



**AN CHÚIRT UACHTARACH**

**THE SUPREME COURT**

**Supreme Court Record No. 2023/86  
[2024] IESC 58**

**O' Donnell C.J.  
Woulfe J.  
Hogan J.  
Murray J.  
Donnelly J.**

**Between:**

**CHAIN WEN WEI**

**Appellant**

**-and-**

**THE MINISTER FOR JUSTICE AND  
THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**Respondents**

**-and-**

**TANG TING TING**

**Appellant**

**-and-**

**THE MINISTER FOR JUSTICE AND  
THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**Respondents**

## **JUDGMENT of Mr. Justice Woulfe delivered on the 19<sup>th</sup> day of December, 2024**

### **Introduction**

1. The appellants appeal the decision of the Court of Appeal (Faherty J.; Ní Raifeartaigh J. and Binchy J. concurring) which upheld the decision of the High Court (Burns J.) which refused the appellants' applications for judicial review of the decisions made by the immigration authorities to refuse them a permission to land or be in the State, pursuant to s. 4 of the Immigration Act, 2004 ("the 2004 Act").

### **Background**

2. The appellants are two Malaysian nationals and, accordingly, were visa exempt for the purposes of entering into the State. Each of the appellants sought permission to land and enter the State through Cork airport on the 12<sup>th</sup> December, 2020, for the purpose of undertaking an English language course which was due to commence on the 4<sup>th</sup> January, 2021. Upon arriving at Cork airport, the appellants were refused permission to land by the respective immigration officers on duty on the day in question, on the basis that the English language course which they were intending to undertake would not take place in person but rather would be conducted online. These refusals were pursuant to s. 4(3) of the 2004 Act, which sets out various grounds whereby an immigration officer may refuse to give a permission to a non-national, coming by air or sea from a place outside the State, to land or be in the State. In this case, the immigration officers refused permission pursuant to s. 4(3)(j) of the 2004 Act ("s. 4(3)(j)"), on the grounds that "the non-national's entry into, or presence in, the State could pose a threat to national security or be contrary to public policy".
3. It is important to note that when the appellants were refused permission to land on these grounds, the State was in Level 3 lockdown due to the Covid-19 pandemic, which led to major restrictions on people living in the State, and on those seeking to enter or leave

the State, in an attempt to prevent the spread of the virus. During the course of the pandemic, certain emergency legislation was enacted by the Oireachtas and various Statutory Instruments and Guidelines were introduced by the Government, in order to contain the spread of the Covid-19 virus as effectively as possible.

4. Guidelines issued by the Government on the 27<sup>th</sup> October, 2020, in respect of English language courses, having regard to the Covid-19 pandemic, stated that:

“[D]ue to new public health restrictions under Level 5 of the Government Framework for Restrictive Measures in Response to COVID-19, English Language Providers have been directed to move all tuition modules online. This is an exceptional and short term and temporary measure due to COVID-19 pandemic. Once restrictions return to Level 3 or lower the standard ... criteria of in-person tuition will reapply. Prospective students seeking to enter the State should wait until in-person tuition has been resumed. Failure to do so may result in students being refused leave to land and refused registration. Providers have been requested to bring this to the attention of prospective students.”

5. The above Guidelines had a particular backdrop, as in January, 2011, the Irish National Immigration Service (“INIS”) issued a “New Immigration Regime for Full Time Non-EEA Students, Guidelines for Language...Students” (the “2011 Guidelines”). This scheme governs the conditions applying to students coming to Ireland to pursue an English language course, and was available to all intending students on the INIS website. The scheme specifies that:

“It is not permissible for a student to come to Ireland to undertake a ...distance learning course.”

6. Further, in August, 2020, with respect to the entry into the State of students intending to commence an English language course, all immigration officers in the State received an email in the following terms:

“Re: Students seeking to enter the State to pursue online courses.

In recent weeks, the Garda National Immigration Bureau has received a number of enquiries from international students regarding the above mentioned matter. Specifically, clarification has been sought as to whether it is permissible for a non-EEA student to enter the State to enrol in an online course of study. Immigration Officers at points of entry to the State should be aware that, under the existing student guidelines, which were issued by the [INIS] in 2011, non-EEA students are not permitted to enter the jurisdiction to undertake part-time or distance-learning courses.

...

It is noted that, in response to the public health emergency, the INIS has granted certain exemptions to students, one of which is that they may take their classes online if their schools/colleges are closed. This exemption, however, applies only to students who are already resident here. It does *not* extend to persons who are seeking to enter the State to pursue their studies,

To reiterate, it is not permissible for a non-EEA student to come to Ireland to undertake an online course. Individuals should not be permitted entry for this purpose and should not be registered on the basis of an online course.”

7. Both appellants were questioned upon their arrival at Cork airport regarding the purpose of their coming to Ireland. It appears that there was conflict in the evidence given by each side as to what the appellants said at the airport regarding their state of knowledge of how their English language classes would be conducted. The trial judge did not feel

it necessary to resolve this conflict, as she felt that this dispute was “of no consequence to the issues in these proceedings” (at para. 7 of her judgment in the second appellant’s case, see: [2022] IEHC 226). Burns J. stated that what the second appellant’s state of knowledge was regarding whether the course would be conducted in person or online was immaterial, as indeed was the intention of the college in that regard. The important issue was whether in fact the course would be conducted online or in person, and the reality of that proposition, as of the 12<sup>th</sup> December, 2020, was that there was no prospect of language courses being conducted in person, even though the country had moved to Level 3 lockdown.

8. The immigration officer served each of the appellants with a notice pursuant to s. 4(4) of the 2004 Act, which informed them of the grounds for the refusal of permission to land, which were stated to be that “her entry into, or presence in, the State could pose a threat to national security or be contrary to public policy”. The appellants were also served with a notice pursuant to s. 14 of the 2004 Act, which required that they stay at the Four Seasons Hotel in Kanturk on the night of the 12<sup>th</sup> December, 2020. Further, they were required to surrender their passports and to report the following morning to the information desk at Cork airport. They were also given a further written notice, setting out the provisions of s. 12 of the 2004 Act which relate to surrender of passports.
9. Upon leaving Cork airport on the evening of the 12<sup>th</sup> December, 2020, both appellants contacted a solicitor and later that evening an urgent application was brought in the High Court in respect of each appellant seeking leave to apply for judicial review for orders of *certiorari* of the respective decisions refusing them leave to land, and seeking injunctions prohibiting their removal from the State. The leave application was adjourned to the 13<sup>th</sup> December, 2020, and subsequently until the 21<sup>st</sup> December, 2020, when leave was granted.

- 10.** In the amended statement of grounds in both cases, the appellants pleaded that there was an absence of reasons for the refusal; that there was no factual basis for the immigration officers' concerns recited on the face of the decisions, and that the essential *rationale* for the decision to refuse leave to land was not patent from the terms of the decision, nor could it be inferred. The appellants also pleaded that the respondents erred in law and/or acted *ultra vires* or unreasonably or irrationally in refusing them leave to land on the basis that their entry into the State could pose a threat to national security or be contrary to public policy.
- 11.** Further, the second appellant also pleaded that the notification of refusal of leave to land failed to comply with s. 4(4) of the 2004 Act in that it did not specify whether the “overarching” ground for the refusal was “national security” or “public policy”, which, the appellants contended, are separate and distinct grounds of refusal, albeit that they are related.
- 12.** By their amended statements of opposition, the respondents pleaded that the decisions to refuse the appellants leave to land were made in accordance with s. 4 of the 2004 Act; that it was a long-established policy of INIS that it was not permissible for a student from a non-EEA country to come to the State for the purpose of undertaking a course delivered online or by way of distance learning; that the appellants had been refused entry into the State on the basis of s. 4(3)(j) of the 2004 Act and that a written notice to that effect had been provided to them, and that the respondents did not err in law or act *ultra vires* or unreasonably or irrationally in refusing leave to land on the basis that the appellants' entry and presence in the State could pose a threat to national security or be contrary to public policy, in circumstances where s. 4 of the 2004 Act confers a wide discretion on the respondents to refuse permission to land on the basis, *inter alia*, of public policy.

## **The High Court**

- 13.** The High Court dismissed the applications for judicial review in two complementary judgments delivered on the 23<sup>rd</sup> March, 2021.
- 14.** The trial judge considered whether it had been established that the appellants' presence in the State was contrary to public policy, having regard to the correct meaning of that phrase within the 2004 Act. The trial judge's attention was drawn to two conflicting High Court authorities which analysed the meaning of "public policy" as referred to in s. 4(3)(j). First, in *Ezenwaka v Minister for Justice, Equality and Law Reform* [2011] IEHC 328 ("*Ezenwaka*"), Hogan J. considered the scope of that provision and stated (at para. 13) that the words "public policy" do not simply mean contrary to existing Government policy, but rather connote a situation where the *personal conduct* of the immigrant poses a real and immediate threat to fundamental policy interests of the State. In that sense, he felt that the concept of public policy at issue here is but another variant of the concept of national security, albeit wider and somewhat more flexible in its scope and reach than national security properly so called.
- 15.** Subsequently Humphreys J. in *Li and Wang v Minister for Justice and Equality* [2015] IEHC 638 ("*Li and Wang*"), delivered a conflicting decision in which he regarded the public policy ground in s. 4(3)(j) as being "in the widest possible terms" (at para. 43(ii)). He later stated (at para. 47) that the reference to national security alongside public policy was perhaps unhappy as a matter of drafting, but he was of the view that having regard to the object and purpose of the Act, that reference did not dilute or qualify the scope of the "public policy" ground. He added that this ground conferred an extremely wide discretion on the Minister to determine whether, in her view, the presence of a particular non-national in the State is contrary to public policy, as determined by her.

**16.** Faced with these two conflicting decisions, the trial judge first examined the long title of the 2004 Act, which states that it is: “An Act to make provision, in the interests of the common good, for the control of entry into the State...”. She noted that neither Hogan J. nor Humphreys J. had dealt in their decisions with the use of the word “or” in s. 4(3)(j) of the 2004 Act. Having regard to the use of the alternative “or”, she disagreed with Hogan J. that public policy is but a variant of national security, and that it relates to personal conduct. She felt that two different concepts are at play within s. 4(3)(j), the first being that a non-national can be refused permission to land if their entry into or presence in the State could pose a threat to national security, and the second being that a non-national can be refused permission to land if their entry into or presence in the State is contrary to public policy.

**17.** The trial judge noted that the public policy at issue in this case was the Government policy since 2011 that students from non-EEA countries are not permitted to enter the State for the purpose of partaking in an English language course, if that course is being delivered online, and the basis for the public policy was to regulate the admission of non-EEA students into Ireland. That question of admission to the State was a matter solely for the first respondent to determine in accordance with domestic law as provided for by s. 4(3) of the 2004 Act. She then stated as follows in her judgment in the first appellant’s case (see:[2021] IEHC 227) (at para. 28):

“With respect to non-EEA students undertaking an English Language Course, the First Respondent has adopted a legitimate policy of not permitting a student to enter the State if that course is to be conducted online. If such a student sought to enter the State, the First Respondent must be in a position to refuse permission to enter, on an individualised basis, so as to give effect to her function of regulating entry into the State. The list of grounds in respect of which entry can



be refused is limited to those set out in s. 4(3) of the 2004 Act. The Oireachtas must have intended that the First Respondent would be empowered to refuse entry for legitimate policy reasons on an individual basis and accordingly, “public policy” as referred to in s. 4(3)(j) must refer to Government policy relating to the regulation of entry into the State as opposed to relating to personal conduct on the part of a non-national which poses a real and immediate threat to fundamental policy interests of the State. Otherwise, the First Respondent would not be in a position to regulate entry into the State and give effect to the purpose of the Act.”

- 18.** While the trial judge declined to grant relief to the appellants, she subsequently certified that her decisions in these cases involved a point of law of exceptional public importance and granted the appellants leave to appeal the decisions to the Court of Appeal, in accordance with s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act, 2000. The point of law (which was identical in each case) was framed in the following terms:
- “For the purposes of s. 4(3)(j) of the Immigration Act 2004, is “public policy” to be interpreted as meaning general Government policy or is it to be defined as a variant of national security, albeit wider and somewhat more flexible in its scope and reach than national security properly so called?”

### **The Court of Appeal**

- 19.** The Court of Appeal dismissed the appellants’ appeals. In terms of the interpretation of “public policy”, Faherty J. (in her judgment for the Court) cited the decision of this Court in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] 2 ILRM 313 (“*Heather Hill*”), stating that Murray J. had eloquently drawn the requisite roadmap for this task, distilling as he did the requisite principles of interpretation from his

analysis of the case law. She then set out the position prior to the Aliens Act, 1935 (“the 1935 Act”) regarding the admission and expulsion of non-nationals to and from the State and the subsequent legislative history which led, ultimately, to the enactment of the 2004 Act.

**20.** As regards a plain reading of s. 4(3)(j) of the 2004 Act, Faherty J. stated that there can be no doubt that, when read having regard to their ordinary and natural meaning, the terms “national security” and “public policy” admit of different concepts. The respondents relied especially on the fact that “national security” and “public policy” are separated by the disjunctive “or”, and stated that applying the ordinary and natural meaning to the words contained in the subsection, the effect is that the concepts are alternative to one another (and were enacted to be so). Faherty J. stated that support for the respondents’ position was to be found in the *dictum* of Hardiman J. in *Montemuino v Minister for Communications* [2013] IESC 40 (“*Montemuino*”), where he stated (at para. 27):

“I consider that the Oxford Dictionary aptly states the contemporary meaning of the disjunctive “or”. Where two things are separated in speech or writing by the word “or” they are distinguished from each other or set in antithesis by “or”; they are set up as alternatives to each other or words so separated. It follows that the words so separated are not identical but are different in nature or meaning.”

**21.** Faherty J. questioned whether the proposition advanced by Hardiman J. in *Montemuino* was displaced once s. 4(3)(j) is construed having regard to the *noscitur a sociis* maxim, as contended by the appellants. Having discussed the said maxim in detail, Faherty J. concluded (at para. 93) that this was not a case where it was properly to be applied, in circumstances where “national security” and “public policy” were capable of being regarded as two separate concepts, and she stated that the “two expressions are far from

synonymous with one another or naturally sequential”. She added (at para. 94) that “each of these concepts is entirely capable of being seen as a separate and distinct concept and not requiring the application of the maxim *noscitur a sociis*.”

- 22.** Faherty J. was satisfied (at para. 95) that the ordinary and natural meaning of “national security” was both different and capable of being seen as different to the concept of “public policy”, especially where neither concept of “national security” or “public policy” had been defined in the 2004 Act, and in circumstances where the provisions of s. 4(3)(j) were separated by the word “or”.
- 23.** Faherty J. went on to consider the context and purpose of the 2004 Act as aids to interpretation. She stated that one of the objects of the Act as identified in its long title was to make provision in the interests of the common good (*i.e.* the public good) “for the control of entry into the State”. She felt that were, potentially, matters other than the “personal conduct” of an entrant into the State that may affect the interests of “the common good”. That being the case, it seemed to her that to restrict “public policy” in the manner suggested by the appellants would not be consistent with the objective sought to be achieved by the 2004 Act, as set out in its long title. Interpretating “public policy” in the manner sought by the appellants would run counter to the context and purpose of the 2004 Act.
- 24.** Ultimately, Faherty J. concluded that the policy in force as of the 12<sup>th</sup> December, 2020, (excluding online language course students from entering into the State for such study) was within the ambit of public policy provided for in s. 4(3)(j). She therefore upheld the decision of the trial judge, stating that she did not err in her findings, which flowed logically and principally from the powers granted to the first respondent under s. 4(3), and from the context and purpose of the 2004 Act itself.

## **Determination**

- 25.** Following the Court of Appeal judgment, the appellants made an application for leave to appeal to this Court. This Court granted leave to appeal in a determination dated the 27<sup>th</sup> November, 2023 (see [2023] IESCDET 140). The Court considered that the appeal raised significant and important issues relating to the operation of the 2004 Act and, specifically, the precise ambit of the public policy provision contained in s. 4(3)(j). These matters had not previously been the subject of a reserved judgment from this Court concerning the extent and scope of this statutory phrase. There was also the question of whether public policy in this sense can be equated with “Government policy” and, if so, whether the policy in question requires to have some independent statutory foundation, a matter examined in passing in a different statutory context by this Court in *A&B Minors: Adoption Authority of Ireland v. C and D* [2023] 1 ILRM 161 (“*A&B Minors*”).
- 26.** The Court further considered that this case also raised difficult questions of statutory interpretation, which had to date resulted in differing High Court judgments on the point. The case also presented difficult issues relating to the rule as to context, *noscitor a sociis*, and the circumstances in which the word “or” is to be regarded as disjunctive or conjunctive in the context of statutory interpretation. It seemed to this Court that the issues raised were manifestly ones of general public importance, and that it was therefore appropriate to grant the appellants leave to appeal pursuant to Article 34.5.3 of the Constitution.

## **Submissions of the Appellants**

- 27.** The appellants submit that the phrase “public policy” in s. 4(3)(j) of the 2004 Act is no more than a residual category of possible reasons to refuse leave to land and one that

must be narrowly construed. In addition, by virtue of its juxtaposition with the phrase “national security” in the same subsection, it connotes the existence of something relating to personal conduct on the part of the non-national that could adversely affect one of the fundamental interests of the State.

*Statutory Interpretation*

- 28.** The appellants cite the case of *Bederev v Ireland* [2016] 3 IR 1 (“*Bederev*”), wherein Denham C.J. referred to discerning the true intention of the Legislature as being always the fundamental test for the Court. They also cite *Heather Hill*, in which this Court restated the approach to statutory interpretation.

*The Historical Frame of Reference and the Mischief which the 2004 Act sought to Remedy*

- 29.** The appellants note that the admission and expulsion of non-nationals to and from the State was originally a matter of inherent executive discretion. However, the 1935 Act was introduced to regulate that power by way of legislation. They cite *Laurentiu v Minister for Justice, Equality and Law Reform* [1999] 4 I.R. 26 (“*Laurentiu*”), in which this Court found that s. 5(1)(e) of the 1935 Act was inconsistent with Article 15.2 of the Constitution, as it failed to set out sufficient principles and policies necessary to govern a delegation of power to the Minister. It is submitted that *Laurentiu* raised doubts about the validity of other subsections of s. 5 of the 1935 Act, and they cite a number of legislative provisions and certain case law which led to the enactment of the 2004 Act.
- 30.** It is submitted that an analysis of the legislative history, and the “mischief” which the 2004 Act sought to remedy, supports the contention that “public policy” as referred to

in s. 4(3)(j) is used in the narrow sense of the term and does not encompass general Government policy. The appellants stated that while the Court of Appeal judgment recites the legislative history in some detail, it did not appear to engage with it or consider its implications, if any, for the task at hand.

- 31.** The appellants also contend that the interpretation of s. 4(3)(j) by the Court below could give rise to the same situation that fell foul of Article 15 of the Constitution in *Laurentiu*. They state that the Court of Appeal should have concluded that the policies governing the entry of non-nationals to the State were set out with as much detail as possible in the 2004 Act itself, leaving only a residual power to the Minister to refuse entry on the basis of – as of then unanticipated - public policy/national security issues that might arise in the future. They also observe that significant consequences arise when a person is refused leave to land, as that person will also be left with a permanent adverse immigration record which they will be obliged to disclose when seeking entry to other countries.

*Public Policy and Residual Power?*

- 32.** The appellants refer to *A&B Minors*, wherein O'Donnell C.J. stated that the public policy exception to a recognition of a foreign adoption contemplated by provisions of the Adoption Act, 1991 “should not be given a broad and unrestricted scope”. This was because some matters, indeed, perhaps the most important matters, are now specifically addressed in the definitional section, and refusal of recognition on grounds of public policy becomes a residual category. The appellants submit that a similar process is evident here, where several, if not most, of the detailed provisions set out in s. 4(3) of the 2004 Act cover matters that would previously have been addressed by reference to public policy.

*The Scheme of the 2004 Act*

- 33.** The appellants analyse the scheme of the 2004 Act, including s. 4 itself. They submit that it is clear from an analysis of the Act, including the long title, that the intention of the Oireachtas was to set out in the Act as a whole, in as much detail as possible, its policy surrounding the entry of non-nationals. It is submitted that the Court below simply did not engage in this exercise. As regards s. 4 itself, the appellants note that subs. (3) contains twelve separate specific reasons for refusal of permission to land or be in the State, with provisions covering matters such as the finances, health, possible conviction, immigration history and future intentions of the non-national. As such, it is said, the Oireachtas clearly put much thought into the circumstances in which it would be appropriate to refuse leave to land. It is submitted that to interpret s. 4(3)(j) to mean that a refusal could be based simply on the Government policy of the day would render some, if not most, of the other paragraphs in s. 4(3) otiose, and that the Court should lean against such an interpretation of the legislation.
- 34.** The appellants state that, as Malaysian nationals, they were entitled to enter the State without having first obtained visas. In circumstances where none of the specific scenarios in subs. (3) arose, the immigration officers they dealt with should, it is submitted, have permitted them to land for a period that acknowledged, in accordance with subs. (10), that each of them had relatives living in the State, and that they had access to funds. It would then have been open to the appellants to apply to an immigration officer in Cork, before their respective permissions expired, to extend those permissions in accordance with subs. (7). As level 5 restrictions would have been reimposed at that point, with English language schools returning to online teaching, it

would have been within the discretion of that immigration officer to refuse to extend their permissions, having regard to the Minister's policy in relation to distance learning.

*The Linguistic Context, Noscitur a Sociis and the Conjunctive "or"*

- 35.** The appellants then address the linguistic context and the application of the *noscitur a sociis* maxim. They contend that had the Oireachtas intended the "public policy" criterion to be construed separately from "national security", it would not have included the two terms in the same subsection within s. 4(3) of the 2004 Act. Instead, it would have included a semi-colon after "national security" and would have included a thirteenth criterion dealing with "public policy". They refer to *Dillon v Minister for Posts and Telegraphs* [1981] WJSC-SC 1589 ("*Dillon*"), where the phrase at issue was "an indecent, obscene or grossly offensive character", and Henchy J. explained that the maxim requires "that a word or expression is known from its companions". It is submitted that the Court of Appeal erred in adopting the definition of "public policy" set out in *Murdoch's Dictionary of Irish Law*, before having regard to the *noscitur a sociis* maxim, or any of the other relevant canons of construction, in circumstances where these are important interpretative tools.
- 36.** The appellants contend that the Court of Appeal erred in holding that the word "or" as used in the relevant provision is disjunctive. They submit that, in circumstances where the concepts of "national security" and "public policy" are both in the same subsection, and where that is one of thirteen highly particularised subsections, the *noscitur a sociis* maxim should have been deployed to see whether it assisted the process of interpretation.



*Private International Law Jurisprudence*

37. The appellants cite the decision of this Court in *H.A.H v S.A.A* [2017] 1 I.R. 72 (“*HAH*”), and submit that in their judgments neither O’Malley J. nor Clarke J. viewed Government policy *simpliciter* as the exclusive source of the public policy in question. It was notable, they add, that in *A&B Minors*, in ascertaining the scope of “public policy” for the purposes of the Adoption Act 2010, both O’Donnell C.J. and Hogan J. had regard to a variety of established sources, and not simply to the policy of the Executive. It is submitted that the Court of Appeal erred in failing to consider the sources from which public policy in this context are usually derived. Having regard to those sources, the Minister’s 2011 policy prohibiting non-nationals from registering as students to undertake distance-learning courses could not, *standing on its own*, be viewed as a well-established source of “public policy” at common law.

*Other Legislation*

38. The appellants also consider the use of “public policy” in other legislation in the immigration sphere. They submit that it is significant that “public policy” has often been used alongside “national security” in various statutory provisions (that, in the context of what is at issue in this appeal, can be regarded as being *in pari materia*), and in a manner which suggests that, when the two are used together the phrase “public policy” is to be interpreted as having the particular meaning assigned to it by Hogan J. in *Ezenwaka*.

**Submissions of the Respondents**

39. The respondents concede that the ambit of the term “public policy” is neither easily nor well defined in statute. It is submitted that while the pandemic was the cause of the

appellants' course being delivered online, it was not the genesis for the "public policy" the subject matter of the within proceedings. The public policy at issue was the 2011 Guidelines, which clearly signalled that students from non-EEA countries were not permitted to enter the State for the purpose of partaking in an English language course being delivered online. It is said that this has not been a fleeting policy, nor one that has changed with any successive Governments of the day since. The 2011 Guidelines are rooted in the State's immigration policy regarding non-EEA national students, which the respondents submit is a legitimate one. They contend that the Minister must be empowered, should that be her considered determination, to refuse entry to such persons who seek entry to the State to pursue an online course.

#### *General Context*

40. Various authorities which support the State's right to regulate the entry and presence of foreign nationals in the State are cited by the respondents. They contend that, given the broad discretion afforded to her to control immigration in the State the Minister is entitled to formulate a particular policy and impose certain restrictions on entry as the circumstances, in her opinion, justify. They also cite the decision of this Court in *Bode v. Minister for Justice* [2008] 3 I.R. 795, wherein Denham J. (as she then was) described the power of the State to control immigration as one of the fundamental powers of a State. They contend that the correct starting point is that the appellants did not have an automatic right to be given permission to enter the State. While the appellants are nationals from a country that the Minister had designated as visa-exempt, this did not alter the fact that it is the immigration officer who determines whether a non-national may enter the State, the duration of permission and any conditions attaching if permission is granted.

### *Statutory Interpretation*

41. As regards the interpretation of the 2004 Act, the respondents cite the decision in *Heather Hill*, and submit that the central questions are as follows: (a) why the Oireachtas would *not* have wished to give the Minister a broad power to refuse entry to the State in this case? and (b) where in the specific text or overall context and objectives of the 2004 Act can a negative or narrow purpose be discerned?
42. In terms of the wording of the statute itself, the respondents contend that the “plain and ordinary” meaning of s. 4(1) of the 2004 Act is that an immigration officer *may* grant a non-national permission to land in the State, subject to the other provisions of the Act. It is not disputed that, where the 2004 Act applies, the reasons for refusal of entry are confined to those set out in s. 4(3). It is submitted that, again, the plain meaning of the words in this provision is that an immigration officer has a broad discretion, citing the decision of Humphreys J. in *Li and Wang*.
43. The respondents note that it is common case that neither “public policy” nor “national security” are defined in the 2004 Act or in similar legislation. They cite *Black’s Law Dictionary* where “national security” is defined to connote a situation where the safety of a country and its governmental secrets, together with the strength and integrity of its military, is seen as being necessary for the protection of its citizens. They note that “public policy” is defined in *Murdoch’s Dictionary of Irish Law*, as the principle in law that a person will not be permitted to do that which has a tendency to be injurious to the public, or against the public good. It is submitted by the respondents that applying the ordinary and natural meaning of the two concepts in s. 4(3)(j), *i.e.* “pose a threat to national security” or “be contrary to public policy”, it cannot be said that they are synonymous or simply variants of one another, and to accept the appellants’

interpretation of public policy would be to re-write the subsection to read “contrary to public policy based on sufficiently serious personal conduct”.

- 44.** The respondents submit that both the trial judge and the Court below were correct to find that the two concepts are at play in s. 4(3)(j), expressly separated by the word “or”. While the appellants rely on *Ezenwaka*, the respondents contend that this decision ought to be distinguished on the basis that Hogan J. imposed a rigid EU law interpretation of public policy, which does not fully take account of the domestic nature and the powers granted to the Minister under s. 4(3)(j) of the 2004 Act. They submit that the meaning assigned to s. 4(3)(j) by Hogan J. cannot be gleaned directly from the ordinary words contained in that provision, and that the meaning he assigned was informed by EU law.
- 45.** As regards the Court of Appeal’s finding that it was unnecessary to deploy the *noscitur a sociis* maxim, the respondents contend that this was the correct approach, as the concepts contained in s. 4(3)(j) are far from being synonymous. They submit that, as per the ruling in *Heather Hill*, the words used in s. 4(3)(j) are the sole identifiable and legally admissible outward expression of the objectives of the Oireachtas. The term “public policy” is left intentionally broad and undefined, and this is properly in keeping with the wide powers given to the Minister under the 2004 Act, when also viewed in context.

*The Context and the Object of the Legislation*

- 46.** The respondents then apply what they describe as “the next stage of the *Heather Hill*” approach, by considering the words of the provision in their correct statutory context. In doing so, they examine the long title of the 2004 Act, which states that it is an Act to make provision, in the interests of the common good, for the control of entry into the State. They cite *Li and Wang*, where Humphreys J. considered the meaning of s. 4(3)(j)

in light of the purpose of the Act, and stated (at para. 47) that the “public policy” ground confers an extremely wide discretion on the Minister to determine whether, in her view, the presence of a particular non-national in the State is contrary to public policy, as determined by her.

47. The respondents submit that it is clear from the object of the 2004 Act that it seeks to regulate the terms and conditions under which persons can be admitted into the State. They also submit that the Minister must be in a position to refuse entry on an *individualised* basis, in order to give effect to her function of regulating entry into the State, which in turn gives effect to the purpose of the 2004 Act. Accordingly, it is said that “public policy” as referred to in s. 4(3)(j) must refer to Government policy relating to the regulation of entry into the State, as opposed to personal conduct on the part of a non-national which poses a real and immediate threat to fundamental policy interests of the State.

*Public Policy understood as Fundamental Public Values*

48. The respondents submit that, when one thinks of public policy, it can be understood by reference to cases such as *H.A.H* and *A&B Minors*. In *H.A.H*, Clarke J. referred to identifying the fundamental values inherent in the Irish national legal order which the public policy exception is designed to protect. The respondents note that Hogan J. in *A&B Minors* stated (at para. 28) that “public policy should therefore be understood as a reference to the public policy as can be objectively gleaned – whether expressly or inferentially – from established legal sources, such as the Constitution and perhaps more particularly Acts of the Oireachtas”.
49. The respondents state that the fact that the concept of public policy in these cases is understood in relation to our public values does not exclude the proposition that public

policy can also be understood to mean Government policy in the context of immigration matters, and in particular under the 2004 Act. As Hogan J. noted in *A&B Minors* (at para. 33), “public policy in this sense is not, of course, set in stone”. They contend that when “public policy” is construed in context, it does not make the Minister’s 2011 Guidelines any less of a public policy.

- 50.** The respondents highlight that there are many non-statutory schemes operated by the Minister, which are administrative schemes established by her, exercising executive power. They contend that the fact that the 2011 Guidelines do not have statutory footing *per se*, should not disentitle the Minister from relying on a long established policy regarding immigration control of non-national students. They note that the appellants did not challenge the validity or otherwise of the 2011 Guidelines.

#### *The Pre-existing Legal Framework*

- 51.** The respondents state that it is clear from the appellants’ submissions note that they rely heavily on the legislative history that preceded the 2004 Act. They state that the significance of *Laurentiu* has to be viewed chiefly through the prism of Article 15.2.1 of the Constitution. While the ratio of *Laurentiu* was that the Aliens Order 1946 impermissibly trespassed on the requirement in Article 15.2.1 that the Oireachtas must make the laws, that was remedied by the 2004 Act, and it contains sufficient principles and policies notwithstanding the broad powers given to the Minister under the Act. The respondents submit that while the legislative history is informative, it is not determinative of the scope and meaning of s. 4(3)(j), and certainly not as the appellants contend.

## Decision

52. It seems to me that a relatively net question of statutory interpretation arises for decision on this appeal, namely the scope of the term “public policy” as it appears in s. 4(3)(j) of the 2004 Act, and in particular whether that term should be narrowly construed by virtue of its juxtaposition with the term “national security” in the same subsection.

### *The Principles of Statutory Interpretation*

53. The principles governing statutory interpretation have been recently restated by this Court in *Heather Hill* and *A.B. & C. (A Minor) v. The Minister for Foreign Affairs and Trade* [2023] 1 ILRM 335 (“A.B. & C.”). In *Heather Hill*, in his judgment for the Court, Murray J. cited with approval the judgment of McKechnie in *The People (DPP) v. Brown* [2019] 2 I.R. 1, and he summarised the essential points which McKechnie J. had made as follows (at para. 106):

“(i) The first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning...

(ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include ‘*the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including...LRC or other reports; and perhaps...the mischief which the Act sought to remedy*’...

(iii) In construing those words in that context, the Court will be guided by the various canons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language...

(iv) If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court will seek to discern the intended object of the Act and the reasons the statute was enacted...”

**54.** Murray J. went on to consider s. 5 of the Interpretation Act, 2005 which provides for a departure from the literal interpretation of statutory provision in four identified situations. He concluded as regards the effect of this provision as follows (at para. 128):

“...while the meaning of the language used in a provision remains the focal point of any exercise of the statutory interpretation, textual or contextual ambiguity or obscurity as well as the production of absurdity or undermining of an identifiable legislative intent will enable the taking into account of broader considerations to ascertain and implement the legislator’s intention. To that extent, s. 5 is of assistance in providing legislative grounding for and confirmation of the approach that is today taken by the courts (and had been taken by some judges for a very long time). As the Law Reform Commission Consultation Paper makes clear, this was required in a context in which some of the judicial decisions suggested unease in looking beyond the language of the provision. Section 5 puts it beyond doubt that the approach suggested in those decisions does not represent the correct interpretative method. As matters have transpired, the Courts have independently of s. 5 arrived at the same point. It follows that while there are unresolved issues around some aspects of this provision (see the comments of McKechnie J. in *AWK v. Minister for Justice* [2020] IESC 10 at paras. 45 – 50) it does not change the basic analysis to be undertaken when interpreting a statute, at least insofar as relevant to this case. And, critically, it leaves no room for doubt but that the words used in the legislation have a primary reference point in the exercise.”



55. Subsequently, in *A.B. & C.*, this Court, per Murray J., stated as follows (at para. 73):

“...it is to be remembered that the cases – considered most recently in the decision of this Court in *Heather Hill*... - have put beyond doubt that language, context and purpose are potentially in play in *every* exercise and statutory interpretation, none ever operating to the complete exclusion of the other. The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The Court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words.”

*The Words used in the Legislation*

56. As set out above, the starting point in the construction of a statutory provision is the language used in the provision under consideration, and the plain and ordinary meaning of that language. In this case s. 4(3) of the 2004 Act provides that an immigration officer may, on behalf of the Minister, refuse to give a permission to a non-national to land or be in the State if the officer is satisfied that one of twelve listed grounds has been established. Ground (j) empowers the immigration officer to do so if satisfied “that the

non-national's entry into, or presence in, the State could pose a threat to national security or be contrary to public policy”.

**57.** In my opinion the plain and ordinary meaning of the words used in s. 4(3)(j) is that the immigration officer may refuse to give a permission on two alternative bases, *i.e.* if he or she is satisfied either that the non-national's entry into, or presence in, the State could pose a threat to national security or that such entry could be contrary to public policy. I say this for two principal reasons.

**58.** Firstly, I agree with the Court below that there can be no doubt that when read having regard to their ordinary and natural meaning, the terms “national security” and “public policy” admit of different concepts. “National security”, as the words suggest, means the security or safety of a country and includes various related matters concerning the military and intelligence gathering.

**59.** “Public policy”, on the other hand seems to me to be a much wider concept, albeit one that is more difficult to clearly define. The Court below cited a definition found in *Murdoch's Dictionary of Irish Law* (3<sup>rd</sup> Ed. 2000), which was a shorter version of the following definition set out in *Egerton v. Brownlow (Earl)* (1853) 4 H.L. Cas 1 (at 196):

“Public policy,...is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.”

**60.** In *Naylor, Benzon & Co. Ltd v. Krainische Industrie Gessellschaft* [1918] I K.B. 331, McCardie J. set out another attempted definition as follows (at 342):

“The phrase ‘public policy’ appears to mean the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so

that anything is treated as against public policy if it is generally regarded as injurious to the public interest...”.

**61.** Public policy, therefore, seems to relate to certain policy which is directed towards the achievement of the public good or the public interest. That raises the question as to how does one identify any such public policy, or what are the sources of same?

**62.** In *A. & B. Minors* this Court considered public policy in the context of s. 57 of the Adoption Act, 2010, which provides for recognition of certain “inter county” adoptions “unless contrary to public policy”. In his judgment for the Court, O’Donnell C.J. considered the sources of public policy in that field and stated as follows (at para. 60):

“Historically, questions of recognition were a matter for the common law and not a matter directly addressed by the provisions of the Constitution or statute law. Where, however, questions of recognition are expressly dealt with by the Constitution or by statute, then there is no remaining ground for any question of public policy. The conclusion of any case becomes a matter of constitutional or statutory interpretation. Where, however, there is no provision dealing directly and explicitly with recognition and enforcement of foreign transactions, the Constitution or statute law of the State dealing with the same subject matter within the State is the best and firmest guide to public policy. If, for example, certain matters when occurring within the jurisdiction of the State, are prohibited by the criminal law, or certain types of contracts made or to be performed in the State are by statute to be treated as unenforceable, then such matters represent a very clear guide to public policy. Moreover, such primary law seems to suggest that such matters, although lawful when carried out abroad, may be considered to offend against public policy in Ireland, so that effect might not be given to a contract containing certain terms. I agree,

therefore, that the public law of the State is the best and surest guide to public policy, but I do not agree that in considering public policy a court is, or should be, confined to the provisions of the Constitution or the contents of the statute book.”

**63.** O’Donnell C.J. went on to state that it was, in his view, both appropriate and helpful to consider a wide range of materials to attempt to assess not just the existence of public policy, but the strength with which it applies. A Court would, of necessity, afford greater weight to clear expressions of policy contained in legislation, but that in itself was no reason to exclude other matters which might be helpful. He noted that in *H.A.H.* this Court held unanimously that public policy did not require the refusal of recognition of a potentially polygamous marriage which was lawful in the State of habitual residence. However, in her judgment O’Malley J. went on to express the view, with which the other members of the Court agreed, that recognition of the second marriage in an actually polygamous marriage would be contrary to fundamental constitutional principle and, therefore, contrary to public policy. O’Donnell C.J. stated (at para. 62) that, in doing so, O’Malley J. had regard to the Constitution and statute law of the State, but also to international agreements entered into by the State and the attitude of the executive. He noted that in entering an agreement and binding the State to its terms, the executive expresses a policy position.

**64.** O’Donnell C.J. also considered that the position of the Attorney General as a constitutional officer, and adviser to the Government, may be of relevance in particular cases. He referred to the case of *Adams v. Adams (Attorney General intervening)* [1970] 3 W.L.R. 934, where Sir Jocelyn Simon stated that he thought that the Attorney General also had the right of intervention at the invitation or with the permission of the Court where the suit raised any question of public policy on which the executive may have a

view which it may desire to bring to the notice of the Court. He added that if clear law was expressly based on considerations of public policy, then the Executive must accept it and them unless and until the law is changed by the Queen in Parliament; but where the law was doubtful or the considerations of public policy might be in dispute, the view of the Executive might be of value to the Court. O'Donnell C.J. was of the view that similar considerations apply in this jurisdiction.

- 65.** It seems clear from the above that the sources of public policy may include expressions of policy positions by the Executive, at least in cases where there is no conflicting expressions of policy contained in legislation. It is of course the case that in the modern State the Executive expresses many policy positions other than by way of legislation, and does so by way of a constant stream of policy documents, circulars, guidelines and other means. I should clarify that when I refer to “the Executive” here, I am referring to the executive arm of Government in a broad sense, to include not only the Government as per Article 28 of the Constitution, but also the departments of State administered by the members of the Government, and Government agencies which operate under the control and within the sphere of those departments.
- 66.** A couple of examples of such modes of expressions of policy by the Executive might be mentioned. In the field of education there was no legislation in this State regulating primary education until the Education Act, 1998. Before that Act the system operated by means of administrative circulars from the Department of Education addressed to schools and management. Similarly, in the field of agriculture there is often no legislation underpinning complex schemes administered by the Department of Agriculture involving huge sums of money. Thus, prior to a Statutory Instrument in 1994, virtually the entire milk quota system was administered by a series of administrative circulars and notices made by the Department of Agriculture. See

generally on this issue Hogan, Gwynn Morgan & Daly, *Administrative Law in Ireland* (5<sup>th</sup> Ed., 2019) at paras. 2-14 to 2-163.

**67.** Immigration law itself provides examples of such expressions of policy by the Executive. Thus, in *A.Z. v. Minister for Justice* [2024] IESC 35, this Court recently considered issues arising from the Minister’s “Policy Document on Non-EEA Family Reunification”. The “executive summary” to the policy document begins in the following terms:

“The purpose of this document is to set out a comprehensive statement of Irish national immigration policy in the area of family reunification.”

**68.** That is not to say that every such expression of policy by the executive will necessarily amount to “public policy”, within the meaning of that term as found in certain statutory provisions. It would seem necessary for there to be a sufficient degree of clarity and consistency around the expression of policy before that could possibly be the case.

**69.** All of the above suggests to me that, *prima facie* at least, the potential scope of public policy is much wider than national security. While the latter could possibly be viewed as one aspect of the former, there are potentially many other aspects.

**70.** The second reason for holding that the plain and ordinary meaning of the words used in s. 4(3)(j) suggests that there are two alternative bases for the refusal of a permission relates to the use of the word “or” between the words “pose a threat to national security” and “be contrary to public policy”.

**71.** In *Montemuino*, this Court considered the interpretation of a statutory provision which provided that a person who fishes in contravention of the relevant Regulations shall be guilty of an offence and shall be liable, as a statutory consequence of a conviction:

“To forfeiture of all or any of the following found on the boat to which the offence relates:

- (a) any fish,
- (b) any fishing gear.”

72. In his judgment, Hardiman J. stated as follows:

“26...The phrase “all or any” consists of two words separated by the disjunctive word “or”. According to the Oxford English Dictionary this disjunctive word was originally a “reduced form of OTHER”, and this derivation is suggestive. It suggests that the word after *or* is different or “other” than the word which precedes it. The same dictionary, addressing the contemporary meaning of the word *or* finds it in the following senses:

- (1) Introducing the second of two or all but the first, or only the last, of several, *alternatives*.
- (2) Introducing the only remaining possibility of choice of *two or more quite different or mutual exclusive alternatives*.
- (3) Followed by or as an *alternative*; either.”

(Emphasis supplied)

27. I consider that the Oxford Dictionary aptly states the contemporary meaning of the disjunctive *or*. Where two things are separated in speech or writing by the word “or” they are distinguished from each other or set in anthesis by or; they are set up as alternatives to the other word or words so separated. It follows that the words so separated are not identical but are different in nature or meaning.

28. If the statutory phrase of relevance here read:

“...forfeiture of all of the following found on the boat...” (emphasis added)

the meaning would be quite clear: all the fish and all the gear would be liable to forfeiture.

29. But the subsection is not worded in that way. In that Act as passed by the Oireachtas the words “or any” follow the word “all”. In the ordinary and natural meaning of words, the effect of this addition is to create an *alternative* to the forfeiture of “all” of the gear and catch.”

**73.** In my opinion, in the same way as in *Montemuino*, the use of the disjunctive word “or” in s. 4(3)(j) suggests that the phrases “pose a threat to national security” and “be contrary to public policy” are distinguished from each other or set in anthesis by or; they are set up as alternatives to the other words so separated. It follows that the words so separated are not identical but are different in nature or meaning.

**74.** The foregoing considers the ordinary and natural meaning of the words used in s. 4(3)(j). It is then necessary to consider whether viewing those words in context, as per Murray J. in *Heather Hill*, might impact upon the apparent meaning of those words. The appellants relied upon two principal matters in that regard.

*The Noscitur a Sociis Maxim*

**75.** In her judgment for the Court below Faherty J. stated (at para. 70) that the appellants did not really challenge what a plain reading of the terms “national security” and “public policy” conveys. She noted (at para. 46) that their overarching submission was that, in arriving at the decisions she did, the trial judge failed to apply and/or failed properly to apply the maxim *noscitur a sociis* to the construction of s. 4(3)(j). It is therefore necessary to consider the potential application of this maxim in some detail.

**76.** In *Dillon v. Minister for Post and Telegraphs* (Unreported, Supreme Court, 3<sup>rd</sup> June, 1981) Henchy J. stated that the maxim *noscitur a sociis* “means that a word or



expression is known from its companions”. That case concerned the interpretation of a Regulation, made pursuant to the Post Office Act, 1908, which prohibited the posting of “any postal packet...having thereon...any words...of an indecent, obscene or grossly offensive character”.

**77.** The plaintiff was a candidate for the election to Dáil Éireann in June 1981, and he wished to avail himself of the free postage facilities provided for candidates under the relevant legislation. He got an election brochure prepared and printed, but it was rejected as ineligible for free postage because it contained the following sentence to which the relevant Minister took exception:

“Today’s politicians are dishonest because they are being political and must please the largest number of people.”

**78.** The Minister rejected the plaintiff’s brochure on the grounds that the brochure contained words of a “grossly offensive character” within the meaning of the relevant Regulation. In his judgment Henchy J. (with whom Griffin J. and Kenny J. agreed) expressed doubt as to whether he would have held that the sentence quoted above would have offended against the Regulation, even if the prohibition were simply against words of a grossly offensive character.

**79.** Henchy J. then continued as follows:

“9. But the embargo is not simply against words of a grossly offensive character. So I do not have to reject the Minister’s objection on that ground. The embargo is against ‘any words, marks or designs of an indecent, obscene or grossly offensive character’. That assemblage of words gives a limited and special meaning to the expression “grossly offensive character”. As Stamp J. said in *Bourne v. Norwich Crematorium Limited* [1967] 2 All E.R. 576 (at 578):

‘English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put into the sentence with the meaning which you have assigned to them as separate words.’

10. Applying the maxim *noscitur a sociis*, which means that a word or expression is known from its companions, the expression “grossly offensive character” must be held to be infected in this context with something akin to the taint of indecency or obscenity. Much of what might be comprehended by the expression if it stood alone is excluded by its juxtaposition with the words “indecent” and “obscene”. This means that the Minister may not reject a passage as disqualified for free circulation through the post because it is apt to be thought displeasing or distasteful. To merit a rejection it must be grossly offensive in the sense of being obnoxious or abhorrent in the way that brings it close to the realm of indecency or obscenity. The sentence objected to by the Minister, while many people would consider it to be denigratory of today’s politicians, is far from being of a ‘grossly offensive character’ in the special sense in which that expression is used in the Act.”

**80.** In my opinion the purpose of the *noscitur a sociis* maxim is to limit what should otherwise be recognised as the generality of the wording *in a particular context*. In *Dillon* the particular context was the posting of certain material which contained words alleged to be of a “grossly offensive character”. It seems to me that Henchy J. regarded that term as ambiguous within that particular context. Did it mean words which were apt to be fraught, displeasing or distasteful, or did it mean grossly offensive in the sense of being obnoxious or abhorrent in a way that brings it close to the realm of indecency

or obscenity? Henchy J. was able to resolve that ambiguity by reliance on the “assemblage of words” (“words...of an indecent, obscene or grossly offensive character”) in order to find that the expression “grossly offensive character” was “infected in this context” with something akin to the taint of indecency or obscenity.

**81.** The appellants also relied upon the application of the *noscitur a sociis* maxim in the judgment of this Court in *Kelly v. Commissioner of An Garda Síochána* [2013] IESC 47. In his judgment for the Court O’Donnell J. (as he then was) considered the interpretation of Regulation 35(2) of Garda Síochána (Disciplinary) Regulations, 2007. Regulation 35(2) provided that an Appeal Board may refuse to consider an appeal in garda disciplinary proceedings where:

“(b) Having considered the member’s statement of the ground or grounds of appeal, it is of opinion that the case made by the member is frivolous, vexatious or without substance or foundation.”

**82.** O’Donnell J. addressed the test set out in Regulation 35(2)(b) and stated as follows:

“39. At first sight it might be thought that the different grounds in Regulation 35(2) are to be treated disjunctively. I accept that the concept of “frivolous” or “vexatious” claims or appeals may involve a consideration of motive or intent of the claimant or appellant and therefore a somewhat subjective test, (although it is possible that proceedings may be frivolous or vexatious without being intended to be so) whereas the concept of “without substance or foundation” appears to require a purely objective analysis. However, I consider that each of the tests must be set in the context of Regulation 35(2) as a whole, and the interpretation of the individual phrase can benefit from the light cast on it by the surrounding words. The wisdom expressed in the Latin expression, *noscitur a*

*sociis* is that it is possible to learn something about a word, like a person, from his or her friends, neighbours and associates.

40. I consider that the terms can usefully be approached as describing a category of cases where it is appropriate to dismiss the case or appeal without a formal hearing. While logically the concepts of “frivolous”, “vexatious” and “without substance or foundation” are distinct concepts there is a significant degree of overlap between them. Almost all appeals are claims which are properly described as frivolous or vexatious can also be said to be without substance or foundation. The addition of the concept of “without substance or foundation” extends the category somewhat, since there can be cases objectively determined to be hopeless which are nevertheless advanced *bona fide* and with all seriousness but which on analysis are bound to fail. Nevertheless, in applying the test it is useful to consider the matter cumulatively, recognising the test is to be applied on the papers, and as describing those cases which can be summarily disposed of, without a hearing.”

**83.** It is important, in my opinion, to note that O’Donnell J. applied the *noscitur a sociis* maxim in the particular “context of Regulation 35(2) as a whole”. Within that particular context he felt there was a “significant degree of overlap” between what might appear logically to be distinct concepts of “frivolous”, “vexatious” and “without substance or foundation”, such that the concepts could be treated “as describing a category of cases”.

**84.** I turn now to the first of two conflicting High Court authorities on the meaning of “public policy”, as referred to in s. 4(3)(j). In *Ezenwaka*, the second applicant was a Nigerian national and was the wife of the first applicant, who was also a Nigerian national and who had been granted residency in the State. The first applicant lived in Nigeria with their two children, who were also Nigerian citizens, but they were granted

the appropriate type of “D” visas permitting family reunification in the State under the relevant scheme or policy governing family reunification.

**85.** When the second applicant and her two children arrived in Dublin airport in July 2008, they presented their Irish visas to the immigration officers. Having examined the documents, the immigration officers formed the view that the visas had been issued in error, and that the first applicant was not entitled to seek family reunification under the relevant scheme or policy. The immigration officers refused a permission under s. 4(3)(j), on the ground that their presence in the State would be contrary to public policy.

**86.** In his judgment Hogan J. quashed the decision of the immigration officers to refuse permission. Having quoted s. 4(3)(j), he then stated as follows (at para. 13):

“The first issue which arises for consideration is the meaning of the phrase “public policy”. The reference to public policy must here be understood in the statutory context in which it occurs: see, e.g. the classic comments of Henchy J. in *Dillon v. Minister for Post and Telegraphs*, Supreme Court, 3<sup>rd</sup> June, 1981. The very fact that the reference to “public policy” is juxtaposed beside the words “national security” means that the former words take on their traditional and somewhat more restricted meaning in the sphere of immigration law. In that context, the words “public policy” do not simply mean contrary to existing Government policy, but rather connote a situation where the *personal conduct* of the immigrant poses a real and immediate threat to fundamental policy interests of the State. In that sense, the concept of public policy at issue here is but another variant of the concept of national security, albeit wider and somewhat more flexible in its scope and reach than national security proper so called.”

- 87.** It seems clear from the above that Hogan J. applied the *noscitur a sociis* maxim (without expressly referring to same) when construing s. 4(3)(j), relying on the comments of Henchy J. in *Dillon*. With respect, I do not think that the maxim is properly applicable in the present case.
- 88.** Firstly, I do not think that one can regard the term “public policy” as ambiguous within the particular context of s. 4(3)(j), in the same manner in which Henchy J. regarded another term as ambiguous in *Dillon* and as requiring the application of the *noscitur a sociis* maxim, as per para. 90 above.
- 89.** Secondly, in my opinion the reference O’Donnell J. in *Kelly* to “a category” is of significance. In *Craies on Legislation* (12<sup>th</sup> Ed., 2020) the *ejusdem generis* rule of construction is considered in conjunction with the *noscitur a sociis* maxim, as almost two sides of the same coin: see para. 20.1.17. In a similar vein *Dodd, Statutory Interpretation in Ireland* states (at para. 5.68) that: “*ejusdem generis* is a particular aspect of *noscitur a sociis*”. One can therefore take note of the following statement made by Farwell L.J. in *Tillmans & Co. v. S.S. Knutsford* [1908] 2 K.B. 385 (at 403):
- “Unless you can find a category, there is no room for the application of the *ejusdem generis* doctrine.”
- 90.** In contrast to the approach which O’Donnell J. was able to apply in *Kelly*, in the particular context which arose in that case, I do not think that there is a sufficient degree of overlap between the distinct concepts of “national security” and “public policy” in the particular context of s. 4(3)(j), and in the wider context of the 2004 Act read as a whole, to enable the Court to treat these two concepts as “describing a category of cases”. As per Faherty J. in the Court below (at para. 103), I am not satisfied that the fact that the *noscitur a sociis* maxim was applied in *Kelly* is dispositive of what is in issue here, in circumstances where the “significant degree of

overlap”, which O’Donnell J. found between the concepts at play in *Kelly*, is not evident on a plain reading of s. 4(3)(j). I agree with Faherty J. that whilst both “national security” and “be contrary to public policy” are included in one subsection of the 2004 Act, each of these concepts is entirely capable of being seen as a separate and distinct concept and not requiring the application of the maxim *noscitur a sociis*.

**91.** I will return to other aspects of *Ezenwaka* below.

#### *The Legislative History*

**92.** The appellants also placed particular reliance upon the historical frame of reference and the mischief which, it is said, the 2004 Act sought to remedy. It is common case that the admission and expulsion of non-nationals to and from the State was originally a matter of inherent executive discretion, and that the 1935 Act was introduced to regulate those powers by way of legislation. Section 5(1)(e) of the 1935 Act provided that the relevant Minister may, “if and whenever he thinks proper”, by order make provision for the exclusion or deportation and exclusion of aliens from the State. In *Laurentiu* the Supreme Court held that this provision was inconsistent with Article 15.2 of the Constitution, as it failed to set out sufficient principles and policies necessary to govern a delegation of power by the Oireachtas to the Minister.

**93.** It appears that the decision in *Laurentiu* raised doubts about the validity of other provisions of the 1935 Act. Section 5(1)(a) of that Act had delegated a similarly broad power to the Minister to prohibit, by order, aliens from landing in or entering into the State. In *Kanaya v. Minister for Justice, Equality and Law Reform* [2000] 2 ILRM 503, Murphy J. noted (at 509) that the statement of opposition had admitted that Article 5(2) of the Aliens Order 1946 (the “1946 Order”), made under s. 5(1)(a) of the

1935 Act, was invalid as it comprised an unconstitutional delegation of legislative power.

94. Following the decision in *Laurentiu* in May 1999, the Oireachtas enacted s. 2 of the Immigration Act, 1999 (“the 1999 Act”), which provided, at subs (1) that:

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

95. In *Leontjava v. DPP* [2004] 1 I.R. 591, the High Court declared s. 2 of the 1999 Act invalid having regard to Articles 15, 20, 25 and 26 of the Constitution. In conjunction with an appeal to this Court by the State, the Oireachtas enacted the 2004 Act as an emergency measure pending the outcome of that appeal. The State ultimately succeeded in the appeal, and so leave to land is now governed by both s. 4 of the 2004 Act and Article 5(2) of the 1946 Order, with the latter deemed to have statutory effect.

96. The appellants submit that an analysis of the legislative history, and the “mischief” which the 2004 Act sought to remedy, supports the contention that “public policy” as referred to in s. 4(3)(j) is used in the narrow sense of the term and does not encompass general Government policy. They contend that while the Court of Appeal judgment recites the legislative history in some detail, it does not appear to engage with or consider its implications, if any, for the task at hand, other than to hold that the principles and policies governing the Minister’s discretion in relation to public policy are to be found in the long title to the 2004 Act, the principles of Irish law and the nature of ministerial decision making.

97. The appellants submit that in interpreting the discretion conferred by s. 4(3)(j) as being subject to the requirement that it be exercised *if the Minister considered that this was in the interests of the common good*, the Court below failed to consider that this could



be construed as bringing about the same situation that fell foul of Article 15 in *Laurentiu*. It is submitted that, had it properly considered the legislative history and the “mischief” that the 2004 Act was set up to remedy, it would have concluded that the policies governing the entry of non-nationals to the State were set out with as much detail as possible in the Act itself, with only a residual power left to the Minister to refuse entry on the basis of – as of then unanticipated – public policy/national security issues that might arise in the future.

**98.** The respondents submit that the significance of *Laurentiu* has to be viewed chiefly through the prism of Article 15.2.1 of the Constitution. It is said that while the ratio of *Laurentiu* was that the 1946 Order impermissibly trespassed on the requirement in Article 15.2.1 that the Oireachtas must make the laws, that was remedied by the 2004 Act, and it contains sufficient principles and policies notwithstanding the broad powers given to the Minister under the Act. The respondents submit that while the legislative history is informative, it is not determinative of the scope and meaning of s. 4(3)(j), and certainly not as the appellants contend.

**99.** In my opinion, the appellants’ reliance on the legislative history, and in particular on the decision in *Laurentiu*, is misconceived for the following reasons. *Laurentiu* involved a challenge to the validity of a provision in primary legislation which purported to delegate to the Minister the power to make provision by way of secondary legislation (a ministerial order) for the deportation of aliens. As stated by Keane J. (at 90):

“The central issue in the case, however, is as to whether s. 5(1)(e) of the Act of 1935 infringes Article 15.2 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.”

**100.** In contrast to *Laurentiu*, the present case does not involve a challenge to the validity of the relevant provisions of primary legislation, *i.e.* s. 4(3)(j). This may be because that provision does not purport to delegate any power to the Minister to do anything by way of secondary legislation, as in *Laurentiu*. The power conferred on an immigration officer, on behalf of the Minister, in s. 4(3)(j) is by definition a power conferred by primary legislation. That power, to refuse a permission on the grounds that the non-national's entry into, or presence in, that State could pose a threat to national security or be contrary to public policy, seems to me to represent in itself one of the principles expressly set out in the primary legislation. It does so in the context of the fundamental policy of the Act, as set out in the long title, *i.e.* "to make provision, in the interests of the common good, for the control of entry into the State".

**101.** As set out above, the appellants describe the power in s. 4(3)(j) as "only a residual power left to the Minister to refuse entry". Whether it is accurate to describe the power as residual or not, it is still a power expressly granted by the Oireachtas, and as noted by the Court below (at para. 42), the appellants do not challenge the constitutionality of s. 4(3) or of any part of the 2004 Act.

#### *The Two Conflicting High Court Judgments*

**102.** The Courts below considered the two conflicting High Court decisions which analysed the meaning of "public policy" in s. 4(3)(j) of the 2004 Act, *Ezenwaka* and *Li and Wang*. As regards *Ezenwaka*, I have already considered that decision of Hogan J. in part above, in the context of his application of the *noscitur a sociis* maxim.

**103.** Hogan J. also relied upon the concept of public policy in the context of European Union ("EU") law when stating as follows:

“14. As the Court of Justice observed in Case C-482/01 *Orfanopoulous* [2004] ECR I-5257 with respect to the principle of public policy in immigration matters:

‘66. Concerning measures of public policy..., in order to be justified, they must be based exclusively on the personal conduct of the individual concerned...Previous criminal convictions cannot in themselves justify those measures. As the Court has held, particularly in *Bouchereau*, the concept of public policy pre-supposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.’

15. It is true that these comments were made in the context of a derogation on public policy grounds from the free movement provisions of Article 39. In that respect, it may be acknowledged that the concept of public policy in that context would have to be interpreted with an exactness and strictness that might not necessarily be applicable in the case of a refusal under the 2004 Act. At the same time, any decision to refuse admission to the State on s. 4(3)(j) grounds must be based on the personal conduct of the non-national concerned.”

**104.** With respect, I do not agree with the approach adopted by Hogan J. in this instance.

As he himself acknowledges in the passage quoted above, the interpretation of public policy by the Court of Justice arose in a different context, in a context of a Member State derogating from one of the fundamental freedoms in EU law, free movement of persons. This may help to explain the strict construction of public policy in EU law. However, Hogan J. noted that the same strict construction might not necessarily be

applicable to the concept of public policy under the 2004 Act, and in my opinion it is not so applicable for the reasons set out earlier in this judgment.

**105.** In the present case the appellants naturally relied strongly upon the approach of Hogan J. in *Ezenwaka*, and his requirement that any refusal of permission on public policy grounds must be based on the “personal conduct” of the non-national concerned. They submitted that there was no conduct “personal to them” that could have justified a refusal on public policy grounds. While I have sympathy for the appellants, as the refusal of permission must have been very disappointing and upsetting for them, I cannot accept this submission.

**106.** It seems to me that virtually every expression of policy by the Executive is directed at a class of persons rather than at one individual, as a policy normally denotes something more general than an individual decision affecting just one individual. The personal conduct then arises by virtue of conduct which brings the individual within the class of persons to whom the policy relates. In the present case the conduct in question was seeking to enter the State before in-person tuition had been resumed, contrary to the 2011 Guidelines as triggered by the October 2020 Guidelines.

**107.** The second High Court decision to be considered is the subsequent decision of Humphreys J. in *Li and Wang*. That case concerned a refusal by the Minister to renew a permission to be in the State, pursuant to s. 4(7) of the 2004 Act. The refusal was based on a policy statement adopted by the Minister, and published on the relevant website, which in general required non-EEA long term family reunification applications by parents to join children in the State to be pursued from the applicant’s home country.

**108.** In the course of his judgment Humphreys J. considered s. 4(3)(j) and stated (at para. 43) that the grounds in subs (3) “are in wide terms and in particular, para (j) insofar as

it refers to “public policy”, is in the widest possible terms”. He later continued as follows (at para. 47):

“The reference to national security alongside public policy is perhaps unhappy as a matter of drafting, but I am of the view that having regard to the object and purpose of the Act, this reference does not dilute or qualify the scope of the “public policy” ground. That ground confers an extremely wide discretion on the Minister to determine whether, in her view, the presence of a particular non-national in the State is contrary to public policy, as determined by her. Of course, such determination is subject to the usual criteria of constitutionality and legality but subject to that, the formulation of public policy in relation to immigration control is exclusively a matter for the Minister for Justice and Equality, who is responsible to Dáil Éireann in that regard.”

**109.** I do not necessarily agree with Humphreys J. that the reference to national security alongside public policy is perhaps unhappy as a matter of drafting. I can see how the drafters might have considered it appropriate to put the two concepts together in the same paragraph, as both amounting to more general grounds for refusal of permission, in circumstances where national security could possibly be viewed as one aspect of the much wider concept of public policy.

**110.** I do, however, agree with Humphreys J. as to the broad scope of “public policy” in s. 4(3)(j) for the reasons set out earlier in this judgment.

#### *Application of the Principles*

**111.** In the light of my interpretation of s. 4(3)(j), the immigration officers were entitled to refuse to give a permission to the appellants, on the grounds that their entry into, or presence in, the State could be contrary to public policy. The public policy in question

was set out in the 2011 Guidelines, which specified that it was not permissible for a student to come to Ireland to undertake a distance learning course. The 2011 Guidelines represent a clear and consistent expression of a policy position by the Executive, and I agree with the Court below that the policy is a perfectly rational one. The operation of the 2011 Guidelines was triggered by the Covid 19 pandemic, and the Government Guidelines of October 2020 whereby English language providers were directed to move all tuition online.

### **Conclusion**

**112.** In conclusion, I am satisfied that the Courts below did not err in construing s. 4(3)(j) of the 2004 Act as they did. I would therefore dismiss the appeal.