

**APPROVED**

**THE HIGH COURT**

**[2024] IEHC 323**

**[Record No. 2022/1556P]**

**BETWEEN**

**NIAL RING, STEPHEN RING, DARRAGH RING AND LIAM MCGRATTAN**

**PLAINTIFF**

**AND**

**THE MINISTER FOR HEALTH, IRELAND AND THE**

**ATTORNEY GENERAL**

**DEFENDANT**

**JUDGMENT of Mr Justice Nolan delivered on the 31<sup>st</sup> day of May, 2024**

**Introduction**

1. The Plaintiffs in this action seek declarations that regulations introduced during the COVID-19 pandemic in 2020, which restricted the movement of people and made it a penal offense to leave their homes and participate in events, are unconstitutional for various reasons. Not surprisingly, the Defendants deny that the regulations are unconstitutional.

## **The COVID pandemic**

2. The COVID-19 pandemic, also known as the coronavirus pandemic, is a global pandemic of coronavirus disease 2019 (COVID-19) caused by severe acute respiratory syndrome. The novel virus was first identified in an outbreak in Wuhan, the capital of Hubei, China, in December 2019, before it spread to other areas of Asia, and then worldwide in early 2020. The World Health Organization (WHO) declared the outbreak a public health emergency of international concern on the 30<sup>th</sup> of January 2020, and assessed that the outbreak had become a pandemic on the 11<sup>th</sup> of March 2020.

3. The virus first reached this country in late February 2020 and cases were soon confirmed in all counties. Large gatherings were cancelled, including the St. Patrick's Day festivities.

4. The Oireachtas passed emergency legislation giving the State far-reaching powers to control the virus's spread, and the Gardaí were given powers to enforce the lockdown.

5. That legislation was The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020, which amended the Health Act of 1947.

6. The legislation passed all stages, and, following requests by opposition TDs, included a sunset provision for review in November 2020. On the 20<sup>th</sup> of March 2020, Seanad Éireann passed the legislation and the Minister signed the legislation into law later that day. On the 27<sup>th</sup> of March 2020, the first stay-at-home order banned all non-essential travel and contact with others. People were told to keep apart in public, and those most at risk were told to cocoon.

7. On the 7<sup>th</sup> of April 2020, the Minister for Health made regulations which, *inter alia*, prohibited persons from leaving their places of residence without reasonable excuse and from holding and or participating in events. The regulations took effect from the 8<sup>th</sup> of April 2020

and under amending regulations made on the 10<sup>th</sup> of April 2020 were extended to the 5<sup>th</sup> of May 2020.

### **The Prosecution of the Plaintiffs**

8. Notwithstanding the regulations, on the 17<sup>th</sup> of April 2020, the Plaintiffs left their home and gathered in an upstairs part of a public house in the North Inner City. Whilst there, they were discovered by a member of An Garda Síochána. Thereafter, the Plaintiffs were served with summonses, issued on the 18<sup>th</sup> of January 2021, pursuant to Section 1 of the Courts (No 3) Act, 1986.

9. It is these summonses which the Plaintiffs challenge. They allege that they were charged with a law which did not exist or alternatively was unconstitutional at the time of the alleged offenses took place, on the 17<sup>th</sup> of April 2020.

### **The Plaintiffs**

10. The first name Plaintiff is described as an accountant, businessman, publican and politician and was in 2018, the Lord Mayor of the City of Dublin. The second name Plaintiff is an accountant and son of the first name Plaintiff, whilst the third name Plaintiff is a scientist and also the son of the first named Plaintiff. They all resided in the same house in Clontarf in the City of Dublin. The fourth name Plaintiff is a publican and a businessman and lives also in Clontarf and was the owner of the public house above which the parties were found.

## Agreed Statement of Facts

11. The parties have agreed a statement of facts which are as follows: -
1. On Tuesday 21<sup>st</sup> of January 2020, the 25<sup>th</sup> session of Seanad Éireann (hereinafter “the Seanad”) was adjourned *sine die* having regard to the dissolution of Dáil Éireann and the forthcoming general election.
  2. The 25<sup>th</sup> Seanad sat again on the 20<sup>th</sup> and 27<sup>th</sup> of March 2020.
  3. Subsequently, election to the Seanad occurred on or about the 30<sup>th</sup> and 31<sup>st</sup> of March 2020.
  4. Following the election of An Taoiseach by Dáil Éireann on the 27<sup>th</sup> of June 2020, the 26<sup>th</sup> Seanad first met on the 29<sup>th</sup> of June 2020.
  5. In March 2020 it became apparent that the Covid-19 Coronavirus was spreading throughout the State. In response, the Oireachtas enacted the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 delegating to the Minister the power to make regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19 (including the spread outside the State) or where otherwise necessary, to deal with public health risks arising from the spread of Covid-19. The said Act was enacted on or about the 20<sup>th</sup> of March 2020 and *inter alia* inserted Section 31A into the Health Act 1947.
  6. All stages of the consideration by the Seanad of the bill which was enacted as the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 were taken on the 20<sup>th</sup> of March 2020 and the Seanad, by resolution, concurred in the abridgment of time for signature by the President of that bill for the purpose of Article 25.2.2° of the Constitution.
  7. On or about the 7<sup>th</sup> of April 2020, by Statutory Instrument No. 120 of 2020, the Minister made an Order declaring the entire State to be an affected area, for the purposes of the

Health Act 1947, where there was known or thought to be sustained human transmission of Covid-19.

### **SI 121/2020**

8. On the 7<sup>th</sup> of April 2020, the Minister made Statutory Instrument No. 121/2020 (The Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) Regulations 2020), pursuant to Section 31A of the Health Act 1947, as amended (“SI 121/2020”).
9. Certain provisions of SI 121/2020 were stated to be “*penal provisions*”. In accordance with Section 31 A (6), contravention of those provisions, which were stated to be penal provisions, was a criminal offence.
10. SI 121/2020 was stated to be in force until the 12<sup>th</sup> of April 2020.
11. On the 8<sup>th</sup> of April 2020, the Minister caused an electronic copy of SI 121/2020 in an approved format to be delivered to the Parliamentary Library for the purpose of it being laid before the Dáil and Seanad in line with the Standing Orders of Dáil Éireann and Seanad Éireann.
12. SI 121/2020 appeared on the Order Paper of Dáil Éireann on the 16<sup>th</sup> of April 2020.
13. SI 121/2020 first appeared on the Order Paper of Seanad Éireann on 29<sup>th</sup> June 2020.

### **SI 128/2020**

14. On the 10<sup>th</sup> April 2020, the Minister made Statutory Instrument No. 128 of 2020 (“SI 128/2020”). This provided that SI 121/2020 was amended such that it would remain in force until the 5<sup>th</sup> of May 2020.
15. On the 13<sup>th</sup> of April 2020, the Minister caused an electronic copy of SI 128/2020 in an approved format to be delivered to the Parliamentary Library for the purpose of it being

laid before the Dáil and Seanad in line with the Standing Orders of Dáil Éireann and Seanad Éireann.

16. SI 128/2020 appeared on the Order Paper of Dáil Éireann on the 16<sup>th</sup> April 2020.

17. SI 128/2020 first appeared on the Seanad Order Paper on the 29<sup>th</sup> of June 2020.

### **Extension of Operation of the Regulations**

18. SI 121/2020 was subsequently further amended to extend its operation.

19. SI 153/2020 *inter alia* extended the operation of SI 121/2020 to the 18<sup>th</sup> of May 2020.

20. SI 174/2020 *inter alia* further extended the operation of SI 121/2020 to the 8<sup>th</sup> of June 2020.

21. SI 206/2020 revoked SI 121/2020 on the 8<sup>th</sup> of June 2020.

### **Section 5 of the 1947 Act**

22. Section 5 of the Health Act 1947 requires that any regulations made under the said Act to be laid before the Houses of the Oireachtas as soon as may be after they are made, and, if a resolution annulling the regulation is passed by either such House within the next subsequent twenty-one days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder.

23. No resolution was passed by either Dáil Éireann or the Seanad annulling either SI 121/2020 or SI 128/2020.

24. The 8<sup>th</sup> of July 2020 was the twenty-first day on which Dáil Éireann sat after SI 121/2020 was laid before it.

25. The 16<sup>th</sup> of October 2020 was the twenty-first day on which Seanad Éireann sat after SI 121/2020 was laid before it.
26. The 8<sup>th</sup> of July 2020 was the twenty-first day on which Dáil Éireann sat after SI 128/2020 was laid before it.
27. The 16<sup>th</sup> of October 2020 was the twenty-first day on which Seanad Éireann sat after SI 128/2020 was laid before it.

### **The Charges**

28. In or around April or May 2021, the Plaintiffs were served with summonses issued on the 18<sup>th</sup> of January 2021 pursuant to Section 1 of the Courts (No.3) Act 1986. The Plaintiffs stand charged with offences contrary to Section 31A (6) and Section 31A (12) of the Health Act, 1947, as amended. The charges arise from alleged breaches of Regulations 4 and 5 of SI 121/2020.
29. It is alleged that on or about the 17<sup>th</sup> of April 2020, at approximately 23.00, all four Plaintiffs left their respective places of residence without reasonable excuse, contrary to Regulation 4(1) of SI 121/2020. It is further alleged that the first and fourth named Plaintiffs held or participated in an event in a relevant geographical area, contrary to Regulation 5(1) of SI 121/2020. The said alleged breaches are prescribed to be breaches of ‘penal regulations’ for the purposes of Section 31A(6) of the Health Act 1947 as amended. The charges are denied.

### **Section 31 A of the Health Act 1947 (as amended)**

12. The amended Act is titled “*Regulations for preventing, limiting, minimizing or slowing spread of COVID-19*”. Subparagraph one reads as follows:-

**31A.** (1) *The Minister may, having regard to the immediate, exceptional and manifest risk posed to human life and public health by the spread of Covid-19 and to the matters specified in subsection (2), make regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19 (including the spread outside the State) or where otherwise necessary, to deal with public health risks arising from the spread of Covid-19 and, without prejudice to the generality of the foregoing, such regulations may, in particular, provide for all or any of the following:*

- (a) restrictions to be imposed upon travel to or from the State;*
- (b) restrictions to be imposed upon travel to, from or within geographical locations to which an affected areas order applies;*
- (c) without prejudice to the generality of paragraph (b), restrictions to be imposed upon persons or classes of persons resident in, working in or visiting locations referred to in paragraph (b) including (but not limited to)—*
  - (i) requiring persons to remain in their homes, or*
  - (ii) without prejudice to any other provisions of this Act or regulations made thereunder requiring persons to remain in such other places, as may be specified by the Minister;*
- (d) the prohibition of events, or classes of events, including (but not limited to) events—*
  - (i) which, by virtue of the nature, format, location or environment of the event concerned or the arrangements for, or the activities involved in, or the numbers likely to be*



*attending, the event could reasonably be considered to pose a risk of infection with Covid-19 to persons attending the event,*

*(ii) at specified geographical locations to which an affected areas order applies,*

*(iii) at locations which by virtue of the nature, format, or environment of the locations concerned or the arrangements for, or the activities involved in, or the numbers likely to be attending the type of events at the locations, could reasonably be considered to pose a risk of infection with Covid-19 to persons attending at events at those locations,*

*(iv) where the level of proposed attendance or likely level of attendance at the event could reasonably be considered to pose a risk of infection with Covid-19 to persons attending the event;*

*(e) the safeguards required to be put in place by event organisers in relation to events in order to prevent, limit, minimise or slow the risk of persons attending any such event of being infected with Covid-19;*

*(f) the safeguards required to be put in place by owners or occupiers of a premises or a class of premises (including the temporary closure of such premises) in order to prevent, limit, minimise or slow the risk of persons attending such premises of being infected with Covid-19;*

*(g) the safeguards required to be put in place by owners or occupiers of any other place or class of place, (including the temporary closure of such place or class of place) in order to prevent, limit, minimise or slow the risk of persons attending at such place or class of place of being infected with Covid-19;*

*(h) without prejudice to the generality of the foregoing paragraphs, the safeguards required to be put in place by managers (howsoever described) of schools, including language schools, creches or other childcare facilities, universities or other educational facilities (including the temporary closure of such facilities) to prevent, minimise, limit, or slow the risk of infection of persons attending such premises of being infected with Covid-19;*

*(i) any other measures that the Minister considers necessary in order to prevent, limit, minimise or slow the spread of Covid-19;*

*(j) the giving of notices, the particulars to be contained therein and the manner in which such notices may be given for the purposes of the regulations;*

*(k) such additional, incidental, consequential or supplemental matters as the Minister considers necessary or expedient for the purposes of giving full effect to the regulations.*

*(2) When making regulations under subsection (1), the Minister—*

*(a) shall have regard to the following:*

- (i) the fact that a national emergency has arisen of such character that there is an immediate and manifest risk to human life and public health as a consequence of which it is expedient in the public interest that extraordinary measures should be taken to safeguard human life and public health;*
- (ii) the fact that a declaration of Public Health Emergency of International Concern was made by the World Health Organisation in respect of Covid-19 and that Covid-19 was duly declared by that Organisation to be a pandemic;*
- (iii) the fact that Covid-19 poses significant risks to human life and public health by virtue of its potential for incidence of mortality;*
- (iv) the policies and objectives of the Government to take such protective measures as are practicable to vindicate the life and bodily integrity of citizens against a public health risk;*
- (v) the need to act expeditiously in order to prevent, limit, minimise or slow the spread of Covid-19;*
- (vi) the resources of the health services, including the number of health care workers available at a given time, the capacity of the workers to undertake measures, to test persons for Covid-19 and to provide care and treatment to persons infected with Covid-19, the necessity to take such measures as are appropriate to protect health care workers from infection from Covid-19, and the capacity of hospitals or*

*other institutions to accommodate and facilitate the provision of care and treatment to infected persons;*

*(vii) the resources, including the financial resources, of the State;*

*(viii) the advice of the Chief Medical Officer of the Department of Health,*

*and*

*(b) may, have regard to any relevant guidance (including, in particular, any guidance relating to the risk assessment for, and case definition relating to, Covid-19) provided by the World Health Organisation, the European Centre for Disease Prevention and Control, the Health Protection Surveillance Centre of the Health Service Executive and other persons with relevant medical and scientific expertise.*

*(3) Before making regulations under subsection (1), the Minister—*

*(a) shall consult any other Minister of the Government as he or she considers appropriate having regard to the functions of that other Minister of the Government, and*

*(b) may consult any other person as the Minister considers appropriate for the purposes of these regulations.*

*(4) The Minister may, having consulted any other Minister of the Government as he or she considers appropriate having regard to the functions of that other Minister of the Government, exempt specified*

*classes of persons including, but not limited to persons, who perform essential services, including statutory duties or other specified public or other services, from regulations under subsection (1).*

*(5) This section is without prejudice to the provisions of Section 31, including as they may relate to Covid-19.*

*(6) A person who—*

*(a) contravenes a provision of a regulation made under subsection (1) that is stated to be a penal provision,*

*(b) obstructs, interferes with or impedes a relevant person in the course of exercising a power conferred by regulations under this section on that relevant person,*

*(c) fails or refuses to give to a relevant person information—*

*(i) that is within the first-mentioned person's knowledge,*

*(ii) that the first-mentioned person is required by regulations under this section to give the relevant person, and*

*(iii) that the first-mentioned person has been requested to give, or has been otherwise informed of the requirement to give, to a relevant person,*

*or*

*(d) in purported compliance with a requirement under regulations under subsection (1), gives information to a relevant person that,*

*to the first-mentioned person's knowledge, is false or misleading  
in any material particular,  
shall be guilty of an offence.*

**13.** All of this must be seen in the context of the title, the recital and the provisions themselves. The title reads as follows:-

*“An Act, to make exceptional provision, the public interest and having regard to the manifest and grave risk to human life and public health posed by the spread of the disease known as Covid-19 and in order to mitigate, where practicable, the effect of the spread of the disease known as Covid-19, to amend the Health Act 1947 to confer a power on the Minister for Health to make regulations prohibiting or restricting the holding of certain events or access to certain premises and to provide for enforcement measures; to provide for powers for certain medical officers of health to order, in certain circumstances, the detention of persons who are suspected to be potential sources of infection with the disease known as Covid-19 and to provide for enforcement measures in that regard; and to confer on the Minister for Health the power to designate areas as areas of infection of Covid-19 and to provide for related matters; to amend and extend the Social Welfare Acts to provide for amendments in relation to entitlement to illness benefit for persons who have been diagnosed with, or are a probable source of infection with the disease known as Covid-19; and to provide for amendments in relation to jobseeker's benefit and jobseeker's allowance to mitigate the economic effects of the spread of the disease known as Covid-19; and to provide for related matters”.*

**14.** Whilst the recitals read as follows:-

*“WHEREAS an emergency has arisen of such character that it is necessary for compelling reasons of public interest and for the common good that extraordinary measures should be taken to deal with the immediate, exceptional and manifest risk to human life and public health posed by the spread of the disease known as Covid-19;*

*AND WHEREAS the State is and its citizens are, in significant respects, highly exposed to the effect of the spread of the disease known as Covid-19; and having regard to the constitutional duty of the State to respect and, as far as practicable, by its laws to defend and vindicate the rights of citizens to life and to bodily integrity, it is necessary to introduce a range of extraordinary measures and safeguards to prevent, minimise, limit or slow the risk of persons being infected with the disease known as Covid-19;*

*AND WHEREAS as a consequence it is necessary for the State to take the measures in this Act to address the emergency and to defend and vindicate the rights of citizens to life and to bodily integrity;”*

**15.** The relevant parts of the regulations S.I. No. 121/2020 read as follows:-

*“Restrictions of movement of applicable persons*

*4. (1) An applicable person shall not leave his or her place of residence without reasonable excuse.*

*(3) Paragraph (1) is a penal provision for the purposes of Section 31A of the Act of 1947*

*Restrictions on events*

5. (1) *A person shall not -*

*(a) hold an event in a relevant geographical area unless -*

*(i) the event is a relevant event, and*

*(ii) the number of participants in the event is limited to not more than is*

*reasonably necessary having regard to the nature of the purposes for which the event is held,*

*or*

*(b) participate in an event in a relevant geographical area unless -*

*(i) the event is a relevant event, and*

*(ii) the person is a relevant participant.*

*(2) Paragraph (1) is a penal provision for the purposes of Section 31A of the Act of 1947.*

### **The Case Law Discussion**

**16.** The Plaintiffs case is that there was not sufficient safeguards put in place having regard to the principal not to abdicate from the constitutional imperative that criminal legislation is a matter for the Oireachtas. Therefore, the starting point for this discussion must be Article 15.2.1 of the Constitution which reads as follows:-

*“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.”*

**17.** The principle authority in relation to the issue of the exercise of an unconstitutional delegation of legislative power is *Cityview Press limited V IDA, the Minister for Labour and*



*the Attorney General [1980] IR 281 (“Cityview”)*. In a remarkably short judgment, given the importance of the issue, O’Higgins C. J. succinctly said as follows :-

*“the giving of powers to a designated minister or subordinate body to making regulations or orders under a particular statute has been a feature of legislation for many years. This practice has obvious attractions in view of the complex, intricate and ever-changing situations which confront both the legislature and the executive in a modern 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 Houses 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 nor 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 is an unauthorized 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 authorized; 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, it would be within the permitted limits - if the law is laid down in the statute and details only are filled in or contemplated by the designated minister or subordinate body - there is no unauthorized delegation of legislative power.”*

**18.** Forty-four years later that is a good summary of the principle which is at the core of this case. The *Cityview* test has been followed by the courts for many years thereafter. However, in a number of recent cases the law has become somewhat more nuanced. Recent cases include

*McGowan v The Labour Court [2013] IESC 21 and Bederev v Ireland, the Attorney General and the D.P.P 2016 [IESC] 34.* In *Bederev v Ireland*, the Plaintiff was charged with certain offences contrary to sections under the Misuse of Drugs Act 1977. He challenged the legislation on the grounds that it had failed to provide any sufficient guidance as to the principles or policies that were to be applied in declaring substances to be controlled drugs. The Plaintiff lost in the High Court but was successful in the Court of Appeal. The matter was appealed to the Supreme Court.

**19.** However, in the High Court, Gilligan J. said that the rationale behind the principles and policies test or the *Cityview* test is that the purpose of the legislative provision must be sufficiently clear to allow a litigant to effectively challenge by way of judicial review the delegated legislation or other administrative action taken under the act.

**20.** However, this case is known for the views of Charleton J., who agreed with Gilligan J. In what seems to me to be of relevance, given the Plaintiffs submission in relation to the concern that a minister may create a criminal statute, he said as follows:-

*“what lay behind the judgment under appeal was, I think, an entirely proper concern for the protection of the values enshrined in Article 15.2.1 of the Constitution. The vital nature of that provision is emphasized when, as here, a question arises regarding the criminalisation of certain activities or conduct. The Article makes clear that, subject to Article 15.2.2, exclusive power of making laws for the state is vested in the Oireachtas, and not elsewhere.”*

**21.** He considered the long title and noted the main criminal offences were set out with particularity.

**22.** Dealing with an issue which is very much to the heart of this case, namely a national emergency, he said:-

*“Whilst the state have argued urgency as a central factor justifying the delegation of legislative power, that cannot enable the abrogation of the power of the Oireachtas. The fact that a*

*particular mischief, be it a financial crisis, the collapse of an insurance company or something similar, requires an urgent response does not justify any departure from the strict requirement that legislation is for the Oireachtas. As Denham J stated in Laurentiu v Min for Justice to “abdicate would be to impugn the constitutional scheme”.*”

**23.** He further observed that:

*“in none of these cases, and the many more cited in argument on this issue, is the mere fact that subsidiary legislation allows for a discretion as to how to target a particular mischief regarded as stepping outside the boundaries of what is constitutionally permissible; provided it is a mischief which has itself being sufficiently described in the parent legislation. Every delegation of legislative authority involves, of necessity, a power to do something or to refrain from doing something. The issue as to whether a particular course is pursued as a matter to be decided by the person or body giving effect to what is in the statute by reference to its objective and to the boundaries which it sets as to what is permissible.”*

**24.** The key observation being that the mischief has been sufficiently described in the parent legislation which, in turn, must be seen by reference to its objectives within the boundaries which are set out. The legislation must be considered as a whole with a view to discerning the mischief or issue to be addressed. In those circumstances, the Supreme Court overturned the Court of Appeal and upheld the judgment of Gilligan J. and the legislation was not found to be unconstitutional.

**25.** This then brings us to the seminal decision of *NECI v The Labor Court & Others* [2020] IEHC 303, where the complexities of the issues can be seen from the fact that the headed note runs to ten pages. In essence, the matter related to the validity of an employment order which purported to regulate the remuneration of electricians working in the construction industry. The High Court held that certain orders under the appropriate legislation were invalid and granted an Order of Certiorari.

**26.** The matter was leapfrogged to the Supreme Court, where MacMenamin J. and Charleton J. delivered the judgement of the court. In his judgment, MacMenamin J. noted that the ultimate test was whether there had been a usurpation, abrogation, or trespass on the legislative power of the Oireachtas, which can only be vested or given to the Oireachtas itself. To that end, he said as follows:-

*“a court may look at the long title, the individual sections, and the schedule in order to discern the power delegated, its limitations or boundaries a court is entitled to consider the purpose and effect of the provisions, the historic frame of reference within which they are to operate and the previous enactments that are required to be repealed. Is entitled to analyze particular words within their immediate and overall context. The legislation must set boundaries, and of defining subject matter, such that those affected by the legislation could discern those boundaries, and the subject matter of the legislation.”*

**27.** He paraphrased Charleton J.’s assessment of the limits to the scope of the inquiry as:-

1. An assessment of the Act should be based on a reasonable, but not far reaching, examination of the provisions.
2. The purpose of the various principles and policies criteria is to ask whether the legislation sets boundaries, and in the sense of defining rules of conduct or guidelines.
3. Does the legislation, having defined the subject matter, contain basic conditions of fact and law?
4. Is the legislative purpose of the provisions discernible by identification of objects or outcomes, as well as principles?
5. Is the power of delegated sufficiently delimited?
6. Does the exercise of the subordinate power contain sufficient safeguards?

7. The primary question, is there an abdication by the Oireachtas of its constitutional role?

28. He observed that the primary question was had there been an abdication by the Oireachtas of its constitutional role that a court will ensure that a subordinate body, in this case the Minister, is not vested with an absolute and untrammelled discretion.

29. Charleton J. dealt with parliamentary oversight, which is an important consideration in the context of this case, where the Seanad was not sitting at the time that the regulation was introduced. He set out three common formulations in delegated legislation whereby democratic scrutiny is potentially to be reaffirmed by the Oireachtas. He said as follows: -

*“the first, of the most common legislation which delegates powers to local authorities, is where the local authority sets rates or other charges, such as harbour fees, or makes rules for the use of public spaces: there is no potential for debate before the Oireachtas as to the balance or lack thereof of these decisions... The second and third models involve the Oireachtas sending away within a package of legislation some issue, one usually requiring detailed expert assistance or technical assessment, with an imperative for it to return and, hence, carrying the prospect of fresh scrutiny. That model may be that the subordinate measures be laid before the Dáil and Seanad where it will pass unless taken up by a sufficient number of representatives to require that it be debated before being passed or rejected.*

8. *A common formulation, in this second instance, found in almost 300 pieces of legislation, is that the subordinate legislation passes automatically if laid before the Oireachtas and will only fail “if a resolution annulling the regulation is passed by either such House”...*

9. *Finally, and most commonly of recent times, a statutory provision may call for a positive consideration of a subordinate legislative measure by one or more houses of the Oireachtas before a statutory instrument may achieve the force of law. This is found in around 200 pieces*

of legislation where “a resolution approving of the draft has been passed by each such House” which means the Dáil and Seanad”.

**30.** At paragraph 11 he dealt with the case made by the Plaintiff, namely the significance of the oversight and its importance in the context of the Constitution. He said as follows:-

*“perhaps there is rhyme or reason to this distinction, but none is immediately apparent from the importance of the measure and the variation in legislative treatment as to the approval of subordinate rules to make the law. Making new drugs subject to criminal regulation on indictment, varying the powers of a gas company, or supporting people devastated financially by the latest pandemic; should not logic dictate that these be tiered in importance and the nature of the scrutiny afforded democratically intensified according to their impact and significance? Perhaps, but as the judgments in Bederev indicate, this return to harbour of delegated legislation, set forth for subordinate drafting, for express or tacit approval has become part of the scheme of complex legislation since shortly after the promulgation of the Constitution in 1937 and most definitely be a factor as to whether the Oireachtas has exercised or have unconstitutionally abdicated the powers granted to them by the people.”*

**31.** The Plaintiffs place great store in these observations and emphasize that the highest degree of scrutiny should be afforded to any case in which a criminal sanction is created by the Minister and the Minister alone, as here.

**32.** However, that is to see these words in isolation. He went on to say *“Thus, the Oireachtas must direct, by way of statutory command, which does not need to be, and is almost never, a prescriptive list of factors, but which must be apparent from the entire legislative text, what limits of the outcome of any subsidiary legislation should be.”*

**33.** He felt that any delegation must be done in such a way as to preserve the control of the Oireachtas over what is done subordinately, and that enough guidance would have to be given

to a subordinate authority so that the control of the Oireachtas as to the outcome might still be maintained. He felt this was a fundamental rule.

**34.** He went on to say:

*“What is not permitted is a delegation “so broad as to constitute a trespass by the delegate or the subordinate on an area reserved to the Oireachtas”... The point being the continued guiding hand within the discernible boundaries by the sole constitutional legislative body. Perhaps the models of, first, subordinate rules never returning to , the Oireachtas, or second, coming back but passing unless put on the order paper of either house by sufficient numbers of public representatives, or third, reverting to an item on the order paper and requiring a positive vote, have received little attention in former decisions but, it is nonetheless clear that it may be a key factor.”*

**35.** Crucially he went on to say:-

*“But why would that factor influence the issue of abrogation or retention of democratic power under Article 15.2? Clearly, it cannot be the only factor and is not mentioned in any of the sighted decisions as being in itself determinative..... It is the overall package that a court must earnestly consider should a case be made of an infringement of Article 15.2.....*

*The Constitution speaks for itself as to what may be done. Limited delegation for an express purpose and with sufficient guidance as to an assured outcome, or an outcome within a defined and limited range, or discretion within a limited assessment, is what is required. More than that infringes the Constitution. This approach requires the informed construction of the complete legislation and the analysis of each part of the enactment to see precisely what authority to make rules have been delegated and whether this is more than the Constitution permits.”*

**36.** He concluded his reasoning by saying as follows:

*“It stands to reason that the more limited a delegation, the more constricted the opportunity to possibly move outside the borders of what the Oireachtas has set, the less likely it will be for a court to find an abrogation of power”.*

He did, however, say that difficulty in framing legislation is not a valid defense to the Oireachtas abdicating its authority.

**37.** The doctrine of separation of powers does not deny the Oireachtas the power to direct that an administrative body, properly designated for that purpose, and properly delineated in its task, should have a latitude within which it is to ascertain the conditions which it has made prerequisite to the operation of its legislative command.

### **Discussion-Decision**

**38.** At the outset, I think it is appropriate that the court should acknowledge the devastating consequences of the pandemic, not only to the economic and social structures of the State, but more particularly to the citizenry of the State. Thousands of people died during the pandemic. More people died as a result of COVID-19 than did in both the War of Independence and the Civil War put together.

**39.** The government of the day was placed in an extraordinarily difficult position. Indeed, governments throughout the democratic world and beyond were stretched, nearly to the point of breaking, in an attempt to try to restrict the devastating effects of the virus.

**40.** In this jurisdiction, that was made even harder by virtue of the fact that, as the statement of agreed facts sets out, a general election had taken place in January of 2020 and the government was still to be formed. This gave rise to a unique set of circumstances whereby the Dáil was not in a position to elect a Taoiseach and thereby not in a position to comply with the constitutional requirement of completing the composition of the Seanad.



**41.** In many ways, it shows how effective our democratic system operated that the Seanad last sat and adjourned, *sine die*, on the 21<sup>st</sup> of January 2020, having regard to the dissolution of the Dáil and the forthcoming general election. Notwithstanding the ongoing worldwide earth-shattering events, it sat again on the 20<sup>th</sup> and 27<sup>th</sup> of March 2020.

**42.** Every act and regulation passed by both houses has the presumption of constitutionality. At all times, the onus is upon the Plaintiffs to prove that a provision is unconstitutional. That is a significant burden, notwithstanding that it is a burden which must be considered on balance of probabilities. Nonetheless, the status quo is that the legislation is constitutional.

**43.** The Plaintiffs have conceded the first point in their written submissions, as to when the legislation was laid before both houses. However, the issue of the effectiveness of the legislation in the context of the Seanad not sitting, because the new Seanad was not in place, is still very much part of their case. The statutory instruments did not appear on the order paper of the Seanad, prior to their enforceability. Therefore, the Plaintiffs argue, the regulations did not have adequate oversight from the legislative branch of the State and, in circumstances where criminal liability attached to certain matters specified by the Minister, the regulations themselves constituted an impermissible delegation of legislative function. That is a big statement.

**44.** To that end, it seems to me that Section 5 of the 1947 Act is relevant. It reads as follows:-

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

**45.** In argument, Mr. Hartnett SC for the Plaintiffs raises an issue as to what the last line of the section means. It seems to me that what it means is that even if a regulation was annulled, any step taken pursuant to that regulation, which would include the prosecutions in this case, would remain valid. However, that is not the question before the court.

**46.** In my opinion given the remarkable, unprecedented, unparalleled configuration of an entirely unpredictable pandemic event together with the remarkable, if not necessarily unprecedented situation of the difficulty of forming a government, the laying of the regulation before the Seanad, on the 16<sup>th</sup> of October 2020 was “*soon as may be after it was made*” in the circumstances, notwithstanding that the provision was revoked twenty days or so before that.

**47.** It was clearly the intention of both houses of the Oireachtas that this legislation should be put in place, for the proper and indeed constitutionally appropriate step of vindicating lives, as the preamble of the Act clearly states. It cannot be overemphasized that the reason why these remarkable and unprecedented steps were being taken, was to save lives. We will never know how many lives have been saved, but we certainly know from experience across the water, that failure to take appropriate steps in time cost lives. This step was not done on some party-political whim, or some attempted power grab, carried out by an unconscionable dictatorship. It was done to defend and vindicate the rights of citizens of the State to life and to bodily integrity, pursuant to the Constitution. These are the purest of motives and are in stark contrast to what was done in other jurisdictions, when appropriate steps were not taken, for what seems to be party political purposes.

**48.** For the Plaintiffs to come to court to say, on this particular point, that the legislation and more particularly the regulations, are somehow invalid due to an alleged technicality seems to me to be wrong. Indeed, it cannot go without commenting that the first name Plaintiff was the first citizen of the capital city of the state. In those circumstances, while I note that the Plaintiffs do not in any way criticize the purpose of the legislation, or the content of the

regulations, relying upon what this court perceives to be a technicality, seems to me to be wrong.

**49.** In those circumstances, it seems to me that the first ground of challenging the regulations must fail.

**50.** Turning to the second and far more substantial ground, namely that the legislation does not have sufficient oversight given that the Minister has the power to create a criminal offence, there is much more to be said for it.

**51.** If the courts were to apply the *Cityview* test, then it seems to me that the regulations do not fall foul of the law since the principles and policies are clearly set out in the statute. However, the court must look not only at the principles and policies but must have regard, in a holistic way, to the statute as a whole.

**52.** In this case, the principles and policies can be found clearly in three distinct places. Firstly, the long title of the Act, as set out above, is very clear. It is “*to make exceptional provision in the public interest and having regard to the manifest and grave risk to human life and public health posed by the spread of the COVID-19 and to mitigate the effect of that spread its purpose is to confer powers upon the Minister to make regulations prohibiting and restricting the holding of certain events*”. Nothing could be clearer. Both houses of the Oireachtas voted to give the Minister these exceptional provisions, in the public interest, given the manifest and grave risk to human life, authorizing him to make regulations prohibiting and restricting the holding of certain events or access to certain premises. That is its purpose.

**53.** The principles underlying this can be seen in the recital. Here it says, “*an emergency has arisen of such a character that it is necessary for compelling reasons of public interest and for the common good that extraordinary measures should be taken to deal with the immediate, exceptional and manifest risk to human life and public health posed by COVID-19*”. It goes on to say that the State and its citizens are highly exposed to the effect of the spread of the virus,

and in what seems to me to be crucial to the determination of this issue says:- “*and having regard to the constitutional duty of the state to respect and, as far as practicable, by its laws to defend and vindicate the rights of citizens to life and to bodily integrity, it is necessary to introduce a range of extraordinary measures and safeguards to prevent, minimize, limit or slow the risk of persons being infected with COVID-19.*”

**54.** Finally, it concludes that because of the situation that the State finds itself in, it is necessary for the State to take the measures to address the emergency and again “*to defend and vindicate the rights of citizens to life and to bodily integrity*”.

**55.** The principles and policies are manifest. They could not be clearer.

**56.** The Plaintiffs say that is not enough, there were not sufficient safeguards in place. The Constitution remains a “*granite edifice*” and no matter what the circumstances are, there should be the highest degree of oversight. In this regard, the Plaintiffs repeat their assertion that the fact that there was not a sitting Seanad meant that oversight was lacking.

**57.** However, following on from *NECI* and the associated jurisprudence, it is appropriate that not only should the court look at the long title, the individual sections, and the schedule in order to discern the power delegated, its limitations and boundaries, the court should also take a “*holistic*” approach to the legislation and regulations, but, as noted by MacMenamin J., there are limits to the scope of the inquiry. Therefore, applying those tests, the following seems to be the case.

**58.** Firstly, the court should determine whether or not the act contains sufficient principles and policies, based on a reasonable, but not far reaching, examination of the provisions. As I noted above, the principles and policies of this legislation are manifestly clear. There is no need for any far-reaching examination of the provisions. They are in simple language and their meaning is clear.

**59.** Secondly, the court must look at the purpose of the principles and policies and ask whether the legislation sets boundaries, in the sense of defining rules of conduct or guidelines. In my opinion the legislation does set boundaries. Those boundaries are constitutional in nature where it states clearly that the purpose is to defend and vindicate the rights of citizens to life and bodily integrity. Secondly, Section 31A itself sets out what is restricted. As Mr. Guerin SC, for the Defendants stated, we did not experience a lockdown as they did in Wuhan or parts of Italy. There were clear restrictions but there are also many exceptions. However, it seems to me that Section 31A (2) is particularly relevant. It mandates the Minister to have regard to multiple factors. These include the fact that a declaration of a public health emergency of international concern was made by the WHO, the policies and objectives of the government to take protective measures to vindicate the life of bodily integrity of the citizens against a public health risk, the resources of the health service, the financial resources of the state, the advice of the Chief Medical Officer of the Department of Health, the WHO and many others. On top of that, the Minister is obliged to consult with other Ministers of the government that he considers appropriate and “*other persons*”. All of this makes eternal sense and clearly sets out boundaries in the sense of defining rules of conduct or guidelines to the Minister.

**60.** Thirdly, the court has to consider does the legislation define the subject matter and contain basic conditions of fact and law? Clearly that is the case. The legislation is clearly defined. It is for the purpose of vindicating life which is a constitutional imperative. It clearly contains conditions of fact and of law.

**61.** Fourthly, is the legislative purpose of the provisions discernible by identification of objects or outcomes as well as principles? The object is clear. The object is to prevent the spread of COVID-19. The outcomes are also clear. It is to ensure there are as few deaths or serious injuries as possible. All of that is easily discernible from the parent legislation.

**62.** Fifthly the court has to ask, is the power delegated sufficiently delimited? This is an area where the Plaintiffs challenge the powers of the Minister. They argue that since the legislation creates a criminal offence, it cannot be said that there are sufficient safeguards since it is the Minister who makes that decision. I do not agree with that submission. I believe the power has been sufficiently delimited. The offenses which the Plaintiffs are charged with are directly taken from the statute. Further, the power is limited as set out and by having a sunset clause. SI 121 remained in operation until the 12<sup>th</sup> of April 2020. It, in turn, was replaced by SI 128 which extended the life of SI 121, to the 5<sup>th</sup> of May 2020. This is clear delimitation.

**63.** Sixthly, the court has to ask does the exercise of the subordinate power contain sufficient safeguards? The first question to be asked is what is a “*safeguard*” in this context. It seems to me that a safeguard is a step which ensures that the Minister or his officials cannot run roughshod over the wishes of the Oireachtas. The Plaintiffs argue for the highest level of scrutiny, such referred to by Charlton J. in *NECI*, namely a positive consideration of the subordinate legislation by both houses of the Oireachtas, before it would achieve the force of law i.e. the third model. Of course, that could not have occurred in this case due to the political situation then pertaining, namely, the failure to form a government and nominate members of the Seanad, or “*the pickle*”, the government found itself in, as Mr. Hartnett SC suggested.

**64.** Nonetheless, there are safeguards. Clearly a sunset clause is a safeguard. Secondly, the fact that the parent legislation was passed by both houses of the Oireachtas. Thirdly, the wording of the regulations follows the wording of the Act. That is also a safeguard. Indeed these safeguards echo precisely the words of O'Higgins CJ when in *Cityview* he said:-

*“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 Houses 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.”*

**65.** Or as Charleton J. put it “*in none of these cases, and the many more cited in argument on this issue, is the mere fact that subsidiary legislation allows for a discretion as to how to target a particular mischief regarded as stepping outside the boundaries of what is constitutionally permissible; provided it is a mischief which has itself being sufficiently described in the parent legislation*”.

**66.** Finally, it seems to me that the Act itself has safeguards in the manner in which the Minister is obliged to consult and to consider views of experts, international health bodies, the economy of the State and the views of his fellow ministers and others. All of this amounts to a safeguard. The Minister is clearly curtailed by these steps and cannot embark upon a folly of his own. As Charleton J. said:- “*Limited delegation for an express purpose and with sufficient guidance as to an assured outcome, or an outcome within a defined and limited range, or discretion within a limited assessment, is what is required.*” That is what happened here.

**67.** There is yet another safeguard in that in Article 4.1 and 2 of the regulations, a person, whilst obliged not to leave their place of residence, can do so in circumstances where they have a reasonable excuse. What is or is not a reasonable excuse is set out in a broad manner. That seems to me to be a safeguard.

**68.** Finally, the court must ask the primary question; has there been an abdication of its constitutional role? It is clear from the analysis which I have carried out above, that I believe there has been no abdication on the part of the Oireachtas, there are many safeguards, and it is clear that both houses of the Oireachtas had in their contemplation the exact type of regulations as they came into being, by reference to the primary legislation.

**69.** I return to the argument of the Plaintiffs that this court should consider the views of Charleton J. that because the Minister has the power to create a criminal offense, the highest form of scrutiny should be applied. It is not at all clear to me that it forms part of the *ratio*, that different pieces of legislation require different forms of oversight, to the extent that the creation

of a criminal offense by the Minister would require the third form of oversight such that the statutory provision should call for a positive consideration of the subordinate legislation measure by one or more of the houses of the Oireachtas before a statutory instrument may achieve the force of law.

**70.** It seems to me that if I were to consider that to be the obligation placed upon the Oireachtas, given the significant importance of the legislation, I would be dictating to the houses of the Oireachtas the manner in which they should carry out their business. That is not the role of this court. To do so would be to infringe the separation of powers. I do not think it is appropriate or necessary.

**71.** Further it should be noted that the *Bederev* case involved a criminal sanction, all be it in the context of adding a number of other drugs to a scheduled list. Nonetheless, I do not accept the premise that a regulation which imposes a criminal sanction created by the Minister requires the imposition by the court of a specific method in dealing with delegated legislation.

**72.** In the circumstances, it seems to me that the second ground of challenge to this crucial legislation must fail. I find that the safeguards which are contained in the legislation were appropriate. That being the case, I am of the opinion that the legislation and regulations are constitutional, and I so find. I will hear the parties as to the appropriate order to be made.