be after it is made."

Section 10 of the Act reads as follows:-

"10 - (1) The Executive Council may by order exempt from the application of any provision or provisions of this Act, or of any aliens order, the citizens, subjects or nationals of any country in respect of which the Executive Council are satisfied that, having regard to all the circumstances and in particular the laws of such country in relation to immigrants, it is proper that the exemption mentioned in such order should be granted.

(2) Every order made by the Executive Council under this section shall be laid before each House of the Oireachtas as soon as may be after it is made, and, if a resolution is passed by either House of the Oireachtas within the next subsequent twenty-one days on which such House has sat after the order is laid before it annulling such order, such order shall be annulled accordingly, but without prejudice to the validity of anything previously done under such order.

(3) The Executive Council may, at any time, by order, revoke any order previously made by them under this section."

Finally, Section 11 is in the following form:-

"11- (1) The Minister may by order make regulations in relation to any matter or thing referred to in this Act as prescribed or to be prescribed, but no such regulation shall be made in relation to the amount of a fee without the consent of the Minister for Finance.

(2) Every regulation made by the Minister under this section shall be laid before each House of the Oireachtas as soon as may be after it is made, and W a resolution annulling such regulation is passed by either such House within the next subsequent twenty-one days on which such House has sat after such regulation is so laid before it, such regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder.

The power given by Section 10 was used to allow free movement between Ireland and the United Kingdom. Also, our accession to the European Economic Community led to the making of the European Communities (Aliens) Regulations, 1977 (SI. No. 393 of 1977) which granted certain rights to aliens who are nationals of a member State of the community.

Section 11 provides the machinery whereby orders contemplated by Section *5* (1) (e) can be made. But, as previously indicated the real issue in this case is whether it is competent for the Oireachtas to grant discretions such as that contained in the Section *5* (1) (e) of the Aliens Act, *1935*.

PRESUMPTION OF CONSTITUTIONALITY.

The Aliens Act, 1935 being a pre-constitutional statute, there can be no formal presumption that it does not violate the present Constitution. Nevertheless the onus still rests on the Applicant to show that it is inconsistent with the present Constitution and not therefore carried forward by Article *50.* Indeed, in the peculiar circumstances of the present case, where the attack on the Statute is based on Article 15 Section 2 of the present Constitution one could point out that the 1922 Constitution contained an almost identical provision.

Article 15 Section 2.1 of the present Constitution appears in a portion of the Constitution headed *"The National Parliament - Constitution and Powers"* and reads as follows:-

Article 15.

2. 1 "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.

2 Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures ".

Article 12 of the Constitution of the Irish Free State provided, *inter alia,* as follows:-

"The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State is vested in the Oireachtas ".

For the purposes of this case I would be of the view that the difference of wording between the relevant provisions of Article 15 of the present Constitution and of Article 12 of the Constitution of the Irish Free State are so slight that if the Aliens Act, 1935 could be presumed to be not in conflict with the relevant provisions of the Constitution of the Irish Free State it could also

be presumed to be not in conflict with the relevant provisions of the present Constitution.

For many years it was assumed that, because the Constitution of the Irish Free State could be amended during all of its life by *"ordinary legislation"* that any piece of legislation which, incidentally, conflicted with the Constitution amended *it pro tanto* even though it was not expressed to be an Act to amend the Constitution. This doctrine is derived from a passage in the Judgment of O'Connor M.R. in ***R (Cooney) v. Clinton*** (delivered in 1924 but not reported until 1935, see [1935] IR 245, 247. The passage in question reads as follows:-

> "It was urged that any Act of Parliament purporting to amend the Constitution should declare that it was so intended, but I cannot accede to that argument in view of the express provision that any amendment made within the period may be made by ordinary legislation ".

But if one looks at Article 50 of the Constitution of the Irish Free State it seems quite clear that the Article uses the term *"ordinary legislation"* to distinguish amendments which may, for a limited period, be made by the Oireachtas itself from amendments which must be submitted to the people by way of referendum.

To derive from this distinction a doctrine that the Constitution could be amended by ordinary legislation which need not even be expressed to be a constitutional amendment showed scant respect to the Constitution. It also assumed that the Oireachtas had so little respect for the Constitution that they would amend it without thinking of what they were doing. It also had the practical disadvantage that one could not find out what the Constitution of the Irish Free State provided without reading the whole body of Statute law passed since 1922.

In any event this doctrine was abandoned by the modem Supreme Court in Conroy v. Attorney General *[1965]* JR 411 when it summarily rejected a submission that the Constitution of the Irish Free State must be taken to have been automatically amended by any provision of the Road Traffic Act, 1933 which was in conflict with it. (See p. 443)

For these reasons, therefore, I would approach this case on the basis that the onus of proving that Section *5* (1) (e) of the Aliens Act, 1935 is inconsistent with the Constitution rests on the Applicant.

THE SPECIAL POSITION OF ALIENS.

Article 15 Section 2 of the Constitution vests in the Oireachtas *"the sole and exclusive"* power of making laws for the State. It is an assertion of the power of the Oireachtas. That is why, for instance, Section *6* of the Offences Against the State Act, 1939 makes it a criminal offence punishable with up to ten years penal servitude for any person to take part in any way in any body of persons purporting to be a legislature not authorised under the Constitution. Certainly one could not deduce from the words of Article 15 alone that the Oireachtas had not power, within the Constitution, to pass laws of any particular kind.

One must bear this in mind when considering the case of Cityview Press Ltd. v. An Chomhairle Oiliúna and Ors. [1980] IR 381. In that case the attack on the constitutionality of the Industrial Training Act, 1967 was rejected by the High Court and, on appeal, by the Supreme Court, so that the remarks about the limitations on the Oireachtas's capacity to delegate its powers are *obiter.* More important, in that case Counsel were agreed on the principles to be applied and the dispute related merely as to how these principles were to be applied. As McMahon, J. put the matter at p. 389 of the Report:-

> "It was agreed by the parties that under the Constitution (in particular Article 6. s.2, and Article 15, s.2, sub-s. 1) there is a limit

> upon the extent to which legislative power may be delegated to subordinate agencies by the Oireachtas, and that it is not competent for the Oireachtas by such delegation to abdicate its legislative function. Counsel were not able to find any authority of our Courts upon the question but the Court was referred to a number of decisions of the Supreme Court and of State Courts of the United States of America; the parties agreed that the general principles which were expounded in such authorities are applicable to the constitutional position in our law ".

The reference to Article 6 is important. Article 6 provides that all powers of Government *"legislative, executive and judicial* ' derive, under God, from the people and goes on to provide that these powers of Government are excercisable *"only by or on the authority"* of the organs of State established by the Constitution.

Counsel maintained that common approach to the case in the Supreme Court and it is clear from their submissions that both sides relied on the Theory of Separation of Powers, and that the problem was how that theory was to be applied to the particular circumstances of that case. Both sides appear to have been agreed that one way of reconciling the powers of legislature with those of

the executive was if the legislature formulated policy and the executive implemented it.

The Court accepted these principles, used them to test the Statute, and found that the Statute survived the test.

But the purpose of the Theory of Separation of Powers is to protect the rights of the citizen. Absolute power may not be delegated to any executive agency because to do so would be inconsistent with the rights of the citizen. On the theory of the separation of powers, the rights of the citizen will be secure only if the legislature makes the laws, the executive implements them and the judiciary interprets them.

One of the tasks of legislation is to strike a balance between the rights of individual citizens and the exigencies of the common good. If the legislature can strike a definitive balance in its legislation so much the better. But the problem which confronted the Court in the Cityview Press case is that the facts of modem society are often so complex that the legislature cannot always give a definitive answer to all problems in its legislation. In such a situation the legislature may have to leave complex problems to be worked out on a case by case basis by the executive. But even in such a situation the legislature

should not abdicate its position by simply handing over an absolute discretion to the executive. It should set out standards or guidelines to control the executive discretion and should leave to the executive only a residual discretion to deal with matters which the legislature cannot foresee.

This, as I understand it, was the reasoning of the learned High Court Judge in the present case and the reasoning appears to me to be perfectly sound. Where I, respectfully, disagree with the learned High Court Judge is in his application of this reasoning to the facts of the present case. The reasoning was developed in an effort to strike a balance between the rights of the individual citizen and the exigencies of the common good. But there is no such balance to be struck in the present case for the simple reason that, under our law, an alien has, generally speaking, no right to reside in Ireland. That is the principle on which the 1935 Act rests. It is important to remember that we are here dealing, not with the Rule, but with the exception.

That is why the 1935 Act is entitled an Act *"For the control of aliens"* The Act accepts that a number of aliens may in fact be in Ireland and provides that they are to be subject to the normal civil and criminal law as these affect citizens. The Act protects diplomatic and consular officials and authorises the Minister to make special provisions concerning the Masters of ships, the pilots

of aircraft, railway companies whose railway lines cross the land frontier and the drivers of road vehicles entering or leaving the State. But the draconian nature of the Act is well illustrated by Section *5 (5)* which provides, in effect, that an innocent alien who has been ordinarily resident in the State for upwards of five years may not be deported unless he has received three months advance notice of such deportation in writing.

If one is to glean the policy of the Act from its terms it would appear to be that generally speaking aliens have no right to be in Ireland and may be excluded or deported at any time unless the Minister sees some reason for allowing them to remain.

RULE OF LAW.

Mr. Hogan S.C. (on behalf of the Applicant) submits and, Mr. Finlay S.C., in large measure, concedes that there are certain limits placed on the powers of the Oireachtas and of the powers of the Minister which derive from the fact that Ireland is a country governed by law. Thus the Oireachtas would not be competent to delegate to the Minister power to amend the Aliens Act itself. Likewise if the Oireachtas were to delegate to the Minister a discretion which on its face appeared absolute the Minister could not use this discretion to amend the Aliens Act itself. So also if an alien were to get involved in civil or

criminal litigation he would, generally speaking, have the same rights as any other litigant. Moreover the State will not be permitted to give inconsistent reasons for deporting an alien. It cannot refuse him a work permit and then say that the reason for deporting him is that he cannot support himself. All of these matters are important but must not be allowed to obscure the central issue in this case which is that an alien has no right to be in Ireland save only with the consent of the Minister for Justice.

PREVIOUS CHALLENGES TO ACT.

The Aliens Act has survived many previous constitutional challenges. In ***Pok Sun Shum v. Ireland*** [1986] ILRM 593 the plaintiff who was an alien married to an Irish citizen, and who had been served with a deportation order, sought to challenge the order and the Act on the basis that they violated the family provisions of the Constitution.

Costello, J. rejected the challenge stating at pages 596-7:-

"Mr. Gaffney SC submitted on behalf of the plaint ifs that because of the very entrenched provisions of the family rights in the Constitution, these could not be trenched upon, in any way, by the State and, in particular, by the Aliens Order. He went so far as to answer a question I put, to say that Wan alien landed in the State on one day

and married the next day to an Irish citizen in the State, the State was required, by the Constitution, to safeguard the rights which were given to the family, and these could not be taken away by the Aliens Act 1935. In other words, the order made under the Aliens Act 1935 was unconstitutional. I cannot accept that view. I do not think that the rights given to the family' are absolute, in the sense that they are not subject to some restrictions by the State and, as Mrs. Robinson SC has pointed out, restrictions are, in fact, permitted by law, when husbands are imprisoned and parents of families are imprisoned and, undoubtedly, whilst protected under the Constitution, these are restrictions permitted for the common good on the exercise of its rights. It seems to me that the Minister 's decisions and the Act, and orders made under it are permissible restrictions and I cannot hold that they are unconstitutional ".

Later in the same year Gannon, J. in ***Osheku v. Ireland*** [1986] IR 733 rejected a similar challenge stating at page 746:-

"The control of aliens which is the purpose of the Aliens Act, 1935, is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of

the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution ".

In the same case Gannon, J. made the following significant findings at page 749:-

(1) "The Aliens Act, 1935, and the statutory orders of 1946 and of 1975 are not inconsistent with the Constitution.

(2) The said statutory orders of 1946 and 1975 and any implementation thereof by the Minister for Justice are not ultra vires the authority conferred by the Aliens Act, 1935, nor inconsistent with the Constitution.

(3) Mr. Osheku the first plaintiff is not entitled to remain nor reside in nor leave nor re-enter the State otherwise than in conformity with the Aliens Act, 1935, and the orders thereunder.

(4) Mr. Osheku is not entitled to remain in nor reside in nor leave nor re-enter the State save in compliance with the restrictions or requirements of the Minister for Justice in pursuance of the Aliens Act and orders.

(5) An order by the Minister for Justice deporting Mr. Osheku the first plaintiff made in the due exercise of the discretion vested in him by the Aliens Act, 1935, and the statutory orders thereunder, would not infringe the constitutional rights of any of the plaintiffs ".

In the following year (1987) the issue of the constitutionality of the Aliens Act, 1935, came before me in the case of ***Fajujonu & Ors. v. The Minister for Justice and Ors*** [1990] 2 IR 151.

The first and second plaintiffs in that case were a Nigerian and a Moroccan citizen respectively, who had been married in London in 1981, and who, shortly thereafter had come to live in Ireland and had remained in Ireland without notifying the Minister for Justice of their presence. Shortly before the institution of proceedings Mr. Fajujonu had been asked by the Minister for

Justice to make arrangements to leave the State and it was this request, coupled with the fear that deportation order would follow, which gave rise to the proceedings.

The case was one of considerable hardship. At the date of the hearing before me Mr. Fajujonu and his wife had been resident in the State for upwards of six years. They had three young children all of whom had been born in Ireland. In 1983 they had been given a house by Dublin Corporation in Ballyfermot. They were apparently popular with the local community. The Secretary of the local Tenants Association, Mr. Larkin gave evidence on their behalf at the hearing before me. Indeed it would appear that it was a request by the Committee of the Ballyfermot Sports and Leisure Complex to employ Mr. Fajujonu which brought his presence in the country formally to the attention of the Department of Justice.

However, as I stated at page 153 of my Judgment:-

> the issue of principle which the plaintiffs seek to raise in this case arises not from any of these matters but from the fact that the third plaint if Miriam Fajujonu, is a citizen of Ireland having been born here on the 24th September, 1983. Since then Mr. and Mrs. Fajujonu have had two further children. These also are Irish citizens and,

though they have not joined as parties to these proceedings, the same issues arise in relation to them as arise in Miriam ‘s case

However I felt obliged to follow the decisions in ***Osheku v. Ireland*** and ***Pok Sun Shun v. Ireland*** with which I expressed myself to be in agreement.

When the matter came on appeal before the Supreme Court Mr. and Mrs. Fajujonu had been resident in the State for upwards of eight years. In the Supreme Court the Appellants formally abandoned their attack on the constitutionality of Section *5* of the Aliens Act, 1935 and sought instead guidance as to the way the Minister should exercise his discretion under the Section having regard to the period of time during which the parents had been resident within the State and having regard to the fact that the children were Irish citizens. The Court accordingly dismissed their appeal on the constitutionality of the Act but, in the peculiar circumstances of the case, allowed them to make the alternative case concerning the exercise of ministerial discretion. As Finlay, C.J. (with whom Griffin, J., Hederman, J. and McCarthy, J. agreed) put the matter at [1990] 2 IR 160, 162.

“When the matter came before this Court on appeal the case really made on behalf of the plaintiff by Mr. McDowell was not an assertion of the absolute right incapable of being affected by the provisions of

the Act of 1935, but rather the assertion of a constitutional right of great importance which could only be restricted or infringed for very compelling reasons. Notwithstanding the fact that this was not the case which had been made in the court below, and notwithstanding the fact that it is difficult to fit it comfortably within any of the grounds of appeal which were contained in the notice of appeal, in the interests of justice this Court considered this submission and argument and the reply of the respondents to it.

I have come to the conclusion that where, as occurs in this case, an alien has in fact resided for an appreciable time in the State and has become a member of a family unit within the State containing children who are citizens, that there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that prima facie and subject to the exigencies of the common good that that is a right which these citizens would be entitled to exercise within the State.

I am also satisfied that whereas the parents who are not citizens and who are aliens cannot, by reason of their having as members of their family children born in Ireland who are citizens, claim any constitutional right of a particular kind to remain in Ireland, they are

entitled to assert a choice of residence on behalf of their infant children in the interests of those infant children.

Having reached these conclusions, the question then must arise as to whether the State, acting through the Minister for Justice pursuant to the powers contained in the Aliens Act, 1935, can under any circumstances force the family so constituted as I have described, that is the family concerned in this case, to leave the State. I am satisfied that he can, but only if after due and proper consideration, he is satisfied that the interests of the common good and the protection of the State and its society justifies an interference with what is clearly a constitutional right ".

It is quite clear from the passage quoted (and in particular from the last paragraph) that Finlay, C.J. was satisfied that the Act was not inconsistent with the Constitution but that the Minister, in exercising his discretion, would have to give due and proper consideration to all the circumstances of this case.

The emphasis in the Judgment of Walsh, J. (with which Griffin, J. Hederman, J. and McCarthy, J. also agreed) is slightly different. He warned, for instance that the Minister could not give inconsistent reasons for a

deportation order. The State could not, while denying Mr. Fajujonu a work permit deport him, because of his poverty.

Walsh, J. however was also of the opinion that the Aliens Act was not inconsistent with the Constitution. At page 166 of the Report he says:-

> "In view of the fact that these are children of tender age, who require the society of their parents and when the parents have not been shown to have been in anyway unfit or guilty of any matter which make them unsuitable custodians to their children, to move to expel the parents in the particular circumstances of this case would, in my view, be inconsistent with the provisions of Article 41 of the Constitution guaranteeing the integrity of the family.
>
> The Act of 1935 did not in any way contemplate a situation in which infant citizens of this State could in effect be deprived of the benefit and protection of the laws and constitution of this State. In my view, therefore, the Act is not inconsistent with the Constitution. But it would be ultra vires the Act to exercise the powers which had been sought to be exercised by the Minister to disrupt this family for no reason other than poverty, particularly when that poverty has been effectively induced by the State itself".

The case of ***Tang & Ors. v. The Minister for Justice & Ors.*** [1996] 2 ILRM 46 was concerned with the validity of a departmental decision refusing the plaintiffs' permission to remain in the state. However the present Chief Justice, in the course of his judgment (at p. 59) had the following remarks to make concerning the position of aliens in Irish law:-

> "There is no provision of Irish law entitling the applicants without the consent of the minister to reside in the State for more than one month and without the consent of the minister the applicants are not entitled to remain in the State.
>
> The applicants have no right, legal or otherwise, to remain or reside in this State and had no permission so to remain or so reside; the letters dated 12 October 1993 did not purport to remove the applicants 'permission to remain in the State; they had no such permission and the letters referred to constituted a refusal to grant such permission. The applicants had sought and obtained from the learned trial judge an order of certiorari quashing the decision of the minister contained and communicated by the aforesaid letters.
>
> The quashing of the decision to refuse them permission to remain in the State does not in any way affect their status as aliens. In the absence of the consent of the minister, they have no right to remain in the State ".

DISCRIMINATION.

The control of aliens, though vested principally in the Minister for Justice, relates also to the foreign policy of the State and, in earlier times, was one of the prerogative powers of the Crown. In earlier times prerogative powers were used to authorise the settling in Ireland of Huguenot refugees from France and Protestant refugees from the Palatinate. Many of the sovereign States of Europe used such powers to entice to their countries workers with particular skills such as workers skilled in making silk or glass. At the present time the Government is considering the admission of refugees from Kosovo but the fact that some aliens are admitted does not mean that those not admitted are entitled to complain of discrimination. The reason is simple. They have no right to be in Ireland and the mere fact of their exclusion does not therefore constitute unlawful discrimination against them. The Minister may decide, in the interest of the common good, to admit a particular alien or aliens with particular qualifications such as doctors or computer experts. The Government has, under Section 10 of the Act, given rights, on a reciprocal basis, to British subjects and, at a later stage, to citizens of the Member States of the European Union. But the general power to exclude aliens still remains. This is legislation of a unique kind where the people who are the subject matter of the legislation are not recognised as having any right

to be in Ireland. It is unsafe therefore to test this legislation by reference to cases dealing with legislation designed to regulate the rights of citizens.

CONCLUSION.

The Aliens Act reflects the philosophy of the Nation State. Its unspoken major premise is that aliens have, in general, no right to be on the national territory. It cannot therefore be compared with normal legislation designed to reconcile the fights of the citizen with those of the State in the interests of the common good. On the central issue the Act does not regard the aliens as having any right to be in Ireland though it allows to the Minister a discretion to make exceptions in certain cases. I don't think it matters whether the discretion of the Minister derives historically from the prerogative powers of the Crown or from some other source. The important point is that the Oireachtas has seen fit to regulate this sphere of life and to do so on the basis of maintaining the distinction between citizens who have a right to reside in the State and aliens who have not. But, as the Fajujonu case illustrates, the Minister, having fairly considered all the matters involved in the case can still deport an alien even though his decision may incidentally cause hardship to the alien's children who may be citizens of Ireland.

Whether this system suits the needs of the modern world is another question. Already the State has had to make an exception to it to maintain the common market in labour between this State and the neighbouring island. Another major exception was required on our entry to the European Economic Community (as it then was). It may be that the increased movement of people in the modern world demands a different system. But this is a matter for the Oireachtas not for this Court.

I would reverse the Order of the learned trial Judge.

JUDGMENT delivered the 20th day of May, 1999 by Keane, J.

Introduction

The applicant in this case is a Romanian national who, before he left his native country in 1994, was a professional footballer. Three days after his

arrival in the United Kingdom from Romania he travelled to Ireland where he has since remained.

Immediately following his arrival in Ireland, he applied for asylum in the State under the provisions of the Geneva Convention relating to the Status of Refugees. Under those provisions, this State would be obliged to grant the applicant asylum if he were a refugee within the meaning of the Convention, i.e. a person who has left his native country because of a well founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. That application was made to the first named Respondent (hereafter "the Minister"), as was an application to remain in the State based on humanitarian considerations. The office of the United Nations High Commissioner for Refugees (hereafter "UNETCR") have set out certain principles and procedures to be applied by the contracting states in dealing with applications under the Convention in a document known as "the Von Arnim letter" which was in due course superseded by the "Hope Hanlan letter". It was not in dispute in this case that the Minister, in accordance with normal procedures, consulted with UNHCR before arriving at his decision.

That decision was to refuse the applicant's claim to be treated as a refugee under the Convention. An appeal was brought from it in accordance with the relevant procedure to the Interim Refuge Appeal Authority (the retired President of the Circuit Court, Mr. Justice O'Malley): he recommended that the

Minister's decision be affirmed and, accordingly, the Minister refused to alter his original decision. On the 12th March 1998, the Minister also refused the application for leave to remain on humanitarian grounds and the applicant's solicitor was informed that a deportation order had been made pursuant to the Aliens Order 1946 (hereafter "the 1946 Order"). On March 16th, 1998 the High Court gave leave to the applicant to apply for judicial review in respect of these decisions and interim relief restraining the deportation was also granted pending the outcome of the proceedings.

In the proceedings, the applicant claims a range of reliefs, including orders of *certiorari* quashing the various decisions to which I have referred on the grounds that the procedures to which I have referred had not been followed, that, in particular, the Von Arnim and Hope Hanlan principles had not been applied and that, in any event, Article 13 (1) of the 1946 Order, under which the applicant was purportedly being deported, was *ultra vires* the Aliens Act 1935 (hereafter "the 1935 Act") under which it was purportedly made. In addition, the applicant claimed a declaration that the relevant provisions of the 1935 Act were inconsistent with the provisions of the Constitution and, hence, had not survived the enactment of the Constitution.

A Statement of Opposition having been filed on behalf of the Appellants, the substantive case came on for hearing in the High Court before Geoghegan J. In a reserved judgment, he dealt first with the grounds other than those relating

to the constitutionality of the *1935* Act. Having come to the conclusion that the Applicant had not established his claim to be entitled to those reliefs, he went on to consider the constitutionality of the *1935* Act and concluded that s.5(1)(e) of the *1935* Act, which empowered the Minister to make orders in respect of the deportation of aliens, was inconsistent with Article 15(1) of the Constitution which vests the law making power for the State exclusively in the Oireachtas.

An appeal has now been taken to this court from that finding and the applicant, for his part, has cross appealed against the dismissal by the learned High Court judge of his claim for other relief by way of judicial review in respect of the decisions and order of the Minister.

The *1935* Act and its interpretation

The *1935* Act is described in the long title as:-

'An Act to provide for the control of aliens and for other matters relating to aliens."

Although one paragraph only of *s.5(1)* is challenged in these proceedings, the entire subsection must be set out. It provides that:-

"The Minister 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 Éireann,

(b) impose on such aliens restrictions and conditions in respect of landing in or entering into Saorstát Éireann, including limiting such landing or entering to particular places or prohibiting such landing or entering at particular places;

(c) prohibit such aliens from leaving Saorstát Éireann and for that purpose prohibit such aliens from embarking on ships or aircraft in Saorstát Éireann;

(d) impose on such aliens restrictions and conditions in respect of leaving Saorstát Éireann 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;

(e) make provision for the exclusion or the deportation and exclusion of such aliens from Saorstát Éireann and provide for and authorise the making by the Minister of orders for that purpose,'

(f) require such aliens to reside or remain in particular districts or places in Saorstát Éireann;

(g) prohibit such aliens from residing or remaining in particular districts or places in Saorstát Éireann;

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

Subsection (2) empowers the Minister to include in an aliens order provisions for a number of purposes which, in his opinion, may be necessary for giving full effect to or securing compliance with the order. These extend to

imposing specific obligations and restrictions on masters of ships, pilots, drivers etc. when leaving or entering the State and giving powers of arrest and detention to the Minister's officers, Customs and Excise officers and, the Defence Forces and the Gardaí.

Subsection (4) provides that an aliens order is not to apply, in general, to members of diplomatic or consular missions. Subsection *(5)* provides that, subject to certain qualifications, an alien who has been ordinarily resident in the State for not less than five years and is either employed or engaged in a business or profession is not to be deported under an aliens order.

Subsection (8) provides that

> "Every aliens order and every order revoking or amending an aliens order shall be laid before each House of the Oireachtas as soon as may be after it is made, and, if a resolution is passed by either House of the Oireachtas within the next subsequent twenty-one days on which such House has sat after such order is laid before it annulling such order, such order shall be annulled accordingly, but without prejudice to the validity of anything previously done under such order."

Section 10 of the Act should also be noted. It empowers the Executive Council (now the Government) to exempt by order nationals of any specified country from the provisions of the Act. It appears that the power has been exercised in respect of one country only, the United Kingdom. Our accession to the ECC, as it then was, in 1972 also led to the making of the European Communities (Aliens) Regulations 1977 (SI No. 393 of 1977) which established a different regime for aliens who were nationals of a member state.

In purported exercise of the power conferred by the *1935* Act, the Minister made the Aliens Order 1946 (SRO No. *395* of 1946) (hereafter "the 1946 Order"). Article 13 provides *inter alia* as follows:-

> "(1) Subject to the restrictions imposed by the Aliens Act, 1935 (No. 14 of 1935), the Minister may, if he deems it to be conducive to the public good so to do make an Order (in this order referred to as a deportation order) requiring an alien to leave and to remain thereafter out of the State.
>
> (2) An order made under this Article may be made subject to any conditions which the Minister may think proper.

(3) An alien with respect to whom q deportation order is made shall leave the State in accordance with the order, and shall thereafter so long as the Order is in force remain out of the State."

The provisions of the *1935* Act and the 1946 Order have been considered in a number of cases in the context of the Constitution. In ***Tang v. Minister for Justice*** High Court, unreported, Flood J, 11 October 1994, the High Court declared Article 13(1) of the Aliens Order 1946 to be *ultra vires* the powers conferred on the Minister by the 1935 Act because the parent Act did not expressly authorise the Minister to make a deportation order where he deemed it "conducive to the public good". That decision was reversed by this court, which found the 1946 Order to be *intra vires* the powers conferred on the Minister by s.1 1 of the 1935 Act (***Tang v. Minister for Justice*** [1996] 2 ILRM 46) In the course of his judgment in that case, Hamilton C.J. cited with approval the following passage from the judgment of Gannon J. in ***Osheku v. Ireland*** [1986] IR 733, 746:-

"The control of aliens which is the purpose of the Aliens Act, 1935, is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it

should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concorde maintained with other nations in accordance with the objectives declared in the preamble to the Constitution."

In the constitutionality of the 1935 Act was upheld, but it had not been challenged on the ground advanced in this case. That decision was followed by Barrington J as a High Court judge in ***Fajujonu v. Minister for Justice*** [1990] 2 IR 151, but again the ground relied on by the plaintiff was not the same as that advanced in the present case. The claim that the Act was unconstitutional was abandoned in the Supreme Court.

A similar view to that expressed by Gannon J. as to the inherent power of sovereign states to exclude and deport aliens has been taken in at least two

other common law jurisdictions, the United Kingdom and the United States. In ***R. v. Brixton Prison (Governor) Ex Parte Soblen*** [1963] 2 QB 243 Lord Denning, MR said (at p.3 00):-

> 'Although every alien, as soon as he lawfully sets foot in this country, is free, nevertheless the Crown is entitled at any time to send him home to his own country if, in its opinion his presence here is not conducive to the public good; and it may for this purpose arrest him and put him on board a ship or aircraft bound for his home country. That was clearly the law under the Aliens Order, 1916.... It is unnecessary to go into the state of the law before the Aliens Orders. I always understood that the Crown had a Royal Prerogative to expel an alien and send him home, whenever it considered that his presence here was not conducive to the public good."

It should also be noted that, although it was made clear in ***Oshekii*** that the vindication of the rights of the State itself could have as its consequence the restriction of the exercise of personal rights, circumstances may also arise in which the exercise by the Minister of his powers, or at least the manner in which they are exercised by him, must yield to the necessity to protect such

personal rights guaranteed by the Constitution. Thus, in ***Fajujonu v. Minister for Justice***, it was held that, while the parents who were the subject of the deportation order at issue in the case had no particular constitutional right to remain in Ireland, they were entitled to assert a choice of residence on behalf of their infant children, who were Irish citizens, in the interests of the children. It followed, accordingly, that the Minister could not make a deportation order in respect of the parents, unless he was satisfied, after due and proper consideration, that the interests of the common good and the protection of the State and its society justified an interference with the constitutional right of the children to remain within the family unit. (See in particular the observations of Finlay C.J., at p.162.)

In that case, Walsh J. (at page 166) said

"The Act of 1935 did not in any way contemplate a situation in which infant citizens of this State could in effect be deprived of the benefit and protection of the laws and Constitution of this State. In my view, therefore, the Act is not inconsistent with the Constitution..."

Since the challenge to the constitutionality of the *1935* Act was not pursued in this court, that observation was clearly *obiter* but, in any event, I do

not think that the learned judge was saying anything more than that the Act was not inconsistent with the Constitution by reason of any conflict with Article 41, guaranteeing the integrity of the family. It follows that the issue raised in this case as to whether the Act is inconsistent with the Constitution in trespassing on the exclusive law making role of the Oireachtas is *res integra.*

Delegated legislation

The increasing recourse to delegated legislation throughout this century in this and the neighbouring jurisdictions has given rise to an understandable concern that parliamentary democracy is being stealthily subverted and crucial decision making powers vested in unelected officials.

The exclusive law making role of the national parliament under the Constitution is set out in emphatic language in Article 15.2. 1 :-

> "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."

Historically, this Article can be seen as an uncompromising reassertion of the freedom from legislative control by the Imperial Parliament at Westminster of the new State. But it is also an essential component in the

tripartite separation of powers which is the most important feature of our constitutional architecture and which is enshrined in general terms in Article 6. At an early stage in the history of the Constitution, however, it was recognised that the practice of delegated legislation then well established had not been outlawed by this Article, provided it was exercised within certain defined limits. As Hanna J. put it, in one of the earliest decisions on the Constitution, ***Pigs Marketing Board v. Donnelly*** [1939] IR 413 (at page 421):-

> " ... the Legislature may, it has always been conceded, delegate to subordinate bodies or departments, not only the making of administrative rules and regulations, but the power to exercise, within the principles laid down by the Legislature, the power so delegated and the manner in which the statutory provisions shall be carried out. The functions of every Government are now so numerous and complex that of necessity a wider sphere has been recognised for subordinate agencies, such as boards and commissions. This has been especially so in this State in matters of industry and commerce. Such bodies are not law makers; they put into execution the law as made by the governing authority and strictly in pursuance therewith, so as to bring about, not their own views, but the result directed by the Government."

The reference to "the Government" in the last sentence might, I think, more appropriately have been to "the Oireachtas". Subject to that qualification, that passage still clearly represents the law and has been endorsed on more than one occasion by this court. In one such decision, ***Cityview Press & Anor. v. An Chomhairle Oiliúna & Ors.*** [1980] IR 381, O'Higgins C.J., speaking for the court, explained the criteria for determining whether the delegation of powers is permissible in somewhat more detail (at page 399):-

> "In the view of this court, the test is 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 filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power."

The learned Chief Justice pointed out that the statute being considered in that case contained a provision for the annulment of the regulations or orders

by either House, as does the 1935 Act. While recognising that this was a safeguard, he added:-

> "Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution.

A subsequent decision of this court, ***Harvey v. Minister for Social Welfare*** [1990] 2 IR 232**,** was strongly relied on by Mr. John Finlay, SC on behalf of the appellants/respondents in support of his general submission that s.5(1)(e) of the 1935 Act was consistent with Article *15(1)* of the Constitution. While he did not go so far as to say that it overruled ***Pigs Marketing Board v. Donnelly*** and ***Cityview Press & Anor. v. An Chomairle Oiliúna*** either expressly or by implication, he urged that it required the courts to adopt what he called a new "methodology" in assessing constitutional challenges grounded on Article *15.1.* The first task of the court, he said, was to determine whether the making of ministerial regulations apparently authorised by the impugned legislation necessarily invaded the exclusive legislative function of the Oireachtas. In determining whether they did, the court was obliged to assume

that the Minister would exercise his powers only in accordance with the Constitution. Hence, if they were capable of being exercised in a manner which did not invade the domain of the Oireachtas, they must survive the challenge to their constitutionality. Thus, in the present case, the impugned section empowers the Minister, not merely to prohibit the entry into Ireland of particular aliens or to order their deportation, but also, for example, to prohibit the arrival of all Romanian nationals or the deportation of any Romanian nationals already here. Such a determination might seem, at first sight, to go far beyond an administrative or regulatory measure and to constitute, not merely a policy decision, but one of a particularly unusual and startling nature. Mr. Finlay's submission, however, as I understood it, was that, if that was to be regarded as a policy decision it would be beyond the Minister's power in the light of Article 15.1, to make a regulation in that form and that, so construed, s.1 *5(1)(e)* was consistent with the Constitution.

The circumstances under consideration by this court in ***Harvey v. The Minister for Social Welfare*** are particularly relevant in coming to a conclusion as to whether that submission is well founded. The applicant had been awarded a widow's non-contributory pension on the death of her husband and was subsequently awarded a blind pension. The blind pension was withdrawn from her when she arrived at the age of 66 on the ground that the blind pension was a form of old age pension paid in advance of a person reaching a pensionable age

and, accordingly, did not continue after she had reached the pensionable age.

In the High Court, the plaintiffs claim was dismissed on the ground that the Minister for Social Welfare had correctly construed the regulations in arriving at what was accepted to be a harsh result. However, in this court, for the first time, the constitutionality of s.75 of the Social Welfare Act, 1952, under which the relevant regulation was purportedly made, was challenged on the ground that it permitted the Minister to legislate, contrary to Article *15.1.* An alternative submission was advanced that the regulation under which the blind pension had been withdrawn was ***ultra vires*** *s.75* of the 1952 Act.

This latter argument succeeded, because the effect of the regulation was to deprive the applicant of her entitlement to two pensions, although the social welfare code in general, and s.7 of the Social Welfare Act 1979 in particular, expressly envisaged that persons could be entitled to two pensions at the one time. The effect of the impugned regulation was, accordingly, to amend, at least by implication, specific provisions contained in the parent legislation.

In considering the challenge to the constitutionality of the parent legislation - which was dealt with first - Finlay CJ, delivering the judgment of the court, said:-

> "The impugned section having been enacted in 1952 is entitled to the presumption with regard to constitutional validity which has

been laid down by this Court, and in particular falls to be construed in accordance with the principles laid down in the decision of this Court pronounced in ***East Donegal Co-operative Livestock Mart Limited v. Attorney General*** [1970] IR 317. This means that it must be construed so that as between two or more reasonable constructions of its terms that which is in accordance with the provisions of the Constitution will prevail over any construction not in accordance with such provisions. Secondly, it must be implied that the making of regulations by the Minister as is permitted or prescribed by s.75 of the Act of 1952 is intended by the Oireachtas to be conducted in accordance with the principles of constitutional justice and, therefore, that it is to be implied that the Minister shall not in exercising the power of making regulations pursuant to that section contravene the provisions of Article 15, s.2 of the Constitution. The Court is satisfied that the terms of s.75 of the Act of 1952 do not make it necessary or inevitable that a Minister for Social Welfare making regulations pursuant to the power therein created must invade the function of the Oireachtas in a manner which would constitute a breach of the provisions of Article 15.2 of the Constitution. The wide scope and unfettered discretion contained in the section can clearly be

exercised by a Minister making regulations so as to ensure that what is done is truly regulatory or administrative only and does not constitute the making, repealing or amending of law in a manner which would be invalid having regard to the provisions of the Constitution.

The court in that case was, accordingly, not concerned with the judicial construction of Article 15.2 adopted in ***Pigs Marketing Board v. Donnelly*** or ***Cityview Press***. It was dealing with an entirely distinct issue, although one which obviously arose in the context of Article 15.2, i.e. as to whether, in the light of the presumption of constitutionality, it can be assumed that a Minister will not exercise a power of delegated legislation so as to repeal or amend existing law. Notwithstanding the general nature of the language used by the learned Chief Justice, I am satisfied that he was not addressing the "principles and policies" test adopted in the earlier decisions: those decisions are not referred to at any point in the judgment. It follows that the submission that the decision in ***Harvey v. The Minister for Social Welfare*** modifies in any sense the statement of the law in ***Pigs Marketing Board v. Donnelly*** and ***Cityview Press*** is unsustainable.

It must be remembered in this context that, in the course of his judgment in ***East Donegal Co-operative v. Attorney General***. Walsh J said (at page 34.1):-

> "... interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning."

Whatever else may be said of the legislation under consideration in the present case, it can hardly be suggested, in the context with which we are concerned, that it is in the slightest degree unclear or ambiguous. In the plainest of language it empowers the Minister to exclude and deport, not merely particular aliens, but whole categories of aliens determined by their nationality or "class". Yet, if Mr. Finlay's submissions are well founded, the Minister would be precluded from doing precisely what the Act says he can do, assuming such a determination could be regarded as a "policy" decision. There would, moreover, be little left of the decisions in ***Pigs Marketing Board v. Donnelly*** and ***Cityview Press*** on that view of the law, since it is difficult to imagine a case in which it could not be said that the Minister would, in any

event, be offending the Constitution in purporting to make use of policy making powers.

Since a judgment I gave as a High Court judge (***Carrigaline Company Limited v. Minister for Transport*** [1997] 1 ILRM 241) was also relied on by Mr. Finlay, I should refer to the passage in it from which he sought to draw support. That was a case concerned *inter alia* with the validity of regulations made under the Wireless and Telegraphy Act 1926-1988 in connection with the granting of licences. It was submitted that *s.5* of the 1926 Act which conferred the licensing power was invalid having regard to Article *15.2.1.* Having referred to ***Cityview Press Limited***. I went on (at page 289):-

> "While it is true that the 1926 Act allows much latitude to the minister in making the regulations under the Act and gives no express guidance - other than what can be gleaned from the long title - as to the criteria, if any, to be set out in such regulations for the granting and refusing of such licences, that does not mean that the minister in making the regulations is necessarily making use of illicit legislative powers.

Having gone on to cite part of the passage from the judgment of Finlay CJ in ***Harvey v. Minister for Social Welfare*** already referred to, I added (at page 290):-

> "The same considerations are applicable to the powers conferred by the 1926 Act. I am satisfied that this ground for challenging the validity of the legislation having regard to the provisions of the Constitution has not been made out.

It appears to me that the case in question might well have been determined solely by reference to the "policies and principles" approach adopted in ***Cityview Press Limited***. To the extent that my judgment in the ***Carrigaline Company Limited*** case suggests that the decision in ***Harvey v. Minister for Social Welfare*** is universally applicable to such cases, it was clearly wrong, and should not, in my view, be followed. I should add that the judgment was manifestly not delivered following a uniquely elaborate scrutiny in two separate hearings of the relevant constitutional provisions, as has happened in this case.

Applying the principles set out in the earlier decisions, Blayney J. as a High Court judge, held in ***McDaid v. Sheehy & Ors.*** [1991] 1 IR 1 that the power given by the Imposition of Duties Act *1957* to the Government to impose customs and excise duties, and to terminate and vary them in any manner, constituted an impermissible delegation of the legislative power of the Oireachtas. He pointed out that the Government were left entirely free to determine what imported goods were to have a duty imposed on them and to determine the amount of the duty: there were no principles or policies contained in the Act itself. Clearly, Blayney J. did not regard the conferring by the Oireachtas on the Government of an unrestricted power to determine what goods were to be subject to duty and the amounts of the duty as of itself constituting a "policy": it was rather the delegation of the relevant policy decisions to another agency, in that instance the Government.

The learned judge also found in that case that an order made in purported exercise of the provision which he had found to be unconstitutional had been confirmed by subsequent legislation and, for that reason, he refused the order of *certiorari* sought in respect of the order. That conclusion was upheld by this court, but a majority of the court also found that, having regard to the subsequent validation of the order in question, a pronouncement on the constitutionality of the legislation had not been necessary. In those circumstances, the appeal against the finding of unconstitutionality was

allowed, but solely on the ground that the issue was moot and the view of Blayney J. technically *obiter*.

The continuing vitality of the ***Cityview*** doctrine is further evidenced by one of the judgments in this court in ***O'Neill v. Minister for Agriculture and Food*** [1997] 2 ILRM 435. In that case, Murphy J, without determining the issue, expressed doubts as to whether the power given by the Livestock Artificial Insemination Act 1947 to the Minister for Agriculture and Food to make regulations for controlling the practice of artificial insemination of animals was constitutional, observing that:-

> "The difficulty of applying to the present case the tests enunciated by the former Chief Justice [in Cityview] is that the 1947 Act provides little guidance as to the policy or principles to be implemented by the minister or the regulations contemplated by the Oireachtas. It is not merely that the lack of policy or principles deprives the minister of suitable guidance but it also fails to provide any significant restriction on the ministerial power. This would be a reason for giving a wide construction to the power conferred on the minister and a consequential doubt as to the constitutionality of the statutory delegation."

The importance of the principles set out in these authorities in a jurisdiction with a written constitution founded on the separation of powers is confirmed by the jurisprudence of the United States Supreme Court which is considered in detail by Denham J in her judgment.

The Constitutionality of the 1935 Act

Since it was not enacted by the Oireachtas, the 1935 Act does not enjoy the presumption of constitutionality, although it was not, I think, seriously disputed that the onus was on the applicant to demonstrate that the impugned provision was inconsistent with Article 15.1. Moreover, as pointed out by the High Court of Saorstát Éireann in ***The State (Kennedy) v. Little*** [1931] IR 39 and O'Higgins C.J. in ***Norris v. Attorney General*** [1984] IR 36**,** it is to be assumed, in the case of the transitory provisions of both Constitutions, that it was intended that the existing body of law should be carried forward with as little dislocation as possible.

I am also prepared to assume, for the purposes of this case, that the power vested in the Minister by *s.5(1)(e)* will be exercised by him in accordance with the Constitution and that he will, where appropriate, apply fair procedures. While the presumption identified by Walsh J. in the ***East Donegal*** case is no doubt a corollary of the presumption of constitutionality itself, which, at least in the formal sense, does not arise in this case, the Minister, as a member of the Government established under the Constitution, is an office

holder under the Constitution. It would create an anomalous situation if the holder of such an office would be presumed to act in a constitutional manner when discharging his duties under an Act of the Oireachtas, but not where the duty arose under a law which, although it predated the Constitution, continued to be the law, because of its consistency with the Constitution.

The central issue in the case, however, is as to whether *s.5(l)(e)* of the 1935 Act infringes Article 15.1 because the principles and policies, if any, which are to be given effect to by orders made by the Minister in exercise of his powers under the provision are not set out in the statute itself.

In considering that question, it is helpful to examine more closely the expression "principles and policies". The "policy" of a particular legislative provision is presumably an objective of some sort which parliament wishes to achieve by effecting an alteration in the law. To take a clear cut example, the policy of legislation concerning rented property was initially to prevent the exploitation of tenants by drastically abridging freedom of contract. In more recent times, the Oireachtas took the view, prompted by the courts (see ***Blake v. Attorney General.*** [1982] IR 117) that the law was, in some areas at least, unduly weighted in favour of the tenants. Accordingly, the pre-existing law was altered so as to give effect to a different objective. However, as the use of the expression "principles and policies" in the plural by O'Higgins C.J. indicates and the example I have given illustrates, one can have different

policies underlying various provisions in the same legislation or legislative code.

In the present case, accordingly, it is necessary to identify first the alterations in the law, if any, effected by the relevant provisions and, secondly, the objective which was intended to be thereby achieved.

In considering what was the state of the law when the *1935* Act was enacted, I shall leave out of account, for reasons which will become apparent later, the legislation which was then in force and which was repealed by the *1935* Act itself. It is clear that, altogether apart from the provisions of the *1935* Act and any preceding legislation, Saorstát Éireann as a sovereign state enjoyed the power to expel or deport aliens from the State for the reasons set out in the judgment of Gannon J. in ***Osheku v. Ireland***. It is, of course, the case that in modern times, both here and in other common law jurisdictions, the exercise of the power is regulated by statute, but that does not affect the general principle that the right to expel or deport aliens inheres in the State by virtue of its nature and not because it has been conferred on particular organs of the State by statute.

An explanation of the manner in which the principle was applicable in the case of member states of the former British Commonwealth is to be found in the judgment of Lord Atkinson giving the advice of the Judicial Committee

of the Privy Council in ***Attorney General for Canada v. Cain & Gilhula*** [1906] AC 542 at p. *546*, viz.

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government or to its social or material interest: Vattel, Law of the Nations Book 1, s. 231; Book 2 s.125. The Imperial Government might delegate these powers to the governor or the Government of one of the colonies, either by royal proclaimation which has the force of the statute - ***Campbell v. Hall*** [1774] 1 Cowper, 204 - or by a statute of the Imperial Parliament, or by a statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them."

Article 51 of the Constitution of the Saorstát Éireann declared that the executive authority of the State was to be vested in the King, but the wording of the Article made it clear that, in effect, it was to be vested in the Executive Council which was to "aid and advise" the Crown in its exercise. In English constitutional theory, the executive power of the State, to the extent that it was not expressly delegated by legislation to other bodies, such as Ministers, was regarded as being vested in the Crown in the form of the royal prerogative. It was accepted by counsel in the present case that the power of the State to deport aliens independently of any statutory power was part of the prerogative power. It is unnecessary, in the context of the present case, to consider in any detail the vexed question as to the extent to which, and the form in which, the royal prerogative survived the enactment of the 1922 Constitution which was considered by this court in ***Webb v. Ireland*** [1988] IR 353 and ***Howard v. Commissioners of Public Works*** [1993] ILRM 665. It is sufficient to say that, in the light of the authorities to which I have referred, it is clear that, at the time the 1935 Act was enacted, the power of Saorstát Éireann to expel or deport aliens was, in the absence of legislation, vested in the Crown acting on the advice of the Executive Council.

The change, accordingly, effected in the law by s.5(1)(e) was not the conferring on the State of an absolute and unrestricted power to deport aliens: that power was already vested in the State. But it was now to be exercised by

the Minister in whatever manner he chose, subject only to the restrictions imposed elsewhere in the Act in the case of diplomatic and consular representatives and aliens who had been resident in the State for at least five years. In short, the objective of *s.5(l)(e)* was to enable the Minister to exercise, at his absolute and uncontrolled discretion, the power of deporting individual aliens or categories of aliens or, if he considered it a preferable course, to spell out himself in the form of regulations the restrictions or qualifications which should be imposed on the exercise of the power. The Minister in effect opted for the first course in making the 1946 Order and his exercise of the power was found by this court in Tang to be *intra vires* the powers conferred by s.11.

That was certainly an alteration in the law; but to describe it as a "policy" begs the question, since it assumes that such an alteration can properly be so described. The policy of the legislation was not to enable the State to deport aliens at its pleasure, subject only to whatever qualification, by legislation or otherwise, it elected to impose on the exercise of the power: that power was already vested in the State. The effect of the alteration was to enable the Minister, and not the Oireachtas, to determine, not merely the aliens or classes of aliens who should be deported, but also the modifications, if any, to which the exercise of the power should be subjected. Undoubtedly, the designation of categories of aliens as being either immune from, or subject to, deportation at the discretion of the State and the delineation in legislative form of

modifications on the exercise by the State of its powers in the area of deportation were policy decisions; but they were decisions which could henceforth be taken by the Minister. The Oireachtas had, in effect, determined that policy in this area should be the responsibility of the Minister, subject only to the restrictions to which I have already referred and, of course, to the power of annulment vested in either House. As Geoghegan J. succinctly put it:-

> "The Oireachtas of Saorstát Éireann did not legislate for deportation. It merely permitted the Minister for Justice to legislate for deportation."

The situation in this case is in some ways analogous to that which arose in ***McDaid v. Sheehy & Ors***. The central role in the raising of revenue allotted to Dáil Éireann under Article 17 of the Constitution had been effectively delegated in that case to the Government and, as Blayney J. found, such a delegation could not of itself be properly described as a "policy". It is difficult to see how the similar assignment in this case of the State's power to deport aliens to a minister could properly be regarded as a "policy".

It is quite usual to find that the exercise of the rule making power is subject to annulment by either House and I do not underestimate the value of such a provision. However, even in the hands of a vigilant deputy or senator, it

is something of a blunt instrument, since it necessarily involves the annulment of the entire instrument, although parts only of it may be regarded as objectional. In any event, I do not think that it could be seriously suggested that a provision of this nature was sufficient, of itself, to save an enactment which was otherwise clearly in breach of Article *15.1*.

It cannot be too strongly emphasised that no issue arises in this case as to whether the sovereign power of the State to deport aliens is executive or legislative in its nature: it is clearly a power of an executive nature, since it can be exercised by the executive even in the absence of legislation. But that is not to say that its exercise cannot be controlled by legislation and today is invariably so controlled: any other view would be inconsistent with the exclusive law making power vested in the Oireachtas. The Oireachtas may properly decide as a matter of policy to impose specific restrictions on the manner in which the executive power in question is to be exercised: what they cannot do, in my judgment, is to assign their policy making role to a specified person or body, such as a Minister.

It is instructive, in this context, to consider the manner in which the Minister actually exercised his powers under *s.5* when he came to make the 1946 Order. I have already cited in part Article 13 which relates to deportation: its remaining provisions are purely regulatory or administrative in nature.

However, the provisions of Article *5(3)* provide an interesting contrast. They are as follows:-

> "Leave to land in the State shall not be given to an alien coming from any place outside the State other than Great Britain or Northern Ireland, and leave to remain in the State for more than one month shall not be given to an alien who has come from Great Britain or Northern Ireland, unless the alien complies with the following conditions, that is to say.-
>
> (a) he is in a position to support himself and his dependents;
>
> (b) if desirous of entering the service of an employer in the State, he produces a permit in writing for his engagement issued to the employer by the Minister for Industry and Commerce,
>
> (c) he is not a lunatic, idiot, or mentally deficient,
>
> (d) he is not the subject of a certificate given to the immigration officer by a medical inspector that for medical reasons it is undesirable that the alien should be permitted to land;

(e) he has not been sentenced in a foreign country for any extradition crime within the meaning of the Extradition Acts 1870 to 1906,

(f) he is not the subject of a deportation order;

(g) he has not been prohibited from landing by the Minister;

(h) he fulfills such other requirements as may be directed from time to time by any general or special instructions of the Minister."

These provisions, which were subsequently replaced by the Aliens Order, *1975*, were clearly ***intra vires*** the wide-ranging powers given by s.5(1) of the *1935* Act. They also replicate to some extent provisions which were at one stage applicable to Ireland when part of the United Kingdom but which were contained in s.1 of the Aliens Act *1905* and not in any regulation or order made under that Act. Section 3 of the same Act provided for the deportation of "undesirable aliens" but only in specified circumstances, e.g. where an offence had been committed. The restrictions on the deportation power were to be found, accordingly, in the Act itself and not in delegated legislation.

It is convenient at this *juncture* to continue the account of the pre-1935 legislation. On the 5th August 1914, within hours of the beginning of the Great War, the Imperial Parliament at Westminister enacted the Aliens Restrictions Act, 1914. It enabled the Crown to make wide-ranging Orders in Council dealing with the admission and deportation of aliens

> "when a state of war exists ... or when it appears that an occasion of imminent national danger or great emergency has arisen...

The hope was no doubt entertained that these draconian powers would be available only for so long as the war lasted, but that was to prove as illusory as the expectation that the tax on income introduced by Pitt during the Napoleonic Wars would be equally short lived. In 1919, the same parliament enacted the Aliens Restrictions (Amendment) Act 1919 which provided in s.1 that the powers to which I have referred could now be exercised "at any time". It also provided for the repeal of the 1905 Act. The 1935 Act, while repealing both the 1914 and the 1919 Act, replaced them with legislation of similarly draconian severity.

It is doubtful whether the 1914 and 1919 Acts survived the enactment of the Constitution of the Irish Free State, Article 12 of which provided that:-

"The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Éireann) is vested in the Oireachtas."

While the wording is somewhat different from Article *15.1*, it would seem to follow inevitably that, if *s.5(1)(e)* was inconsistent with the provisions of Article *15.1*, of the present Constitution, the corresponding provisions in the 1914 and 1919 Acts were similarly inconsistent with the provisions of Article 12 of the Constitution of the Irish Free State, which contained transitory provisions similar to those contained in the present Constitution.

That, however, is of academic interest only, as is the question as to whether the 1935 Act itself survived at least until the enactment of the present Constitution. Pursuant to the provisions of Article *50* of the 1922 Constitution, as interpreted by the courts, the Oireachtas were entitled to amend the Constitution by ordinary legislation at the time the 1935 Act was enacted.

(See ***The State (Ryan) v. Lennon*** [1935] IR 170.) A difficult question has arisen in other cases as to whether the undoubted power of the Oireachtas to amend the 1922 Constitution by ordinary legislation extended to enactments which, although inconsistent with its provisions, did not purport in express terms to amend that Constitution. It had been held by the Court of Appeal of

Southern Ireland in ***R. (Cooney) v. Clinton*** [1935] IR 245 (actually decided in 1924) that the Constitution could be so amended, but that view appeared to have been rejected by this court in ***Conroy v. Attorney General and Another*** [1965] 41***1*** where it was said at page 443 that

> "...The court rejects the submission that the Constitution of Saorstát Éireann was amended by the Road Traffic Act 1933..."

However, in that case the court had already found that the corresponding provisions in the Road Traffic Act 1961 were constitutional and, accordingly, it necessarily followed that the 1933 Act was not in conflict with the provisions of the 1922 Constitution which were in similar terms to those under consideration in ***Conroy's*** case. A more complete statement of the position is to be found in the judgment of Ó Dálaigh C.J. in the subsequent case of ***McMahon v. Attorney General*** [1972] IR 69 where he said (at page 10 1):-

> "[The Electoral Act 1923] was passed within the initial eight years during which, pursuant to Article 50 of the Constitution of Saorstát Éireann, 1922, that Constitution could be amended by ordinary legislation. Moreover, in order that ordinary legislation should prevail over the Constitution, it was not necessary that it

should specify in what respect or in respect of what Articles it amended the Constitution of 1922. see the judgment of Hanna J in ***Attorney General v. McBride*** [1928] IR 451, 456. Subsequently, the Constitution (Amendment No. 16) Act 1929, extended the period of eight years (mentioned in Article 50) to sixteen years, with the effect that, during the existence of Saorstát Éireann it was at no time possible to challenge, as being unconstitutional, any ordinary legislation passed by the Oireachtas of Saorstát Éireann."

[See also ***Shanley v. Commissioners of Public Works*** [1992] 2 IR 477.]

Since, however, this particular issue was not fully argued in the present case and is in any event unnecessary to its disposition, I would not, for myself, express any concluded view as to whether, assuming its lack of conformity with the 1922 Constitution, the *1935* Act should be held to have amended that instrument.

Conclusion

Accordingly, one returns finally to the initial question, i.e. as to whether *s.5(1)(e)* was inconsistent with Article *15(1)* of the Constitution. I am satisfied that the power which it gave to the Minister to determine the policies and principles by reference to which the power already vested in the State to deport

aliens should be exercised was inconsistent with the exclusive role in legislation conferred on the Oireachtas by Article 15.2.10. I would dismiss the appeal.

JUDGMENT delivered the 20th day of May, 1999 by Lynch, J.

The relevant facts of this case have been fully set out in the Judgments just delivered and it is unnecessary for me to repeat them here. I had an opportunity of carefully reading and considering the Judgments in advance of today's sitting and I find myself in agreement with the Judgment of Barrington, J. I'll just add a few words of what I hope are practical considerations.

The State has virtually absolute power regarding the granting or withholding of the right of aliens to come into and remain within the territory of the State. Article *5* of the Constitution and ***Osheku v. Ireland*** [1986] IR 733. The organ of Government to exercise this power on behalf of the State is logically the executive organ (the Government). The legislative organ of Government (the Oireachtas) can nominate a member or members of the executive organ to exercise the power on behalf of the Government and the State. This the Oireachtas has done by the Aliens Act, *1935* nominating the Minister to fulfil that role.

It could be advantageous to *"the people of Éire"* as referred to in the preamble to the Constitution to provide that only aliens of a certain class could land in or enter into or remain in the State - for example only persons who have the benefit of third level education and possessed a degree from a reputable University. It could hardly be gain said that such a regulation was seeking to

promote the common good in accordance with the preamble to the Constitution: the good of the Irish Nation (Article 1): the good of the Irish State (Article 4): and the good of the Irish Citizens (Article 9). This may appear a little far fetched but there have been examples in the past of aliens contributing greatly to the commercial and cultural life of the nation to such an extent that they were subsequently granted honorary Irish citizenship.

Conversely it would not promote the common good of the people of Éire to admit into the State aliens of dubious character likely to engage in telephone, credit card, or computer frauds or any other criminal activity. That is obvious, but one could also say that to admit aliens from a place of illiteracy and absence of the skills required for modem industrial and commercial life would not promote the common good of the Irish Nation either although pushed too far this might conflict with the concept of charity and concord with other Nations also referred to in the preamble to the Constitution. The circumstances of aliens vary to such an extent depending on what part of the world they come from and on the ethos of each succeeding generation that to be effective the powers of control to be given to the executive by the Oireachtas must necessarily be very wide and very widely defined. This is why the powers given to the Minister by the Aliens Act, 1935 are so widely drawn. They confer on the Minister a very wide ranging discretion in the exercise of the

State and the Nation's right to grant or refuse entry to the national territory. Read in the light of the Constitution the Minister must exercise these powers *bonafide* in the interests of the common good of the people of Éire and of concord with other Nations, a formula which allows for discrimination between aliens of a particular nationality or otherwise of a particular class or of particular aliens. See ***Tang v. The Minister for Justice*** [1996] 2 ILRM 46. The Constitution would also of course require that the Minister exercise his wide ranging powers in accordance with natural justice and fair procedures.

By making the Aliens Order, 1946 the Minister has not changed the law in any way. He has merely applied the law arising from the sovereignty of the State and as nominated so to do by the Aliens Act, 1935 to various aliens and categories of aliens in the interests of the common good of the citizens of this State.

In my view the Aliens Act, 1935 and in particular Section *5* thereof is not inconsistent with the Constitution and I would accordingly allow this appeal.