AN CHÚIRT UACHTARACH
THE SUPREME COURT

[2024] IESC 50

O'Donnell CJ.
Dunne J.
Murray J.
Collins J.
Donnelly J.

Record No. S:AP:IE:2023:000104

Between/

Niamh Mulreany

Appellant

-and-

The Director of Public Prosecutions, The Minister for Foreign Affairs, The Minister for Health, Ireland & The Attorney General

Respondents

-and-

The Irish Human Rights & Equality Commission

Amicus Curiæ

AND

Record No. S:AP:IE:2023:000105

Between/

Kirstie McGrath

Appellant

-and-

The Director of Public Prosecutions, The Minister for Foreign Affairs, The Minister for Health, Ireland & The Attorney General

Respondents

JUDGMENT of Ms. Justice Donnelly delivered this 11th day of November, 2024

Introduction

1. These appeals raise two separate issues regarding the regime of mandatory quarantine in a designated facility, colloquially called mandatory hotel quarantine, which was introduced in response to the global Covid-19 pandemic. It is important to state at the outset that the appellants did not dispute the seriousness of the Covid-19 pandemic or challenge the entitlement of the Oireachtas in principle to make provision for mandatory quarantine for those entering the State from certain countries where there was a high risk of importation of Covid-19. Furthermore, there was no specific challenge mounted to the effect that the state at issue in these proceedings – the United Arab Emirates ("UAE") – was a state which ought not to have been designated as such a high-risk state. Instead, the challenge brought by Ms Mulreany and Ms McGrath ("the appellants") is based on the procedures through which the UAE was so designated and, separately, upon an issue about the legality of the 'review' mechanism in respect of the continued quarantine. Thus, this appeal raises issues about whether there has been an unconstitutional delegation by the Oireachtas of its legislative function contrary to Article 15.2.1° of the Constitution and whether there has been an unconstitutional delegation of judicial power to an administrative 'reviewer'.
2. The quarantine provisions were introduced by the Health (Amendment) Act, 2021 ("the 2021 Act") to reduce the risk of importation of Covid-19 and any other variants of concern from other jurisdictions. On 22 March 2021, the Minister for Health ("the Minister")

designated the UAE and 32 other states as areas travel from which presented a high risk of importation of Covid-19. This designation was made under s. 38E(1) of the Health Act, 1947 ("the 1947 Act") as inserted by the 2021 Act. This section made provision for mandatory quarantine in a designated facility for those arriving from such states. The designation was published online via the government's website.

3. Two days after the designation was made by the Minister, the appellants travelled on holiday to the UAE. Upon their return, which was delayed as they had not pre-paid the mandated quarantine costs, it is alleged that they were required to quarantine in a designated hotel facility, but that they refused to go there. The appellants were arrested and charged with the offence of resisting being brought to a designated facility under s. 38B(7) and in breach of s. 38D(1)(c) of the 1947 Act as inserted by s. 7 of the 2021 Act. They were remanded in custody and after a night in prison, they were released on bail and they subsequently completed the mandatory quarantine. That charge remains extant against each appellant and the appellants have applied for prohibition of their trials. The appellants applied to the Designated Appeals Officer for a review, in accordance with subss. 38B(16) and (17) of the 1947 Act, of their quarantine confinement, but this was refused. They made no further requests to review. They were released from mandatory quarantine on 13 April 2021 in accordance with statutory provisions.

The Statutory Scheme

4. The mandatory quarantine scheme and the arguments in this case can only be understood having regard to relevant provisions in the 1947 Health Act, as enacted and as amended. Section 5 of the 1947 Act provides that the Minister for Health can make regulations under the Act in relation to anything referred to in the Act. Any regulation made under the Act, is, pursuant to s. 5(5), required to be laid before each House of the Oireachtas as soon as may be after it is made and either House may pass a resolution annulling it within

21 days. Section 31 of the original 1947 Act provided for the making of regulations for preventing the spread of infectious disease.

5. Section 10 of the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020 ("the 2020 Act") inserted into the 1947 Act a new section, s. 31A, which provides a specific power *to make regulations* for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19. The powers in s. 31A remain subject to the requirement that they be laid before the Houses of the Oireachtas pursuant to s. 5(5) of the 1947 Act. The power to make regulations was based on "the immediate, exceptional and manifest risk posed to human life and public health by the spread of Covid-19" and required the Minister to have regard to a number of factors as set out in s. 31A(2), including: the existence of a national emergency, the risk to health, medical advice, and the public resources of the State. This power to make regulations included the power to make provision for restrictions to be imposed upon travel to or from the State.

6. The scheme of mandatory quarantine in a designated facility for those arriving into this jurisdiction from certain other countries was introduced by s. 7 of the 2021 Act, through the insertion of sections 38B, 38C, 38D, 38E, 38F, 38G, 38H, 38I, 38J, 38K, 38L and 38M into the 1947 Act. Section 38(E)(1) gave power to the Minister 'to designate' certain states for the purpose of mandatory quarantine in a designated facility. The Minster was required to have regard to the list of matters in s. 31A(2) (e.g. that a national emergency has arisen and the international nature of the global pandemic), to consult with the Minister for Foreign Affairs, and to regularly review the situation in a designated state.

7. Section 38D creates various offences related to the quarantine provisions such as, failure to comply with the requirement to present for quarantine, resisting being detained in or brought to a designated facility, leaving the designated facility for a purpose other than a statutory one, or refusing to take a RT-PCR test. Section 38G gave power to the Minister

to make regulations for the purposes of "giving further effect to sections 38B to 38L" and, without prejudice to that generality, set out a list of matters that may be provided for.

8. The entire system of mandatory quarantine in a designated facility was subject to what is described as a "sunset clause". Pursuant to s. 9 of the 2021 Act, the provisions related to mandatory quarantine would expire after three months unless the period was extended by a resolution passed by each House of the Oireachtas. The individual designation of a state for the purpose of mandatory quarantine was not subject to any specific overview by the Houses of the Oireachtas.

9. In accordance with the provisions of s. 38B(1), a person who had been in a designated state at any time during a 14 day period prior to the arrival into this State, was required to quarantine in a designated facility for a period which could not be less than 10 days (if a clear RT-PCR test was given on day 10) and up to 14 days, but that time could be extended for further periods of up to 14 days depending on whether a test was taken, whether a test was positive and if positive, whether the person had been symptomatic or asymptomatic at the time of taking the test. Thus, the usual time for mandatory quarantine was between 10 and 14 days, but it could have been for longer if a positive RT-PCR test was returned.

10. The function of a Designated Appeals Officer is set out in subss. 38B(16) and (17) of the 1947 Act (set out in full at paras 51 and 52 below). A person may request that their quarantine be reviewed by a Designated Appeals Officer on various grounds set out in sub-paragraphs (a) to (g) of subs. 16 which include, that the circumstances that are set out in subsections 38B(7)(1)(a) and (b) do not apply to them, because of medical or exceptional reasons or for urgent humanitarian reasons. Subsection 17 of s. 38B requires such a request to be reviewed within 24 hours from the making of the request.

11. The regulations (and the designations) made pursuant to the relevant provisions of the 1947 Act as amended are no longer in force as the sunset clause has come into operation. The constitutionality of the statutory provision regarding the Designated Appeals Officer

and to the designation power of the Minister is still a live issue however, because the appellants are facing criminal trials in respect of offences alleged to have committed by them through resisting being detained or being brought to a designated facility for quarantine.

Judgment of the High Court [2023] IEHC 347

12. In their judicial review, the appellants sought orders of prohibition, *certiorari* and declaratory reliefs. Their applications were founded on the two distinct bases outlined at paragraph 1 above.

13. The High Court (Bolger J.) refused to grant relief and upheld the constitutionality of s. 38(E)(1) of the 1947 Act. Bolger J. rejected the contention that the designation had to be made by regulation as contrary to the clear provision in the subsection. The designation merely activated the mandatory quarantine requirement for which the Oireachtas had already provided. This activation could only occur when the Minister attended to the matters required by legislation. Control by the Oireachtas was retained by the sunset clause contained in s. 9 of the 2021 Act. The requirements for making a designation were more extensive than for the making of regulations under s. 31A. Not all delegated legislation requires to be laid before the Oireachtas.

14. The High Court found that the function of the Designated Appeals Officer did not fall within Article 34 of the Constitution as an administration of justice. The legal basis for the appellants' detention came from the legislation and not the Minister's designation of the UAE as anyone who travelled abroad to a designated state ran the risk of having to undergo mandatory quarantine if they wished to return to Ireland thereafter. Although the 2021 Act was introduced during and because of a public health emergency during a worldwide pandemic, it was not unique in permitting a power of detention for a specific period of time without recourse to a judicial authority.

Issues

15. By determination [2023] IESCDET 124, this Court granted the appellant leave to appeal directly from the High Court (Bolger J.) [2023] IEHC 347. Leave was granted on the following four issues:

1) Is the legislative structure and the delegation to the Minister of the power to make regulations an impermissible delegation of the exclusive law-making power of the Oireachtas under Article 15.2 of the Constitution?
2) What, if any, is the effect of a 'sunset clause' in considering the extent of parliamentary control over such delegated legislative power?
3) Is the power of review by a Designated Appeals Officer as to the holding in custody of a person for the purposes of quarantine an impermissible exercise of the judicial function, contrary to Article 34.1 of the Constitution?
4) Does the availability of Article 40.4 of the Constitution cure any constitutional defects that might be found in this regime or does the nature of the emergency faced by the State justify the measures adopted by the Minister and challenged herein?

16. At the appeal, the issues crystallised into:

a) Whether the designation of the UAE as a state to which mandatory quarantine in a designated facility applied was an impermissible exercise of the exclusive law-making power of the Oireachtas under Article 15.2.1˚ of the Constitution, and
b) If so, whether the power of review of the subsequent quarantine by a Designated Appeals Officer was an impermissible exercise of the judicial function, contrary to Article 34.1 of the Constitution?

An Unconstitutional Exercise of Law-Making Powers?

The appellants' submissions

17. Counsel for the appellants submitted that there had been an impermissible abrogation of the constitutional role and democratic responsibility of the Oireachtas for the following reasons:

a) As the designation of the UAE under s. 38E of the 1947 Act by the Minister created the basis for the restriction of the appellants' liberty backed by a threat of criminal sanction, this restriction was an exercise of a legislative power and thus it should only be enacted by way of primary or secondary legislation.

b) The appellants argued that s. 38E did not give, as is required, *very little margin* to the designation of states. Instead, they submitted, it permitted the Minister to have regard to wide-ranging opinions and broadly defined consideration in reaching such a decision as demonstrated by s. 31A(2)(a)(iv) (government policy and practicality), s. 31A(2)(a)(vi) (the State's resources, both financial and otherwise), and s. 31E(3) (consulting individual Ministers and in particular the Minister for Foreign Affairs). Therefore, the Minister for Health was not subject to a narrow, uncontroversial, and objective test with a limited number of possible solutions as envisaged, the appellants submitted, in *O'Sullivan v Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 IR 751 ("*Sea Fisheries*") and *DPP v McGrath* [2021] IESC 66, [2021] 3 IR 785 ("*McGrath*").

c) The appellants submitted that it was a designation made by a member of the executive without parliamentary scrutiny as nothing in s. 38E itself practically or prescriptively limited the Minister's powers. The Minister was not bound to consider anything other than their own determination, nor were they confined to a definite time frame in their obligation to review designations and this was carried out by the executive alone without independent or external scrutiny. It ought to have been capable of review by the Oireachtas. This was an exercise of power that ought to have returned to the 'harbour of oversight' of the Oireachtas or at least the Dáil (referencing Charleton J.

in *Bederev v Ireland* [2016] IESC 34, [2016] 3 IR 1 ("*Bederev*")). Extensive reliance was also placed on *NECI v Labour Court* [2021] IESC 36, [2021] 2 ILRM 1 ("*NECI*") and *Ryanair v An Taoiseach* [2020] IEHC 461, [2021] 3 IR 355, as authority for the proposition that the retention of ultimate control by the Oireachtas is a vital consideration in assessing the constitutionality of delegated powers.

d) The appellants submitted that the 1947 Act can and should be construed as *requiring regulations* to be enacted in respect of the designation power. They contrast the use of SI 44 of 2021, enacted pursuant to the regulation-making power in s. 31A, where the Minister designated South Africa and Brazil in a schedule as countries from which travellers would have to self-quarantine at home; this schedule also referenced any other countries which were designated in writing by the Minister for Health, including the UAE. Such designation was subject to review and annulment by the Oireachtas under s. 5(5) of the 1947 Act. When it came to designating UAE for the more onerous purpose of mandatory quarantine in a designated facility, however, the use of regulations was abandoned altogether. The appellants submitted that an interpretation of s. 38E which absolves the Minister of such a requirement to make regulations would cast doubt on the constitutionality of the section, and that even under the double construction rule, an interpretation requiring the Minister to enact secondary legislation should be preferred.

18. In support of their contention as to the importance of legislative scrutiny, the appellants submitted that a comparative perspective from other common law jurisdictions shows that the legislature must retain the power to meaningfully scrutinise delegated legislation, even where those systems are imperfect in order to give those instruments a democratic legitimacy that they otherwise lack. They referred to the systems in the UK, Canada and Australia.

19. As observed in the *Annual Review of Irish Law 2021* (Byrne and Binchy; 36th edn, Round Hall 2021), "sunset clauses" were relatively rare in Irish law until 2020. The appellants submitted that delayed parliamentary scrutiny could never be considered preferable to the immediate scrutiny provided for in s. 5(5) of the 1947 Act. The appellants emphasised that the sunset clause was applicable to the system as a whole and did not provide a discrete check on the Minister's designation power and could not be considered an effective means of parliamentary control over the designation power.

The State respondents' submissions

20. The second, third, fourth and fifth respondents ("the State respondents") rejected the contention that there is anything unlawful or unconstitutional about the delegation to the Minister of the specific power to make a *designation* under s. 38E as opposed to "*make regulations*". The 1947 Act provided for designating states in writing and that it need not be carried out by regulation as argued by the appellants. When viewed as a whole, it was clear that in enacting the 1947 Act the Oireachtas intended to demarcate the making of regulations and designation. The features of the 1947 Act coupled with the plain wording of s. 38E support this conclusion.

21. The State respondents commented that the 1947 Act provides different requirements for the making of regulations under s. 31A as distinguished from designations under s. 38E of the 2021 Act. This was observed in para 35 of the High Court judgment which noted that the requirements for designations were more extensive than for making regulations. For example, the additional requirement to consult the Minister of Foreign Affairs concerning designation, the Minister for Health's discretion to consult other persons regarding regulations as distinguished from their mandatory obligation to consult other persons regarding designations, and the different notification process for the regulation process versus designation.

22. The State respondents noted and agreed with the appellants that there is no constitutional requirement that all delegated legislation be laid before the Oireachtas; that requirement depends on the nature of the powers being delegated and the scope of such delegation. The difference between the parties' respective positions is the breadth of the Minister's powers. The State respondents disagree that the Minister had been given broad legislative powers. They also rely on *Bederev*, *NECI* and *McGrath.*

23. Citing *NECI* (para 69), the State respondents submitted that Article 15 "does not, and cannot, require the Oireachtas to predetermine every choice made by a subordinate or delegate". Similarly, citing *McGrath* (para 70), the respondents argued that the choice conferred on the Minister to designate states did not entail an abdication of the power or duty of the Oireachtas or an impermissible encroachment on an area consigned by the Constitution to the Oireachtas. Therefore, they submitted that no Article 15 issue arose in respect of the designation of states.

24. The State respondents commented that insofar as reliance is placed on the comparative experience of the UK, Canada and Australia by the appellants in their submissions, they are of limited utility, not least when the relevant constitutional text is materially different.

25. The State respondents' primary position was that the Minister's power under s. 38E was sufficiently limited in scope that there was no requirement for subsequent parliamentary control. However, in the alternative, such parliamentary scrutiny as was required was provided by way of the "sunset clause" contained in s. 9 of the 2021 Act.

26. In terms of delay, it is unclear how much sooner, if at all sooner, scrutiny pursuant to s. 5(5) would take place before a debate under the sunset clause would be held. It is clear that there is no delineation between "immediate scrutiny" and "delayed scrutiny" when considering the case at hand. The respondents submitted that the timing issue provides no basis for impugning s. 38E. Regarding the complaint that the sunset clause does not provide for "discrete scrutiny" but rather scrutiny of the operation of mandatory

quarantine as a whole by the legislature, the State respondents submitted that they fail to see how the presentation of matters for consideration by the Oireachtas makes s. 38E constitutionally suspect. Similarly, counsel noted that it is not appropriate for the courts to second-guess the nature of or the political considerations regarding the scrutiny that the Oireachtas may undertake, whereas the courts are only concerned with whether an opportunity to scrutinise was afforded.

27. Counsel for the State respondents noted that although the power of annulment under s. 5(5) and the sunset clause in s. 9 are different, they are still both significant powers of review that provide the Oireachtas with an adequate level of control over relevant secondary legislation. Counsel further emphasised that the provisions of the 2021 Act enjoy the presumption of constitutionality. The onus lies on the appellants to clearly establish that any impugned sections are repugnant to the Constitution or that a specific provision or feature of the Act is inconsistent with the Constitution in some compelling or cogent way and they had not done so.

Discussion and Decision on Article 15.2.1˚

The principles

28. Article 15.2.1˚ of the Constitution provides:

> "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".

29. This Article has been the subject of frequent and intense scrutiny by this Court in recent years. It is now well-established that the "principles and policies" test in *Cityview Press v An Comhairle Oiliúna* [1980] IR 381 cannot be considered the sole test as to whether there has been an unconstitutional abdication of Oireachtas power or unconstitutional usurpation of that power. In the cases of *Bederev*, *NECI*, *McGrath* and *Sea Fisheries*

amongst others, this Court has explored and delineated the contours of Article 15.2.1˚ of the Constitution.

30. The Court has also addressed this issue in the even more recent decisions of *Delaney v The Personal Injuries Assessment Board* [2024] IESC 24 and *Conway v An Bord Pleanála* [2024] IESC 34 ("*Conway*") and *Gearty v The Director of Public Prosecutions* [2024] IESC 45 ("*Gearty*"). In *Gearty*, this Court (Charleton J.) warned against judges being "seduce[d] into a re-examination of what are well-settled principles". General propositions following on from the clarifications of the law in *NECI* and *Conway* were identified by Charleton J. at para 21:

1. "The only test for a challenge to subsidiary legislation on the basis of *vires*, or authority to promulgate the measure, is whether there has been an abdication by the Oireachtas of its sole and exclusive law-making authority under Article 15.2.1º of the Constitution.
2. What requires examination in such a challenge is whether what the delegate is to do is sufficiently bounded by the terms of the parent legislation, be it an Act of the Oireachtas or a measure necessitated by European law, and guided as to the nature of the choices to be made by the subsidiary.
3. Of necessity, a choice as to the subject matter of what is delegated may lawfully, within those boundaries and subject to that guidance, be left to be made by the delegate.
4. Where the choice made is one of fundamental policy, as opposed to a limited and guided choice based on the overall text of the legislation delegating the power to make subsidiary legislation, then an abdication of the exclusive lawmaking power of the Oireachtas is manifest.
5. That control has been retained by the Oireachtas, either in the form of requiring a positive vote to confirm subsidiary legislation or by the less strong control of

requiring a vote of nullification within a particular timeframe, may be important but is not essential since some subsidiary legislation is not subject to that scrutiny.

6. Article 15.2.1° is the issue and Article 5 and Article 6 are not to be brought into the equation, being liable both to confuse and being instead addressed to the fundamental structures of the Constitution, rather than representing components of the validity of delegation of the legislative function."

The application of the principles

31. When assessed in the light of the foregoing principles, the wafer-thin nature of the appellants' arguments becomes apparent. Much of their submission was taken up with contrasting the power to make regulations under the 1947 Act (and elsewhere) with the power to make this designation and the argument that s. 38E ought to be read as requiring the designation to have been made by way of a regulation. The rationale put forward for this argument was that a) greater publication requirements would have applied in the case of a regulation and b) that these designation powers were overly broad and that if made by regulation, would have been subject to legislative scrutiny and thus what would otherwise be an impermissible delegation of rulemaking power might be found to be constitutional. It is perhaps an unusual argument to make based upon Article 15.2.1°; if the designation could have been achieved by a statutory instrument, it is therefore not a function that can only be exercised by the Oireachtas. In fairness to the case made by the appellants, their argument was much more nuanced and was primarily to the effect that this was a designation power that could only have been saved if there had been sufficiently protective parameters of both publication and oversight.

32. The argument that s. 38(1) required the designation to have been made by regulation is countered by the wording of s. 38E(1) which in a direct and straightforward way provides the opposite. It states that the Minister "may *designate in writing* any state… (emphasis

added)". Similarly in s. 38F the Minister "shall *designate in writing* such facility… as he or she considers appropriate for the quarantine of applicable travellers (emphasis added)". This wording contrasts with the wording used when providing for regulations such as s. 38G which was also inserted by the 2021 Act. The 2020 Act had explicitly provided for the making of regulations by way of s. 38A, a section which the appellants favourably compare with the requirement to designate. Under s. 38A, Brazil and South Africa had by regulation been made countries to which restrictive travel rules applied. In my view, the fact that the other countries were designated by regulation made under s. 38A only confirms that s. 38E was intended to operate in a different manner. Different wording was used and different publication requirements, as we shall see, applied. The long title to the 2021 Act also distinguished between regulations and designations. In my view, the Oireachtas clearly intended that the normative rules brought about by the designation of states from which travellers were subjected to mandatory quarantine would be made by different means. That finding leads to consideration of the central issue which is whether such a manner of designating states under s. 38E was constitutionally permitted.

33. The appellants did not make the argument that this designation constituted a statutory instrument within the meaning of the Statutory Instruments Act, 1947. Instead, the implication of their contention was that if this designation were to be viewed as a regulation, the requirement of publicity would be met. Thus, if the UAE had been required to be designated by regulation, there would be, according to the appellants, a recognised path for publication. This position was not supported by any case law which requires a particular method of publication for normative rules. It must be recalled that the power to make normative rules is not dependent on the nomenclature of those rules. That is demonstrated by the case of *Conway* where the issue was the Minister's power to make 'guidelines' which had normative effect. In so far as a normative rule is created however, regardless of how such a rule is titled, it is necessary for there to be publication

of that rule. This Court in *Conway* held that the rule of law required normative rules to be publicised although the Court disagreed 3-2 on the source/sources of that requirement. The evidence in the present case is that the fact of designation of the UAE was communicated on the 'gov.ie' website and the Department of Foreign Affairs official travel advisory service website. It was also publicised via the usual official and media channels; various media articles published between 22 and 24 March 2021 were exhibits to an affidavit of Fergal Goodman, Assistant Secretary in the Department of Health. I do not accept that an argument that there should have been one form of publication rather than another form of publication would give rise to the need to apply the double construction rule in the section so as to require the designation to have been made by way of a regulation. There is nothing wrong with publication of a normative subordinate rule via a government website where that mode of publication had been specifically provided for in the parent legislation.

34. Turning to the appellants' arguments that the power of designation was far too broad to be assigned to a minister especially in the context of a criminal offence and, if so assigned, was one which could only have been saved by subsequent legislative scrutiny, I am satisfied that neither aspect of this argument is persuasive. On the contrary, the impugned designation is demonstrably within the range of normative decision-making power that the Oireachtas is constitutionally entitled to confer on another decision maker, in this case the Minister. This is clear from an examination of the manner in which the Oireachtas provided for the mandatory hotel quarantine scheme.

35. Section 31 of the 1947 Act, as originally enacted, provided for the Minister to make regulations for the prevention of the spread of an infectious disease or of infectious diseases generally (including the spread outside the State). The original s. 38 provided for the detention and isolation of persons who were a probable source of infection. At the time of enactment of the 1947 Act, there was a particular concern regarding the spread of

tuberculosis. When the global Covid-19 pandemic struck, the legislature moved to update the regulatory powers to provide for the ability to respond to a fast-spreading virus in a modern connected world. Both s. 31 and s. 38 were updated by the 2020 Act. Subsequently, the 2021 Act made specific provision for a particular type of quarantine which became the mandatory quarantine in a designated facility.

36. The nature and extent of the scheme of mandatory quarantine is set out in the detailed provisions of the 2021 Act. The obligations imposed on applicable travellers to quarantine in designated facilities are described in the lengthy s. 38B of the Act, which comprises twenty-five subsections many of these with their own lengthy further sub-paragraphs. Section 38B(25) is the definition section for s. 38B. The other new sections (s. 38C etc.) of the Act are also very detailed. The entire scheme of mandatory quarantine was a time limited one (see s. 9 of the 2021 Act) lasting only three months unless renewed by a further period of up to three months by a resolution passed by each House of the Oireachtas, which said extension could be extended again for the same limited period. This time limit reflects the "exceptional" nature of the provisions which is referred to in the long title of the Act which were made "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 disease known as Covid-19 and variants of that disease" to provide for mandatory quarantine for persons coming from certain areas where there was known to be sustained human transmission of Covid-19. My reference here to the "exceptional" nature of the provisions is not to suggest that the limits set by Article 15.2.1° on the legislative power of the State is in any way abrogated in a situation of emergency or exceptionality (it is not; per Charleton J. in *Bederev*, para 25), but to demonstrate that the Oireachtas was aware that its legislative provision for a scheme of mandatory quarantine was exceptional in the context of the global pandemic and the 'sunset clause' had to be seen in that light.

37. Significantly, s. 38D(1) creates six separate criminal offences including the offences of resisting being detained or brought to a designated facility, or both, under s. 38B(7) with which these appellants are charged. Section 38D(2) creates two further offences in respect of failure to pre-book places in a designated facility prior to arrival in the State and s. 38D(3) creates a further five offences of various types of obstructive or interference offences in the operation of the quarantine scheme.

38. Section 38E, the impugned provision, and s. 38F which permits the designation of facilities in writing, operate within that precisely delineated scheme for mandatory quarantine which has been enacted by the Oireachtas. Neither of those sections create criminal offences. They merely permit the Minister to make decisions which in fact are quite limited; a state either will or will not be designated or a facility will or will not be designated. Those choices are bounded by a series of matters to which the Minister must give consideration before making the designation. There is nothing inherently wrong or unconstitutional about the Oireachtas having vested in the Minister a power to make what is essentially an administrative decision involving judgements as to which countries ought to be designated having regard to a variety of matters. These were legitimate and understandable matters in the context of the type of decision making required during the changing nature of the Sars-CoV-2 virus, the rise of variants of concern in certain areas outside the State and the importance of the continued functioning of the State in the midst of the pandemic.

39. It is also a worthwhile exercise to approach the issue functionally and to ask the "simple question first raised in *Bederev*", that is to say "whether the matter delegated is apt for the legislative process in a legislature, when the issues delegated can be very detailed, highly case sensitive, and not easily predictable in every future eventuality?" (per MacMenamin J. at para 136 in *NECI*). The answer in the present appeals is that the legislation at issue

provided for precisely the type of decision-making for which a minister may be viewed as being best placed to make.

40. Going back to the primary test of whether there has been an abdication of the constitutional role of the Oireachtas, it is abundantly clear that there has not been any such abdication by leaving the choice of designation of a state to the Minister. The choice of state to designate comes within the overall scheme of mandatory quarantine, the purpose of which is set out in clear terms in the Act, where policies are set out, where criminal offences are created by statute and where the delegated power is limited to designation of the state for the purpose of enabling the operation of a scheme where the boundaries have been set by the Oireachtas. That is sufficient to say that this conferral of decision-making function as to which countries are to be designated falls comfortably within the constitutional powers of the Oireachtas.

41. The appellants made much of the argument that, in the absence of finding that this designation ought to have been made by regulation, the provisions of Article 15.2.1° of the Constitution were breached as there was "no basis on which the constitutional requirement of control of subordinate legislation by the Oireachtas could legitimately have been overridden". A number of points must be made in relation to this argument.

42. The first is that there is no basis for an argument that regulations in and of themselves will entail a level of parliamentary scrutiny. The Statutory Instruments Act, 1947 does not so provide. It is only when the parent Act requires a laying of the regulations before the Oireachtas for a positive or negative resolution does any issue of parliamentary oversight arise.

43. The second is that, as stated in *Conway*, parliamentary oversight is not a separate test that must be considered and passed before rule-making power can be considered constitutional. There is no requirement for oversight by the Oireachtas (in reality by one or both Houses of the Oireachtas that, together with the President, make up the Oireachtas;

a matter that passed through the Oireachtas proper would be a piece of legislation) in every delegated decision-making power. It is one factor among the others to which regard may be had in assessing whether the Oireachtas has abdicated their role to legislate. I would also observe that in the present circumstances the Minister was in any event accountable to the Dáil.

44. The s. 38E decision-making power required no additional 'safeguarding' requirement such as a return to either or both Houses of the Oireachtas for some form of resolution, either positive or negative. As part of the overall legislative provision, the entire scheme had a limit of three months unless renewed and that, in the circumstances of the clear provisions, was sufficient. That is not to say that such a 'sunset clause' was required before the designation of the state could be held not to contravene Article 15.2.1° but, given it was present, it is part of the overall assessment of the scheme. Having regard to the conclusions in previous paragraphs, the grant of power to the Minister to designate the state, travel from which triggered the mandatory hotel quarantine, fell comfortably within the line of constitutionality and the sunset clause copper-fastens that conclusion.

45. Separately and by way of observation, the existence of a sunset clause may be an important factor in the overall assessment of whether provisions which are exceptional in nature and trench on recognised rights such as the right to liberty, are disproportionate to the aims they pursue and therefore invalid have regard to the Constitution. A legislative provision which is indefinite or of extremely long duration compared to the emergency it is designed to deal with, may not be, by the indefinite or lengthy duration, a necessary interference with those legitimate aims. As has been stated above, the scheme of mandatory quarantine was not challenged in this appeal and the issue of the sunset clause only arises because the appellants have said it was inadequate to amount to the 'sufficient' Oireachtas oversight that might otherwise have saved the designation provisions which they claimed were an unconstitutional delegation of the legislative powers of the

Oireachtas. For the reasons set out above, the issue of oversight by the Oireachtas is not a decisive one in terms of whether Article 15.2.1° has been breached. The ultimate test is whether the Oireachtas has abrogated its legislative powers or permitted the decision-maker to usurp their legislating role. For the reasons set out, that did not happen in the provision at issue in this appeal.

46. I have dealt with the appellants' arguments in detail in the foregoing paragraphs, but it is important to re-iterate that those arguments were wafer-thin. Stepping back and looking at the overall claim arising from the provisions of Article 15.2.1° it is demonstrably clear that this type of designation was wholly suited to be carried out at ministerial level and did not require any specific parliamentary oversight in circumstances where the criminal scheme had been established clearly by statute and the designation scheme gave a choice of designation based on the considerations set out in the 2021 Act. It is also important to recall that the exercise of the Minister's powers was subject to judicial review if there were issues with the designation of a particular state (and no such issue was raised here).

47. For the reasons set out, I therefore reject the appellants' submission that s. 38E is invalid having regard to Article 15.2.1° of the Constitution.

An Impermissible Exercise of the Judicial Function?

The constitutional and legislative provisions

48. Article 34.1 of the Constitution provides:

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

Article 37.1 of the Constitution provides:

> "Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution".

49. Section 38B(16) provides that a person in quarantine:

> "may request that his or her quarantine, or in the case of paragraph(f), the quarantine of a dependant person, be reviewed by a designated appeals officer on the grounds that-
>
> (a) Where the person is detained under subsection (7), the circumstances set out in paragraphs (a) and (b) of subsection (1) do not apply to him or her;
>
> (b) At the time of making the request, the requirements of subsection (2)(a) which applied to the person have been satisfied,
>
> (c) at the time of making the request, the requirements of subsection (2)(b) which applied to the person have been satisfied, or, if applicable, a determination of an officer under subsection (2)(b) (iii)(II) or subsection (6) that he or she can not effectively isolate at home, is erroneous,
>
> (d) for medical or other exceptional reasons, including the necessity of providing care for any vulnerable person, his or her quarantine in the designated facility should be ended before the expiration of the period of quarantine required under subsection (2) in respect of him or her,
>
> (e) he or she needs to leave the designated facility on urgent humanitarian grounds,
>
> (f) a decision, made under subsection (10), not to allow a dependant person leave quarantine, was erroneous, or
>
> (g) he or she, being an applicable traveller by virtue of subsection (1) (a)—
>
> (i) has not been in a designated state at any time within the period of 10 days prior to his or her arrival in the State,

(ii) can demonstrate that he or she has quarantined in a facility, equivalent to a designated facility, in a non-designated state for the duration of the period between leaving the designated state and arriving in the State,

(iii) can demonstrate that the quarantine referred to in subparagraph (ii) was undertaken in a room on his or her own,

(iv) has the result of a RT-PCR test as defined in, and in accordance with the requirements of, any regulations under this Act,

(v) has, on arrival in the State, taken a RT-PCR test and the result of that test is that Covid-19 or the virus SARS-CoV-2 is not detected, and

(vi) has, on or after the fifth day of his or her arrival in the State, taken a RT-PCR test and the result of that test is that Covid-19 or the virus SARS-CoV-2 is not detected.

50. The powers of the Designated Appeals Officer are set out in s. 38B(17) as follows:

"(17) Where a request is made by a person under subsection (16), his or her quarantine shall be reviewed by a designated appeals officer as soon as practicable but no later than 24 hours from the time of making the request and the designated appeals officer shall, having called on and considered such evidence as he or she requires to make a decision in relation to that request—

(a) confirm that the person is no longer obliged to remain in quarantine where—

(i) in the case of a request made under paragraph (a) of that subsection, the officer is satisfied that the circumstances referred to in that paragraph do not apply to the person who made the request,

(ii) in the case of a request made under paragraph (b) of that subsection, the officer is satisfied that the requirements referred to in that paragraph have been satisfied by the person who made the request,

(iii) in the case of a request made under paragraph (c) of that subsection, the officer is satisfied that the requirements referred to in that paragraph have been satisfied by the person who made the request, or, if applicable, the determination of the officer referred to in that paragraph was erroneous,

(iv) in the case of a request made under paragraph (d) of that subsection, and subject to subsection (18), the officer, having considered the evidence of a registered medical practitioner where the request relates to any medical reason or relates to the care of a vulnerable person who would be in close contact with the applicable traveller if released, is satisfied that it is appropriate in all the circumstances that his or her quarantine in the designated facility should cease,

(v) in the case of a request made under paragraph (e) of that subsection and subject to subsection (18), the officer is, having considered the humanitarian grounds concerned, satisfied that it is appropriate in all the circumstances that his or her quarantine in the designated facility should cease,

(vi) in the case of a request made under paragraph (f) of that subsection and subject to subsection (18), the officer is satisfied that the decision referred to in that paragraph was erroneous,

(vii) in the case of a request made under paragraph (g) of that subsection, the officer is satisfied that the requirements of subparagraph (i) to (vi) of that paragraph have been complied with,

or

(b) refuse a request made under that subsection and give reasons for that refusal.”

51. There is no limit under s. 38B(17) to the number of times a person may make a request of the Designated Appeals Officer. The Designated Appeals Officer must make the decision as soon as practicable but not later than 24 hours from the making of the request. The Designated Appeals Officer may confirm that the person is no longer obliged to remain in quarantine because they fall within the circumstances outlined at (i) to (vii) or may refuse a request to review and give reasons for that refusal.

Overview of the appellants' case

52. In essence, the appellants' case is that the function of 'review' conferred upon the Designated Appeals Officer is a judicial function which, pursuant to Article 34.1, could only be exercised by judges in courts established by law. If it is the administration of justice, the appellant submits, it is constitutionally prohibited: a decision on liberty could not be considered the exercise of limited functions and powers of a judicial nature which is permitted by Article 37.1 of the Constitution.

The appellants' submissions

53. With respect to s. 38B, the appellants submitted that in exercising the power of review the Designated Appeals Officer was looking at the correctness of quarantine in principle and any decision on liberty, they submitted, necessarily involves the administration of justice.

54. Counsel referred to the five characteristics of administration of justice as set out in *McDonald v Bord na gCon* [1965] IR 217and pointed to how they said these characteristics were met in this case. They accepted however that those criteria were refined somewhat in *Zalewski v Workplace Relations Commission* [2021] IESC 24, [2022] 1 IR 421 ("*Zalewski*"). An over-rigid application of the *McDonald v Bord na gCon* criteria should be avoided.

55. The appellants submitted that decisions on the loss of liberty are properly located within the administration of justice. The power to mandatorily quarantine a person in a designated facility, by virtue of their arrival from a designated state, is grounded upon the automatic application of the limited criteria set out in s. 38B of the 1947 Act, which is triggered immediately upon the person's arrival in the State. The subsequent 'appeal' process takes place in a context where liberty has already been restrained. The consequences of a negative appeal decision are detention for a period of at least 10-14 days and severe restrictions on movement and human contact, including as in the appellants' case, restriction of access to dependent children. The decision involves a consideration of the proportionality of the continuing detention, having regard to a wide range of potential factors including 'medical', 'exceptional' or 'urgent humanitarian' grounds.

56. The appellants drew an analogy between the loss of liberty in the mandatory quarantine provisions and bail. They submitted that the granting of bail is typically determined by the courts as it is related to criminal matters and that decisions in respect of loss of liberty is quintessentially a judicial function, as stated by Keane J. in *O'Mahony v Melia* [1989] IR 335.

57. The appellants rejected the analogy with remission made before the High Court which was characterised by Bolger J. as a power which has traditionally fallen within the remit of the executive. They pointed out that decisions on remission only occur after the person has been subject to the administration of justice in the course of the criminal trial process. These analogies will be considered in detail below.

The relevance of Article 40.4 of the Constitution and/or the nature of the emergency

58. While the High Court considered the availability of a remedy under Article 40.4 and/or by way of judicial review to be an important factor in the finding that the powers of the

Designated Appeals Officer, even if judicial in nature, might be considered 'limited' within the meaning of Article 37 of the Constitution (in line with *Zalewski*), the appellants submitted that any assessment of the availability of an alternative remedy such as an Article 40 inquiry or judicial review must take account of the limited nature of those remedies. The appellants submitted that whether a particular decision-making power is limited or not is necessarily fact-specific, and thus the mere availability of judicial review could never be determinative on its own; it is to be considered cumulatively.

59. The appellants submitted that the jurisprudence relied upon by the High Court is problematic. The CJEU decision in *HID and BA v Refugee Applications Commissioner & Ors* (C-175/11, 31 January 2013) was not concerned with the limited nature of a judicial function, but the independence of the Refugee Appeals Tribunal from the Minister for Justice. Similarly, the decision in *S v Health Service Executive* [2009] IEHC 106 was not concerned with Article 34 or 37 of the Constitution, but with the adequacy of the safeguards for involuntary detention pursuant to s. 38 of the 1947 Act within the context of a challenge under Article 40.4.2˚.

60. The appellants submitted that a more relevant case is that of *Croke v Smith (No. 2)* [1998] 1 IR 101 in which this Court considered a challenge under Article 40.4.2˚ to the applicant's involuntary detention on mental health grounds pursuant to s. 172 of the Mental Treatment Act, 1945. That case did not consider whether the decision to detain constituted the administration of justice, but whether the provision for indefinite detention without judicial adjudication was in breach of his right to liberty. In *Croke v Smith (No. 2)*, the Court referred to *In Re the Application of Neilan* [1990] 2 IR 267 which held that the availability of judicial review was not determinative of whether the exercise of a power falls within the administration of justice. The Court in *Croke v Smith (No. 2)* took the view that the involuntary mental health detention was a decision entrusted to the relevant medical practitioners by the Oireachtas in its role of protecting vulnerable

citizens in the common good. The Court went on to characterise the detention as "an inquiry" rather than an administration of justice decision within the *McDonald v Bord na gCon* principles and that it did not involve a contest between the parties.

<u>Submissions of the State respondents</u>

Review of quarantine by a Designated Appeals Officer

61. The State respondents submitted that the power of review by a Designated Appeals Officer as to the holding in custody of a person for the purposes of quarantine does not constitute an impermissible exercise of the judicial function contrary to Article 34.1 of the Constitution and thus does not concern the administration of justice within the meaning of Article 34.1. The High Court held correctly that the function of the Designated Appeals Officer under s. 38B(16) did not amount to the administration of justice as the function was not to decide whether persons were required to undergo mandatory quarantine, but to review applications for exemption from what was otherwise a legal obligation to remain in quarantine. Thus, the appellants' detention was an automatic consequence of the 1947 Act having travelled to Ireland from the UAE as opposed to originating from the decision of the Designated Appeals Officer. The respondents submitted that there is no basis for the appellants' submission that s. 38B(16) involved the administration of justice as defined in *McDonald v Bord na gCon* as applied in *Zalewski* and they addressed each one of those principles in turn.

62. The State respondents argued that the person's detention is imposed automatically by legislation and what the Designated Appeals Officer may do is lift the detention otherwise imposed. Not all decisions concerning liberty may be categorised as an administration of justice. The respondents rely upon the High Court's conclusions (para 47) on the appellants' bail analogy to argue that the function of the Designated Appeals Officer is

not a judicial one. The respondents submitted that the bail analogy is misplaced and that a better analogy for the powers of the Designated Appeals Officer is remission and custodial sentences.

63. Without prejudice to the foregoing, the respondents submitted that if the Court were to find that the review conducted by a Designated Appeals Officer involved an administration of justice, that function would be no more than "the exercise of limited function and powers of a judicial nature" as permitted in Article 37.1 of the Constitution. They refer to *Zalewski* in which this Court recognised that indicators of "limited" judicial power include the scope of the issues arising and the availability of appeal or confirmation by the court.

Article 40.4 as a cure for constitutional defects

64. The respondents submitted that it is not necessary to reach the fourth question posed in the Determination given their analysis of the third question. The respondents submitted that if the Court rules that s. 38B(16) constitutes an administration of justice that the availability of Article 40.4 and of judicial review are relevant considerations and they disagreed that these remedies were of a 'limited nature'. As apparent from *Zalewski*, Article 37 should not be interpreted restrictively, rather it highlights that in non-criminal matters, justice may be administered by bodies which are not courts and by persons who are not judges.

65. The State respondents argued that the s. 38B review process was specifically and carefully designed to provide a real and meaningful review in in light of the time sensitive nature of mandatory quarantine as a Designated Appeals Officer could respond to an appeal within a 24-hour window or less. The respondents accordingly submitted that it is manifestly clear that the appellants call for a "merits-based judicial oversight of mandatory quarantine" was impracticable.

Submissions of the DPP

66. The DPP restricted her submissions to the issue of whether this was an unconstitutional administration of justice and submitted that the process of review by the Designated Appeals Officer did not amount to an administration of justice pursuant to Article 34.1. Addressing the appellants' bail analogy and the role of the Designated Appeals Officer as being analogous to a court or judge, the DPP reiterated her position as accepted in the High Court that it is an inapt analogy. Further details of her submission in this regard will be addressed below.

Discussion and Decision on Article 34.1

67. As can be seen from the submissions of the appellants, the lynchpin of their claim that the Designated Appeals Officer was exercising judicial power is that the impugned decision concerned (loss of) liberty and that decisions on loss of liberty are properly located within the administration of justice. There are two significant factors relevant to the manner in which that argument must be addressed. The first is that decisions on loss of liberty are not located solely within the administration of justice. The second is that the loss of liberty was consequent on the requirement set out in the legislative provisions, therefore the Designated Appeals Officer was deciding on release rather than on loss of liberty.

68. Prior to expanding on those issues, it is important to start with the protection of liberty in the Constitution. The right not to be deprived of liberty 'save in accordance with law' is a fundamental right guaranteed by Article 40 of the Constitution. That only judicial power can impose such a loss of liberty, end such loss of liberty, or make a decision which continues the loss of liberty is not a proposition that finds any support in legislation or in case law. There are numerous examples of instances where loss of liberty and decisions

or review of that loss are permitted by law to be imposed or taken other than by means of the exercise of judicial power.

Examples of deprivation of freedom of movement otherwise than by judicial function

69. An obvious example is the requirement to undergo mandatory hotel quarantine. This requirement, which has not been challenged by the appellants, is imposed directly by legislation; s. 38B of the 1947 Act as inserted by s. 7 of the 2021 Act, is a *legislative* imposition of the requirement to undergo quarantine. As I will discuss further below, the fact that this is a legislative deprivation of liberty is the contextual framing for the assessment of the role of the Designated Appeals Officer.

70. Another example, which is possibly more properly called a restriction on personal liberty rather than a deprivation of liberty, arises from the initial response to the Covid-19 pandemic under the 2020 legislation. Section 31A of the 1947 Act as inserted by s. 10 of the 2020 Act was the origin of much of the pandemic restrictions on movement of people and of public gatherings. The Oireachtas, through the insertion of s. 31A(1) by the 2020 Act, gave power to the Minister, *having regard to the immediate, exceptional and manifest risk posed to human life and public health by the spread of Covid-19,* to make regulations which could, *inter alia*, require people to remain in their homes. The subsequent Regulations (SI 121/2020 and SI 128/202) provided for restrictions on people leaving their homes and hosting or participating in events.

71. The constitutionality of the amendments to the 1947 Act was challenged in the case of *O'Doherty & Waters v The Minister for Health and Ors* [2021] IECA 59 as being a disproportionate interference with rights including the right to liberty. In the very specific context of that case, leave to apply for judicial review was refused although this Court did not accept that there was a blanket rule that the provision of expert evidence or evidence of policy was a necessary requirement for a challenge to the constitutionality of

a statute. In the context of the very specific challenges brought by those applicants to the proportionality of the legislation, their extreme assertions of certain 'facts' on which their claims were made were not supported by any evidence and in those circumstances, the majority of this Court concluded there was no arguable case for judicial review.

72. The 2020 and 2021 Acts, while unprecedented in scope, were by no means unusual in providing for mandatory quarantine for infectious diseases. The Health Act, 1947, as enacted, contained provisions which enabled the Minister to make regulations for the purpose of dealing with infectious diseases. The Act also provided at s. 30 that any person who knows that "he is a probable source of infection with an infectious disease shall… take every reasonable precaution to prevent his infecting others with such disease by his presence or conduct or by means of any article with which he has been in contact". Section 38(1) of the 1947 Act provides that where a Chief Medical Officer is of the opinion that a person is a probable source of infection with an infectious disease and that his isolation is necessary as a safeguard against the spread of infection and cannot be effectively isolated at home then the Medical Officer may order, in writing, the detention and isolation of such person in a specified hospital or other place. In *S v Health Service Executive*, Edwards J. upheld the constitutionality of that section on the basis that the safeguards contained in that section were adequate to protect the right to personal liberty. Counsel for the appellants make the argument that the issue raised in that case was not that of Article 34 or 37 concerning the exercise of judicial power but was restricted to the issue of safeguards. That is correct but it still leaves the appellants without any support in the case-law for their submission.

73. Another area where a person may be deprived of their liberty without prior judicial intervention is when a person is arrested by a member of An Garda Síochána in respect of specific matters or for a specific purpose. There is a power of arrest on reasonable suspicion in respect of offences which carry sentences of at least 5 years imprisonment

on conviction (see s. 4 of the Criminal Law Act, 1997). After such an arrest the person must either be promptly charged and brought before a court (or released on bail) or detained in a Garda Station for the proper investigation of the offence for which they were arrested if certain conditions are met or, if none of the above apply, released from custody. There is the right, under various pieces of legislation, for an arresting Garda to apply to a member in charge to detain a person for investigation of the arrestable offence for which they were arrested. The length of time for which an arrested person may be detained will vary depending on the Act, e.g. s. 4 of the Criminal Justice Act, 1984 and s. 50 of the Criminal Justice Act, 2007. There is also a separate power of arrest under s. 30 of the Offences Against the State Act, 1939, in respect of scheduled offences which carries with it the right to detain and question that person for up to 48 hours (again if certain conditions are met). These are examples of powers of detention, which are presumed constitutional, and which do not involve the exercise of judicial power.

74. I will discuss the example of detention under the Mental Health Acts, 1945 to 2001 further below.

Lawful detention pursuant to the European Convention on Human Rights

75. Although the present appeal is a challenge based on the Constitution, I consider it useful to refer to Article 5 of the European Convention on Human Rights ("ECHR") which protects the right to liberty and security of the person. Article 5.1(e) expressly permits the lawful detention of persons for the prevention of the spreading of infectious diseases (as well as of persons of unsound mind amongst others). Article 5.1 also permits, *inter alia*, the lawful detention of a person after conviction by a competent court or for the purpose of bringing them before a competent legal authority on reasonable suspicion of having committed an offence. It is significant that detention for the prevention of the spreading of infectious diseases is not bounded by the necessity for the order to have been

made by a competent authority or a court although it is an essential requirement that it be in accordance with a procedure prescribed by law (this latter requirement is similar to the constitutional requirement that no person shall be deprived of liberty save in accordance with law).

76. Article 5.4 of the ECHR goes on to provide an overarching protection by stating that "[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". The challenge brought by these appellants is not one based upon an Article 5.4 claim that there is an absence of a safeguard such as a speedy remedy before a court. Similarly, this is not a constitutional challenge based upon the absence of legal safeguards such as access to a court for review. The appellants, in so far as they seek to distinguish *S v Health Service Executive* and also *Croke v Smith (No. 2)*, disavow an argument based upon absence of safeguards, and make the much more novel argument that any review of their personal liberty other than by a court is, in constitutional terms, a prohibited exercise of judicial power. Therefore, even if such review, or the availability of judicial review/an Article 40.4.2° application, might or might not amount to a safeguard for Article 5.4 ECHR purposes (and to be clear this was not part of the pleadings in this case and nothing on this point was expressly conceded or expressly rejected by any party to the appeal), the issue on this appeal is entirely concerned with the constitutional argument that the 'review' amounted to the exercise of judicial power which is prohibited by Article 34.

<u>Detention for reasons related to mental illness</u>

77. Returning to detention in this jurisdiction for reasons related to mental illness, the law provides that initial decisions on such detentions are not made by judges in courts established pursuant to Article 34 of the Constitution. This Court asked the parties to

address the relevance of *In Re Philip Clarke* [1950] IR 235 which found that the Constitution did not require that there should be a judicial inquiry or determination before a person to whom the Mental Treatment Act, 1945 ("the 1945 Act") applied could be placed and detained in a mental hospital (to use the terminology of the Act). Although the 1945 Act has since been repealed, it is necessary to look at the case in some detail. A challenge was brought to s. 165 of the 1945 Act which permitted a member of An Garda Síochána, who was of the opinion that a person believed to be of unsound mind should for the public safety or the safety of the person himself be placed forthwith under care and control, to take that person into custody and remove them to a Garda Station. The Garda is then required to apply forthwith in the prescribed form to the authorised medical officer for a recommendation for the reception and detention of the person in the district mental hospital. The authorised medical officer must then examine the person and if satisfied that it is proper to make the recommendation for reception must do so in the prescribed form or otherwise refuse the application. This had the effect of detaining the person in the mental hospital.

78. As Gavan Duffy P. said in giving judgment for the Divisional High Court, the challenge was "really an attack on the method of procedure, replacing that under the former law, which, though a District Justice or a Peace Commissioner intervened, was necessarily summary…". The High Court was dismissive of the application calling the new system an "improvement". On appeal, the Supreme Court (O'Byrne J.) gave a considered response to the appellant's main argument which "was based upon the absence of any judicial intervention or determination between the arrest of the person alleged to be of unsound mind and his subsequent detention under a reception order". The Court did not consider that the Constitution requires "that there should be a judicial inquiry or determination before such a person can be placed and detained in a mental hospital" and the section could not be construed as an attack on the personal rights of the citizen.

79. The appellants submitted that this decision had limited relevance because this Court relied on the 'paternal character' of the legislation which was not only in the public interest but also in the interest of the 'dignity and freedom' of the individual concerned. They submitted that the Court had noted that there were procedural safeguards (judicial review/*habeas corpus*) that were sufficient in circumstances where the State takes benign actions in the best interests of the person concerned. They also submitted that the authority of *In Re Philip Clarke* was lessened by its repeal and replacement by the Mental Health Act, 2001 which now provides for a review of detention which is a form of 'quasi-judicial inquiry' citing Charleton J. in *Han v The President of the Circuit Court* [2008] IEHC 160, [2011] 1 IR 504. The paternalistic approach taken by the Court is "increasingly under attack as failing to afford sufficient importance to the right of individuals to make their own decisions" (citing this Court in *AC v Cork University Hospital* [2018] IECA 217.)

80. In my view, however, the decision in *In Re Philip Clarke* is a significant one for a number of reasons. It represented an important milestone in the development of judicial consideration of the phrase "in accordance with law" which, it held, required more than a consideration of the statutory law but also an objective justification of the provision (see Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) para 7.4.13). Furthermore, it was and is a significant decision on the issue of preventative detention for reasons based upon mental disorder and received further approval by this Court in *Croke v Smith (No. 2)*. The appellants seek to distinguish the decision in *Croke v Smith (No. 2)* by arguing that the applicant in that case does not appear to have argued that the decision to detain constituted the administration of justice but rather that the provision for indefinite detention without judicial adjudication was in breach of his right to liberty. While that may be a technically correct description of how the different arguments were categorised, I am not sure that it represents an entirely

correct description of either how the arguments were deployed or more importantly how the constitutional issue was resolved by this Court in *Croke v Smith (No. 2)*. It is necessary to take a closer look at that decision.

81. Hamilton CJ., who delivered the judgment of the Court, recorded that it appears from the High Court judgment of Budd J. that it had been argued by counsel that the provisions were "unconstitutional due to the lack of judicial or quasi-judicial intervention *prior to* the reception and detention of a patient". Hamilton CJ. then stated however that in view of the finding of Budd J. that s. 172 of the 1945 Act was repugnant to the Constitution, the High Court judge did not find it necessary to form any conclusion on this issue or to refer any question with regard to the validity of such provisions to them. This Court was only concerned with the validity of s. 172 of the 1945 Act and made its decision accordingly.

82. The finding with respect to s. 172 still has some relevance to the issue in the present case. The section provided for the situation as to what could be done when a person arrived at the hospital having been conveyed there by a member of An Garda Síochána who had received a recommendation from a medical practitioner. Section 172 provided that where a 'chargeable patient reception order is made' the relevant mental hospital authority, the resident medical superintendent of such hospital and other officers and servants of the hospital are "entitled to receive, take charge or, detain, and retake" the person in case of escape. The chargeable patient reception order is made under s. 171 subsequent to a recommendation for reception made under s.165, when the resident medical superintendent of the hospital (or other medical officer acting on his behalf) is satisfied, having examined the person, that the person is of unsound mind and is a proper person to be taken charge of and detained under care and treatment. It was in that context that this Court came to address whether the detention under s. 172 was unconstitutional.

83. Hamilton CJ. said that s. 172 could not be construed solely in relation to the facts of one particular case but must be construed in light of its own language within the framework of the Act in its entirety and within a constitutional framework. Within that framework the judgment addressed the case of *In Re Philip Clarke* and the findings related to s. 165 of the Act. Hamilton CJ. noted that the main argument *In Re Philip Clarke* was on the absence of judicial intervention or determination but he went on to say with regard to the recommendation for a reception order and the decision to make a chargeable patient reception order that although they:

> "will, result in the deprivation of the liberty of the person to whom they relate, such decisions cannot be regarded as part of the administration of justice but are decisions entrusted to them by the Oireachtas in its role of providing treatment for those in need, caring for society and its citizens, particularly those suffering from disability, and the protection of the common good… These decisions can be set aside in the appropriate circumstances by the court upon an application for judicial review or upon complaint made to the High Court in accordance with Article 40.4.2 of the Constitution but this does not mean that the decisions are part of the administration of justice."

84. Hamilton CJ. cited a passage from the judgment of Keane J. in *In Re the Application of Neilan* that merely because a decision can be set aside by way of judicial review "is not a material consideration in determining whether the exercise of the function in question is properly regarded as part of the administration of justice". Hamilton CJ. then stated he was satisfied that the original detention order made pursuant to the chargeable patient reception order made in accordance with the provisions of s. 171 "was not part of the administration of justice and does not require a judicial inquiry or determination". The judgment then recorded that it was submitted on behalf of the applicant that even if the original detention was lawful, the power given under s. 172 to detain until his removal or

discharge by proper authority or by death was repugnant to the Constitution where powers of detention of an indefinite nature without, *inter alia*, a judicial adjudication prior to detention or without automatic independent judicial review were a failure to vindicate personal rights including the right to liberty. What followed was a very significant review by Hamilton CJ. of the detention power in s. 172 and all the associated safeguards including those which were constitutionally guaranteed.

85. This Court expressly considered the issue of whether the inquiry constituted an administration of justice and cited a passage from *Keady v Commissioner of An Garda Síochána* [1990] 2 IR 493 in which O'Flaherty J. quoted "the characteristic features of the administration of justice" from the decision of Kenny J. in *McDonald v Bord na gCon*. Hamilton CJ. stated unequivocally that in exercising the powers conferred on them by the 1945 Act, neither the resident medical superintendent or the minister (who was given certain powers of discharge on receipt of a report from the Inspection of Mental Hospitals) were engaged in the administration of justice and that no judicial intervention was necessary or required unless either or both of them failed to comply with the requirements of fair procedures and constitutional justice or failed to have regard to the constitutional right to liberty of the patient. I pause here to restate the principle that a requirement to act judicially i.e. to apply constitutional fairness in decision making, "is not a badge of such [judicial] power" (per McCarthy J. in *Keady v Commissioner of An Garda Síochána*). Returning to *Croke v Smith (No. 2)*, Hamilton CJ. said it may be desirable that the necessity for continued detention be subject to automatic review but the absence of these had not been shown to render s. 172 constitutionally flawed because of the safeguards in the Act.

86. In my view, the finding that the initial detention of a person considered to be of unsound mind, the decision to detain pursuant to the chargeable patient reception order and the ministerial review were not the administration of justice, form part of the *ratio decidendi*

of the decision in *Croke v Smith (No. 2)*. It is clear from close consideration of the judgment that the Court was addressing an argument that these decisions had all the characteristics of the administration of justice as identified in *McDonald v Bord na gCon*.

87. After he lost his Supreme Court appeal, Mr Croke lodged an application under the European Convention on Human Rights. It is telling that his complaint under Article 5 ECHR was twofold; the absence of an independent and automatic review *prior to or immediately after* his initial detention *and* the absence of a *periodic, independent and automatic review* of his detention thereafter. The case was declared admissible by the European Court of Human Rights but was the subject matter of a friendly settlement. The agreement between the parties notes that compensation be paid by the State in relation to "the Applicant's legitimate concerns in relation to the absence of an independent formal review of his detention under the Mental Health Acts" and the European Court of Human Rights also noted that the agreement stated that in reaching the accord the State had particular regard to the fact that the applicant's claim was initiated prior to the publication of the Mental Health Bill, 1999. It seems from that position that the main point that was in essence conceded by the State was that the lack of an independent formal *review* was problematic in Article 5 ECHR terms but the settlement of the proceedings did not appear to involve any concession by the State that detention on grounds of mental health had to be reviewed by a court given that the State proceeded to enact the 2001 Act which confers the review function on a non-judicial tribunal.

88. In my view therefore, the decision in *In Re Philip Clarke* is authority for the proposition that preventative/protective detention may be imposed, in certain circumstances and in accordance with law, without the intervention of judicial power. The language of paternalism may no longer be appropriate when dealing with the right of persons to make their own decisions, but I do not accept that it was the paternalistic nature of the legislation in so far as it affected the right of the person *to make their own decision* that was the entire

reason for the finding that no judicial input was required before detention could be required. The rights of others (and not just the right of an individual to make their own decisions) was also of concern to the court in that case. In many ways, there is a similarity between the protection of the rights of others from those who may harm them because they are of unsound mind and the protections of the rights of others from those who may harm them because they are or may be carriers of infectious disease.

89. In their response to the clarification on *In Re Philip Clarke*, the appellants emphasised that it was a case about safeguards which did not address the more fundamental point in these proceedings of whether a *decision to review detention* involved the administration of justice. For the reasons set out above, especially when one considers the explicit reference to the Minister's power to discharge a person from detention in a mental hospital, I do not accept that submission to be an entirely correct description of the issue at stake in that case. Even more fundamentally, that submission represents a move away from the heading in their submissions that "Decisions on loss of liberty are properly located within the administration of justice" which was more absolutist in nature. There can be no doubt that initial decisions as to loss of liberty do not necessarily or inevitably constitute the administration of justice.

90. In my view, those sections of the Mental Health Act, 2001 which also provide for somewhat similar steps through which a person may be initially involuntarily detained in a psychiatric hospital, could not, on the authority of *In Re Philip Clarke* and of *Croke v Smith (No. 2)*, be said to constitute the administration of justice. The major innovations as to the length of detentions and the review of those detentions must be acknowledged as responses to issues concerning Article 5.4 of the ECHR. Moreover, if those safeguards were to be taken away, there might also be constitutional implications for the right to liberty and it is by no means certain that *Croke v Smith (No. 2)* would be followed in respect of the *necessity for those safeguards*. Those safeguards include the major

innovation under the 2001 Act, which is that the admission order, to be made by a consultant psychiatrist, is only valid for a period of 21 days but which may be extended by a renewal order made by the consultant psychiatrist responsible for the care and treatment of the patient concerned for a further period of 3 months where the person is suffering from a mental disorder, which again on similar terms may be extended for successive periods of 6 months. The second major innovation is that there must be a review by a Mental Health Tribunal of the admission order and of the renewal order within the periods set out in the Act (generally within 21 days of the making of the admission order or the renewal order). None of those review matters would affect the finding in *Croke v Smith (No. 2)* that the decision to admit/detain is not the administration of justice.

91. All of the foregoing reveals that:

a) The courts, including this Court, have consistently held that decisions on detention, even indefinite detention, in respect of those who are of unsound mind is not the administration of justice and,

b) That the Constitution does not necessarily require automatic review of such detention provided that sufficient safeguards for the interference with rights can be said to exist.

<u>The analogy with bail</u>

92. The appellants placed significant reliance on the analogy with decisions in respect of bail to argue that the Designated Appeals Officer was administering justice, referring to *O'Mahony v Melia* in support of that contention. That case concerned s. 15 of the Criminal Justice Act, 1951, which gave power to a peace commissioner to remand an arrested person in custody. The High Court (Keane J.) noted that the case was one in which counsel for the State "frankly and with good reason conceded that he was in difficulties in contending that a peace commissioner was not" administering justice when deciding whether to grant bail. Walsh J. had already stated, albeit *obiter*, in *The State*

(Lynch) v Ballagh [1986] IR 203 ("*State (Lynch) v Ballagh*") that "the granting of bail by a court is a judicial act and not a ministerial one" and that when those functions are assigned to a peace commissioner they "are really judicial functions because they purport to have given power to hear evidence and, having heard the evidence, to exercise a discretion as to whether prisoners shall be remanded in custody or on bail". The appellants rely upon the passage from Keane J. in which he cites the duties of the peace commissioner in coming to a decision, to hear contentions of both parties and any evidence, to take into account such considerations as a judge would take and then determine whether the person should be detained or released on bail. In giving that description however, Keane J. demonstrates that it mirrored the process by which a judge makes a decision on bail in criminal proceedings. Thus, the judicial functions of the District Court in relation to the criminal proceedings were purported to be exercised by a peace commissioner in clear violation of the constitutional requirement that justice had to be administered by judges in courts established under the Constitution.

93. Counsel for the DPP submitted that the analogy with bail was inapt. As a matter of first principles, bail is founded on the assumption that no facts have been established in a legal sense and the applicant enjoys the presumption of innocence of the offence charged. Thus, the DPP argued, the decision to grant or deny bail therefore is the administration of justice as the accused cannot have their liberty taken away without a legal process. The DPP submitted that this was mandated by the right to liberty under Article 40 of the Constitution and confirmed in *O'Mahony v Melia*.

94. The DPP submitted that the present scenario, at a level of principle, is very different to bail and aligns more closely with the concept of remission and the exercise of "limited function" in accordance with the *Zalewski* case. She noted that the decision could be likened to the decision of a prison governor granting a prisoner temporary release which has never been considered an administration of justice. Although bail decisions are in

fact an administration of justice, the law permits other authorised individuals to issue bail such as seen in granting station bail by a member of An Garda Síochána.

95. The DPP contrasted conditions that may be imposed when granting bail and the issue of conditions other than mandatory quarantine which would prevent Covid-19 spreading. She noted that bail can be revoked if conditions are not met but once the disease is leaked there is little remedy *ex post* to address the harm caused.

96. The task of the Designated Appeals Officer is to consider whether to make an exception for a particular applicant in light of their personal circumstances. The DPP submitted that restrictive measures, including mandatory quarantine, were necessary at the time they were in effect and proportionate to the aim of preventing the spread of Covid-19 and its variants. The DPP submitted that the High Court's findings should be upheld regarding the inappropriateness of bail as a comparator for mandatory quarantine and that no 'administration of justice' occurs in releasing a person from quarantine.

97. The appellants countered those arguments by saying that in essence the decision of the Designated Appeals Officer involves hearing argument and making a decision affecting liberty. They did not accept that the fact that in one there is a presumption of liberty and in the other a presumption in favour of quarantine alters the nature of the decision being made. I do not find that argument persuasive; it fails to take into account the enormity of the difference between a right to liberty which is in jeopardy precisely because there is, in criminal cases, an accusation of a crime which will have to be adjudicated upon in due course at trial and a situation where liberty has already been restricted by legislative enactment.

98. Hardiman J. in *Maguire v DPP* [2004] IESC 53, [2004] 3 IR 241, having outlined the long history of bail in the common law, stated: "It is therefore clear that the jurisdiction to grant bail is an ancient one, exercised in classical times and in the earliest period of the common law for which there is any surviving evidence". The nature of bail in the criminal

setting is that the 'bail' itself amounts to security given for the appearance before a court for the purpose of determining the dispute between the parties. The right to bail applies in criminal and in extradition matters and in certain civil matters where a person has been deprived of liberty e.g. challenges to deportation cases. In a situation, such as extradition, bail may be granted when the immediate dispute may be over, an example being where the court has already decided that the extradition/surrender of the person to another jurisdiction must take place. In that situation, it is still clear that 'bail', being part of the inherent jurisdiction of the court, is being granted for a particular purpose, i.e. the purpose of the original proceedings. This is explained by the Supreme Court (Murray CJ.) in *Butenas v Governor of Cloverhill* [2008] IESC 9, [2008] 4 IR 189 which addressed the issue of whether the High Court could grant bail where an order for surrender had been made under the European Arrest Warrant Act, 2003. Murray CJ. said:

> "It is an inherent discretionary power that is exercised when a court is considering whether imprisonment is required, not for its own sake, as in the case of imposing a sentence as a punishment after conviction, but for an ulterior or collateral purpose, such as to prevent the evasion of justice by a person absconding, whether in criminal or extradition proceedings. Generally speaking, bail may be granted where the court is satisfied that admitting the person to bail, subject to appropriate conditions, will be sufficient to ensure that that ulterior purpose can be served without depriving the person concerned of his or her liberty."

99. There is therefore no apt analogy with bail for the exercise of the Designated Appeals Officer's powers of review. Bail is a necessary instrument to respect the right to liberty because no person ought to be denied their liberty when the purpose for which their presence is sought can be met by sureties or conditions which do not entail deprivation of liberty. It is inextricably linked to a process – whether criminal or otherwise such as

extradition – which *is* part of the administration of justice, and thus makes sense that it too must be adjudicated upon by a judge. Bail is an inherent part of the judicial proceedings from which it arises. Thus, while there may be a legitimate desire to ensure that when a person is accused of a criminal offence or is sought for extradition that they will be available for the trial/sentence or for extradition, where those matters can be ensured by means other than the deprivation of liberty, bail must be granted. Where a person is charged with an offence, it is trite law to say that they have a presumption of innocence and the right to apply for bail is a necessary corollary of that. Bail in that sense is an interlocutory decision in judicial proceedings. On any view of the 2021 Act, the powers of the Designated Appeals Officer are of an entirely different nature and effect.

100. If the Designated Appeals Officer confirms under s. 38B(17) that the person is no longer obliged to remain in mandatory quarantine in a designated facility that ends the requirement to quarantine. There is no ulterior purpose for which the person "is bailed". The person is still subject to the general requirement on all other persons to self-quarantine in accordance with regulations applicable to persons arriving in the State from a state other than a designated state but time spent in mandatory quarantine is reckonable in calculating the requirements of self-quarantine. There is however no 'ulterior purpose' for which the Designated Appeals Officer's decision brings mandatory quarantine to an end, it is simply a recognition by statute that the person still has the same obligations as the rest of the general public in terms of arrival into the State from another state. Furthermore, unlike where bail is granted under sufficient surety and conditions to ensure that the person appears for trial, the Designated Appeals Officer does not have a power to impose conditions which might ensure that the Sars-CoV-2 virus does not spread. Although general quarantine conditions may apply to the person, the purpose behind mandatory quarantine could not be enforced through other conditions designed specifically to keep any new variant from being transmitted to the general public.

101. The DPP also points to the situation where members of An Garda Síochána may admit an accused person (or in some situations, even a suspect) to 'station bail' if they consider it prudent to do so. For example, s. 31(1) of the Criminal Procedure Act, 1967 (as amended) permits the sergeant or other member in charge of the station, if they consider it prudent to do so, to release the person on bail and for that purpose take a recognisance with or without sureties for due appearance before the District Court at the next sitting of the District Court or a sitting within 30 days. The original enactment of this section and Rule 39 sub-rule 1 of the District Court Rules 1948 (as amended) were at issue in *State (Lynch) v Ballagh*. It is not necessary to consider in these proceedings whether this is an administration of justice (see Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) para 7.4.127) or if it is, whether it is the exercise of a limited power and function of a judicial nature. What is apparent is that station bail of that type is designed to bring about the attendance by the accused person at the District Court proceedings, and will be granted before the Court process has properly commenced. That is entirely unlike the role of the Designated Appeals Officer and the nature of any decision which they may make in a particular case.

<u>The application of the decision in *Zalewski*</u>

102. At this point, it is appropriate to return to the important decision of *Zalewski*. The challenge in that case was to the system of adjudication of employment disputes by adjudication officers with a right of appeal to the Labour Court as established by the Workplace Relations Act, 2015. That adjudication system was, in a factual sense, far removed from the decision-making entrusted to the Designated Appeals Officer in the 2021 Act. The Designated Appeals Officer's decision making was relatively straightforward: Ought they confirm that the person is no longer obliged to remain in quarantine for either entirely humanitarian reasons or for the straightforward reasons that

the requirements to quarantine do not apply? Employment disputes involve the resolution of what may be highly contested, convoluted factual circumstances which have arisen over a protracted period to which often complex legal concepts must be applied and, where an employee successfully argues that their rights have been breached, adjudicating on the correct redress to be applied.

103. The decision of this Court in *Zalewski* as reflected in the judgment of O'Donnell J. (as he then was) is comprehensive and authoritative and the reasoning by which O'Donnell J. came to his conclusions does not require synopsis in this judgment. What is important is to apply the conclusions as to the test for identifying the administration of justice. O'Donnell J. said of the five features identified in *McDonald v Bord na gCon* that they do identify something central to the administration of justice and may be understood as indicating features of importance rather than establishing a statutory checklist. Treating the criteria as a checklist to be minutely and precisely complied with risks missing the wood for the trees. That would encourage an approach to drafting that could remove proceedings from the field of the administration of justice because of some small and in truth insignificant deviation from the checklist which would be a triumph of form over substance.

104. The five characteristics of the administration of justice as found in *McDonald v Bord na gCon* are:

(i) "a dispute or controversy as to the existence of legal rights or a violation of the law;

(ii) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;

(iii) the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;

(iv) the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment;

(v) the making of an order by the court which, as a matter of history, is an order characteristic of courts in this country."

105. O'Donnell J. identified the first, second and third features as being closely related as they identify a dispute about legal rights, its resolution and determination. The fourth is the logical extension of the third, since the resolution of the dispute must not be dependent upon the agreement of the parties but must be capable of enforcement in cases of refusal of the losing party to comply. The fifth feature, the historical nature of the power, is different, and if viewed and applied narrowly, has the effect of confining judicial power to traditional areas resulting in the fossilisation of the administration of justice in the form of the business of the courts in the mid-20th century. O'Donnell J. explained that this feature is best understood in a broader sense and as emphasising the importance of the existing jurisdiction of the courts, and any provision subtracting or creating a parallel jurisdiction to that of the courts should be closely scrutinised for compatibility with the Constitution.

106. In that context it is no wonder that the appellants relied so heavily on the analogy with bail. The jurisdiction to grant bail by courts is of such an ancient lineage that it is an archetypal exercise of the judicial power and any attempt to subtract from court jurisdiction or create a parallel jurisdiction requires careful scrutiny. For the reasons I have set out, the careful scrutiny demonstrates that the analogy with bail is entirely inapt; the exercise of functions by the Designated Appeals Officer does not mirror, does not bear favourable comparison with, and stands in contrast to the exercise of a court in the determination of whether the person before it should be set at liberty through the grant of

bail which will ensure that they are available for the purpose of the proceedings be that for trial, for conviction, or extradition or deportation as the case may be.

Analogy with remission

107. The appellants rejected the analogy with remission as found by the High Court and relied upon by all the respondents. They submitted that the executive power of remission only applies after the person has already been subject to the administration of justice in the trial process. Any decision to release that person early (whether by way of remission or temporary release) does not, as Murray CJ. clarified in *Lynch & Whelan v Minister for Justice, Equality and Law Reform* [2010] IESC 34, [2012] 1 IR 1, alter the original sentence but merely affords the person a benefit to which they otherwise would not have been entitled. Accordingly, as found in *O'Shea v Minister for Justice & Equality* [2015] IEHC 636, a prisoner does not have a substantive right to remission.

108. The appellants submitted that as regards both bail decisions and remission decisions, the deprivation of liberty being imposed or continued is done (or has been done) by a court in an exercise of the administration of justice, and thus there could be no complaint that the person's deprivation of liberty was unlawful. An applicant seeking a review of their mandatory quarantine by contrast, was entitled as a matter of law to be released if they fell into one of the statutory exemptions provided for in s. 38B of the 1947 Act. The appellants submitted that it is not the administration of executive mercy or a policy matter subject to executive discretion, but the first (and, as argued, judicial) determination as to length of time of a deprivation of liberty.

109. The State respondents submitted that the High Court was correct to find that the better analogy is with remission which is clearly an executive function. In *Brennan v Minister for Justice* [1995] 1 IR 612 remission was described by this Court as a power of the

executive as opposed to the judiciary as it does not fit within the rubric of the *McDonald v Bord na gCon* criteria. The DPP also drew the analogy with remission.

110. In my view, while there may be similar features between the exercise of remission and the role of the Designated Appeals Officer, other features are distinctly different. The difference between the manner in which the loss of liberty has been imposed – a court order versus a legislative requirement – is highly significant because the starting point of the detention in the former is the judicial imposition of a sentence following a conviction i.e. for wrongdoing. Under the mandatory detention scheme the loss of liberty is imposed by the legislature for protective/preventative purposes. While there is a certain similarity in the fact that a person whose loss of liberty is required by law can be released from such detention through a process which is primarily humanitarian focussed and is carried out by or on behalf of the executive, any analogy has limited value. Remission of punishment imposed by a court is by Article 13.6 of the Constitution vested in the President but may be conferred by law on other authorities. Such power is, as Geoghegan J. said in *Brennan v The Minister for Justice*, the executive administration of mercy and not the judicial administration of justice. The power to grant temporary release is not however a constitutionally prescribed power but has been described as "a quintessentially executive function" by Keane CJ. in *O'Neill v Governor of Castlerea Prison* [2004] 1 IR 298. What decisions on remission and temporary release have in common is that they take as given that the person is in lawful custody and instead address if there are humanitarian or other policy reasons why that release should be brought to an end either temporarily or permanently.

111. The high point of the appellants' argument that the role of the Designated Appeals Officer is not analogous to one which permits humanitarian/compassionate release is that the Designated Appeals Officer is empowered to make a decision as to whether the person is a person who is subject to mandatory hotel quarantine; a decision on whether by law

the person is obliged to quarantine in a designated facility. Under s. 31B(17)(a)(i), the Designated Appeals Officer may confirm that a person *is no longer obliged* to remain in quarantine where they are satisfied that, a person has been detained under subs. 7 by a Garda (because they have failed to comply with the requirements to pre-book a place in a designated place or present themselves as required to an approved person/Garda on arrival in the State) but they are not a person who comes within the circumstances set out in s. 38B(1)(a) or (b) in that they were not in a designated state at any time within 14 days of their arrival in this State or arrived in this State without the result of a RT-PCR test. Under s. 31B(17)(a)(ii) and (iii), the Designated Appeals Officer may confirm that the person has met the statutory criteria that brings to an end the quarantine period.

112. It must be remembered however that the review of the Designated Appeals Officer comes about in what is a very specific and unusual legislative context. The context was that in the middle of a global pandemic to prevent spread of disease and for the protection of public health, a system of mandatory quarantine had been enacted by the Oireachtas for those who travelled to this State from certain designated states. Those people who travelled to the State, such as these appellants, did so in the knowledge that the system existed and that they would be subjected to it. For those who may have been wrongly caught up in the quarantine system or those whose circumstances may have justified humanitarian cessations of the need for quarantine in the facility, there existed many safeguards including the provision of information about their right to request a review. This review was a highly appropriate and immediate type of 'internal review' or 'safeguard' to ensure that the loss of liberty, whether that be for humanitarian purposes or in circumstances of detention by a Garda of what is believed to be 'an applicable traveller', was correctly kept to a minimum. It permitted any error which may have been made by a Garda, or even the person themselves, to be addressed internally within the system at the earliest opportunity. There is no analogy between this very particular

procedure, designed of course to deal with a novel and unique problem, and any process of review traditionally vested in the Courts. No justiciable controversy was at issue in the Designated Appeals Officer review. Loss of liberty was imposed by statute and his decision was not one of loss of liberty, rather it was a quick and simple way to release someone from any perceived obligation or from an actual obligation for humanitarian reasons.

Analogy with an application under Article 40.4. 2˚

113. There is also no true analogy between the review by the Designated Appeals Officer and the role of the court in an Article 40.4.2˚ application (or even at a court of trial) where the matter to be determined is the legality of the detention. I do not consider that the decision of the Court of Appeal in *AB v Clinical Director of St. Loman's Hospital* [2018] IECA 123, [2018] 3 IR 710 is relevant to any issue that arises here with regard to the role of the High Court under Article 40.4.2˚. The Court of Appeal (Hogan J.) held that since the coming into force of the Mental Health Act, 2001 and the reviews carried out by the Mental Health Tribunals, the nature of the High Court's enquiry under Article 40.4.2˚ into detention for mental health reasons was no longer an enquiry into the substantive merits of the detention (contrary to dicta in *Croke v Smith (No. 2)*. I do not have to decide whether *AB v Clinical Director of St. Loman's Hospital* was correctly decided because the statute here did not provide for an enquiry into mandatory quarantine with the same sort of procedures and safeguards as now exist under the Mental Health Tribunal system. The Tribunal system operates under a high degree of formality, with institutional independence from the approved centres and with specialist members (medical and legal) as well as lay representation. Instead, the *dicta* of Kingsmill Moore J. in *State (Hully) v Hynes* (1966) 100 ILTR 145 (quoted by Hogan J. in *AB v Clinical Director of St. Loman's*

Hospital) is more appropriate when applied, *mutatis mutandis*, to mandatory quarantine pursuant to an Act of the Oireachtas, when he said that:

> "a very wide field of enquiry is open to the court on an application for habeas corpus and when the detention is by an act of the executive, the court can enquire into all of the circumstances. It is concerned not only to see that the documents are in correct form; it can investigate whether the necessary conditions exist to justify execution of such documents, and can enquire whether the necessary conditions exist to justify the execution of such documents, and can enquire whether they have been executed by mistake or whether their execution has been procured by fraud."

Conclusion on the issue of administration of justice

114. Turning back then to the first three characteristic features of the administration of justice in *McDonald v Bord na gCon*, as O'Donnell J. said, they, being closely related, identify a dispute about legal rights, its resolution, and determination. The appellants submitted with respect to the first characteristic, contrary to the finding of the High Court, there was a manifest dispute between the appellants and the State regarding the obligation of mandatory quarantine. The appellants submitted that the key issue is how the general requirement to quarantine applied in individual cases in accordance with a number of statutory criteria. The State respondents said that it was more akin to a decision-maker deciding whether or not criteria set down in legislation applied to the case at hand.

115. It must be recalled that this issue of whether there is a dispute is being assessed at the level of generality based upon the wording in the statute because there was never any actual dispute in the appellants' cases that they did not come within the statutory criteria which mandated quarantine. The appellants are and were entitled to rely upon this argument in their challenge to the validity of the 2021 Act and the full extent of the Designated Appeals Officer's powers must be addressed. The 2021 Act provided that the

Designated Appeals Officer was permitted and indeed required to consider, if asked, whether the statutory criteria apply. It is important to assess the nature and extent of those powers in assessing how important this characteristic is for this exercise of decision making. The decision making at issue here is far from the type of dispute that is the hallmark of the administration of justice. In the first place the decision maker is not the one to have imposed the restriction/deprivation of liberty. As stated previously, the Designated Appeals Officer is one that relieves a person from the obligation. It is particularly important that the interference with liberty was a general legislative imposition on 'applicable travellers'. The review of the Designated Appeals Officer was limited in scope as to whether legislative criteria were met and, as the subsection demonstrates, primarily directed towards humanitarian aspects. In so far as it addressed whether the person applying met the legal criteria for mandatory quarantine, while it may be correct to say that this was a decision-making process for an individual, this is not necessarily the hallmark for the administration of justice. The cases of *In Re Philip Clarke* and *Croke v Smith (No. 2)* demonstrate that the context of the legislative provisions is relevant to whether justice is being administered. Insofar as this is a very particular area – quarantine for the protection of public health – it is more correct to say that this is more akin to the initial decision making or even ministerial review which were held not to be the administration of justice even though liberty was in issue.

116. As for the second *McDonald v Bord na gCon* characteristic, the appellants submitted that it is difficult to see how such an evaluation, given the effect on the liberty of the appellants, does not involve a determination as to their rights. The appellants note the apparent recognition by the High Court of a "right not to quarantine" in certain circumstances. On examination, however, it cannot be said that the decision of the Designated Appeals Officer determined the rights of parties or imposed liabilities or penalties. The purpose of the review, insofar as it concerned whether persons met the

criteria for being subjected to mandatory quarantine was not an issue of rights but whether they came within the category of those who had to quarantine. If they did not come within the category, there was no liability as a matter of law to quarantine. Moreover, it could not be said that any decision that the Designated Appeals Officer made was binding or determinative on another judicial body. Naturally the High Court retains the ultimate jurisdiction under Article 40.4.2° to decide if a person is being detained in accordance with law but even when looking at the binding nature of a *positive* decision by the Designated Appeals Officer confirming that the person is no longer obliged to remain in quarantine because they were not an applicable traveller, such a decision would not be binding on any future criminal court asked to determine an issue about the initial refusal to enter into mandatory quarantine.

117. In terms of the third characteristic, even the appellants accepted that this may not be considered a final determination but argued that the phrase 'subject to appeal' demonstrates the importance of not taking 'finality' too literally and the importance, as stated in *Zalewski*, of entering into the prohibited 'box-ticking exercise'. While it is undoubtedly correct not to make the important constitutional decision as to whether this is an administration of justice based upon the complete absence of one characteristic feature, it is nonetheless a matter to be considered when looking at this provision in a holistic fashion. At the appeal, counsel for the appellants referred to *Joyce v Governor of Dóchas Centre* [2012] IEHC 326, [2012] 2 IR 666 to demonstrate that even where the administration of justice is involved there may be repeat applications to court. That case dealt with applications under Article 40.4.2° and the specific requirements imposed on a High Court judge under that Article in respect of enquiring into the legality of a person's detention. While the case confirmed the right in principle under the Article to go from judge to judge "some measure of realism had to be brought to the process" where a second application would normally turn on something that was overlooked and a third and

subsequent application would generally be regarded as abusive. Applications under Article 40.4.2° are *sui generis* but even in that situation, finality is regarded as an important aspect of the procedure. I therefore do not accept that the decision in *Joyce v Governor of Dóchas Centre* assists the appellants in their attempt to stay within the parameters of the third characteristic.

118. Characteristic number four concerns enforcement of the rights or liabilities. The appellants submitted that it should be borne in mind that the issue of enforcement of rights or liabilities or the imposition of a penalty is a derivative limb and that the application of which flows from a consideration of the first three. Given the observations in the previous paragraphs about the first three characteristics, consideration of this fourth one is unlikely to strengthen the appellants' case. Nonetheless I will address their submission in more detail. They refer to the decision of the High Court that there is "no provision in the legislation for the enforcement of a Designated Appeals Officer review decision. Their decision was not what deprived the applicants of their liberty, rather it was the immediate application of s. 38E of the Act upon their arrival in the State from the UAE". The appellants submitted that this is too narrow and artificial an interpretation of the effect of the decision within the overall context of the legislation. The decision, they say, of the Designated Appeals Officer amounted to a finding that they were not entitled to one of the legal exemptions, the effect of which was that the State continued to have the right to require them to submit to the mandatory quarantine. In this submission, it is the appellants who are not looking at the overall context. The High Court judge was quite correct to view the legislation as imposing the obligation to enter into and to remain in custody; the Designated Appeals Officer's decision not to confirm that the person was no longer obliged to quarantine was not what resulted in the continued obligation. This was a continuing obligation which existed by reason of the provisions of the 2020 Act as amended by the 2021 Act.

119. As for the fifth characteristic, and the appellants' submission that decisions related to the loss of liberty, particularly in respect of a faultless civil detention, have traditionally been reserved for the courts. I have addressed at length and rejected the claim that all loss of liberty decisions are within the traditional purview of the courts. The type of provision at issue here – where the deprivation of liberty comes directly from the statute passed in the context of the protection of public health – is not akin to a bail decision but shares more of the characteristics of decisions related to involuntary detention on grounds of mental disorder.

120. In this close, indeed probably too close, examination of the provisions of s. 38B(17) which permit the Designated Appeals Officer to make decisions on a request for review by a person in mandatory quarantine when compared with the five characteristics of the administration of justice, there is little to support the contention that the role of the Designated Appeals Officer involved an administration of justice. Standing back from the close examination and looking holistically at the provision, there is nothing in any of the case law that supports the view that this type of decision-making is the administration of justice. From any perspective, this was an internal review mechanism which had no analogue with any previously found administration of justice and was not a dispute resolution mechanism which has the first four characteristics of the administration of justice as set out in *McDonald v Bord na gCon* nor was one which had historically been located within the courts system. It was not a decision on loss of liberty but a straightforward, easy and quick administrative process through which inappropriate confinements were brought to an end and through which humanitarian needs might be addressed. I am satisfied that s. 38B(17) is not contrary to Article 34 of the Constitution as the role of the Designated Appeals Officer cannot be said to be the administration of justice. It is therefore not necessary to consider any argument in relation to Article 37.

121. For that reason, I would dismiss those grounds of appeal related to the issue of the administration of justice.

Staying the Prosecutions

122. Leave to apply for judicial review was granted on 4 April 2021. Pursuant to O. 84 RSC the grant of leave does not provide for a stay. No application for a stay or an order of prohibition appears to have been made in these cases and certainly none was granted. There was therefore no reason to stop these prosecutions. If an application for a stay had been made, arguments about the effect of the stay would have been properly dealt with by the High Court. For example, there is no reason why the argument about power of release by the Designated Appeals Officer would have had any effect on the requirement to submit to mandatory quarantine. In relation to the designation of the UAE, an application for a stay would have required a focused and considered decision by the High Court of the impact of such a stay on this prosecution and any others, as well as its impact more generally on the enforcement of pandemic measures. It must be remembered that this Act is and was presumed constitutional. Moreover, the fact that the High Court had rejected the appellants' case ought to have played a role in a consideration of whether the prosecutions could have proceeded while this appeal was pending. Most importantly in a situation where there was any risk that the proceedings would result in system wide delays in prosecutions, the parties had a responsibility to take appropriate matters which may result in an expedited resolution of the judicial review (see *Gearty* paras 49-50).

Conclusion

123. The obligation of mandatory quarantine in a designated facility for those people entering the State, directly or indirectly, from a designated state was provided for by s. 31B of the Health Act, 1947, as inserted by the provisions of the Health (Amendment)

Act, 2021. The challenge was on two distinct bases: a) that the designation of the UAE by the Minister (and in particular by means other than by regulation) was invalid having regard to Article 15.2.1° of the Constitution because it was an unconstitutional exercise of legislative power which said power is limited to the Oireachtas, and b) that the review of the quarantine by a Designated Appeals Officer was the unconstitutional administration of justice.

124. This appeal does **not** raise any issue about the constitutionality of the system of mandatory quarantine in designated facilities; it only concerns the procedural mechanism by which the UAE was so designated. Furthermore, these appeals do **not** raise any issue about the adequacy of safeguards surrounding the right to liberty that were provided during the quarantine period; it raises the discrete issue of whether the Designated Appeals Officer is administering justice in carrying out requests for review by those in quarantine.

125. For the reasons set out in the judgment, I have held that this designation of the UAE as a designated state was not required to be made by way of regulation. In making the designation, the Minister for Health was not purporting to legislate. Instead, the Oireachtas had conferred on the Minister a power of normative rule making that was within its power to so do. The designation had been publicised in accordance with the requirements set out in the statute. There was no requirement for oversight by way of laying the designation before one or both Houses of the Oireachtas for either positive or negative approval.

126. The appellants' claim that the decision of the Designated Appeals Officer was the administration of justice was based primarily on a submission that decisions on loss of liberty are properly located within the administration of justice. In rejecting that claim I have identified many situations where loss of liberty takes place without judicial intervention. The most obvious example of these is the loss of liberty through mandatory

quarantine in designated facilities which is an obligation imposed by statute; this detention was not challenged by these appellants. Moreover, decisions in respect of preventative detention on the grounds that a person is suffering from a mental disorder are made at an initial stage by Gardaí (for the purpose of seeking a recommendation for involuntary admission to an approved centre) and the consultant psychiatrist on the staff of an approved centre may make an admission order for 21 days. Admissions orders and any renewals are subject to review by a Mental Health Tribunal. Arrest of persons on reasonable suspicion of having committed arrestable offences occurs without judicial intervention. Further detention, albeit for limited periods of time, may take place under certain statutes for the proper investigation of those offences where such decisions are made by members of An Garda Síochána of various ranks or positions.

127. In submitting that the decision is an administration of justice belonging to the realm of the courts, the appellants relied upon the analogy with bail. That is not an apt analogy. Bail is of ancient origin where the purpose for the deprivation of liberty has been to make the person available for trial, for execution of penalty, or for extradition; that is to say where the person is required to be available for the purpose of the dispute before the court. An application for bail is necessarily and inextricably connected to a justiciable dispute which will be determined by a judge as part of the administration of justice. Bail ought to be granted where that purpose can be ensured in a manner which respects liberty. That is unlike the decision to be made by the Designated Appeals Officer, if it is decided that there is no obligation to continue in quarantine there is no "bail" to be offered or entered into. The purpose of the quarantine will have come to an end.

128. An analogy with remission is not a good fit. While there may be some similarity with the executive function of remission insofar as the assessment of humanitarian or compassionate considerations are concerned, it is noteworthy that, unlike the role of the Designated Appeals Officer, remission takes place in the context of a judicial decision

following a conviction for wrongdoing. Insofar as the Designated Appeals Officer makes a decision on whether the statutory criteria have been met, this is more akin to an "internal review" of the appropriateness of continued quarantine. Fundamentally however, the Designated Appeals Officer's decision is not one leading to loss of liberty, that loss of liberty has been imposed by statute. The decision is one which may lead to confirmation that the person is no longer obliged to remain in quarantine.

129. The other characteristic features of the administration of justice set out in *McDonald v Bord na gCon* are not a checklist to be applied minutely and precisely. In the present appeal, the review mechanism does not however fit within any of the criteria. The review provisions are principally directed towards humanitarian considerations which are not the hallmark of judicial decisions which are directed towards the resolution of disputes over rights. The obligation to enter into and to remain in quarantine in a designated facility is a statutory obligation imposed on 'applicable travellers'. Enforcement mechanisms stem from that obligation and not from any decision of the Designated Appeals Officers. Looked at holistically there is nothing from any case law that supports the view that this type of decision-making is the administration of justice.

130. In all the circumstances, the sole issue raised in relation to the review by the Designated Appeals Officer of mandatory quarantine, namely that the Designated Appeals Officer was engaged in the administration of justice, has not been substantiated.

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