# THE COURT OF APPEAL

**Finlay Geoghegan J.**
**Peart J.**
**Hogan J.**

**[2014 No. 1409]**
**[Article 64 transfer]**

**BETWEEN/**

**STANISLAV BEDEREV**

**PLAINTIFF/APPELLANT**

**AND**

**IRELAND, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS**

**DEFENDANTS/RESPONDENTS**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 10th day of March 2015**

**1.** This is an appeal from the judgment of Gilligan J. in the High Court delivered on the 14th May, 2014, whereby he refused to make an order declaring s. 2(2) of the Misuse of Drugs Act 1977 ("the 1977 Act") unconstitutional on the ground that it contravened Article 15.2.1 of the Constitution: see *Bederev v. Ireland* [2014] IEHC 490. As s. 2(2) of the 1977 Act vests the Government with powers to declare certain substances to be "controlled drugs" for the purposes of this legislation, it will be seen that this appeal presents a constitutional issue of far-reaching importance.

**2.** The appellants originally appealed to the Supreme Court against this decision. This case was subsequently transferred to this Court from the Supreme Court pursuant to Article 64 of the Constitution by direction of the Chief Justice (with the concurrence of all the members of the Supreme Court) on 29th October, 2014, following the establishment of this Court on the previous day.

**The background to the appeal**

**3.** The appellant in these proceedings, Mr. Bederev ("the appellant"), was charged on 26th April, 2012, at Blanchardstown District Court with certain offences under ss. 3, 15 and 27 of the 1977 Act concerning the possession and the possession with intention to sell certain controlled drugs. These charges were subsequently amended, so that the controlled drug in respect of which the charges were now laid was changed from mephedrone to methylethcathinone. The drug in question, methylethcathinone, was classified by the Misuse of Drugs Act 1997 (Controlled Drugs)(Declaration) Order 2011 (S.I. No. 551 of 2011)("the 2011 Order") as a controlled drug within the meaning of the 1977 Act. The District Court proceedings currently stand adjourned pending the outcome of this appeal.

**4.** Methylethcathinone is a stimulant designed for recreational drug use. Prior to the making of the 2011 Order by the Government, this drug was legally available and could have been purchased at certain retail outlets which specialise in the sale of tobacco paraphernalia. Accordingly, everything, therefore, turns so far as the this appeal is concerned, on the constitutionality of s. 2(2) of the 1977 Act, since the validity of the 2011 Orders rests entirely on this sub-section.

**5.** Article 5 of the Constitution describes the State as "a sovereign, independent, democratic state." 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 powers to make laws for the State."

**6.** Before considering this issue, it is necessary first to set out the relevant provisions of the 1977 Act.

**Key provisions of the 1977 Act**

**7.** The long title to the 1977 Act provides:

> "An Act to prevent the misuse of certain dangerous or otherwise harmful drugs, to enable the Minister for Health to make for that purpose certain Regulations in relation to such drugs, to

enable that Minister to provide that certain substances shall be poisons for the purposes of the Pharmacy Acts, 1875 to 1962, to amend the Pharmacopoeia Act 1931, the Poisons Act 1961, the Pharmacy Act 1962 and the Health Acts 1947 to 1970, to repeal the Dangerous Drugs Act 1934 and section 78 of the Health Act 1970 and to make certain other provisions in relation to the foregoing."

**8.** Section 2(1) of the 1977 Act defines a "controlled drug" as:

"any substance, product or preparation (other than a substance, product or preparation specified in an order under subsection (3) of this section which is for the time being in force) which is either specified in the Schedule to this Act or is for the time being declared pursuant to subsection (2) of this section to be a controlled drug for the purposes of this Act."

**9.** Section 2(2) of the 1977 Act provides:

"The Government may by order declare any substance, product or preparation (not being a substance, product or preparation specified in the Schedule to this Act) to be a controlled drug for the purposes of this Act and so long as an order under this subsection is in force, this Act shall have effect as regards any substance, product or preparation specified in the order as if the substance, product or preparation were specified in the said Schedule."

**10.** The 2011 Order was made pursuant to this latter sub-section. There are, therefore, two means by which a substance can be defined as a "controlled drug" within the meaning of the Act. First, the schedule of the 1977 Act contains a list of drugs which are designated as "controlled drugs" for this purpose. It is, of course, always open to the Oireachtas to amend that Schedule by means of a later enactment. Second, s. 2(2) empowers the Government to make an order adding a particular "substance, product or preparation" to that the schedule.

**11.** Section 2(3) of the 1977 Act empowers the Government to declare by order that the Act shall not apply:

"in relation to a substance, product or preparation specified both in the order and in the Schedule to this Act, and so long as an order under this sub-section is in force, this Act shall not apply in relation to a substance, product or preparation specified in the order."

**12.** Section 2(4) of the 1977 Act enables the Government to amend or revoke an order made under this section.

**13.** Much of the rest of the 1977 Act is taken up with creating criminal offences in respect of the possession, cultivation and sale or supply of controlled drugs.

**The judgment in the High Court**

**14.** In a comprehensive decision which reviewed the major authorities considered elsewhere in this judgment Gilligan J. concluded that the 1977 Act must be interpreted in a holistic fashion. Drawing on the guidance found in the long title and the general objectives of the 1977 Act, Gilligan J. found that the legislation was directed at drugs which "would have negative and detrimental effects on human health and society and is limited to those substances which are likely to be universally harmful to those who misuse them."

**15.** As thus construed, he concluded that the 1977 Act contained sufficient principles and policies to guide and constrain the Government in the making of any order under s. 2(2) so as to satisfy the requirements of Article 15.2.1 of the Constitution. These standards were also sufficient to enable the courts to review the exercise of this power on *vires* grounds. He also considered that the fact that both Houses of the Oireachtas were given the power by s. 38(3) of the 1977 Act to annul by resolution any earlier order made under s. 2(2) was an important safeguard which also assisted him to conclude that the powers conferred by s. 2(2) did not involve the grant of legislative powers and, hence, that the sub-section did not violate Article 15.2.1.

**Article 15.2.1 of the Constitution and the principles and policies test**

**16.** Article 15.2.1 provides that the "sole and exclusive power of making laws for the State is hereby vested in the Oireachtas." While there is no doubt but that this provision has given rise to a

considerable degree of litigation, the starting point on the question of whether the legislative power has been delegated remains the test which was enunciated by O'Higgins C.J. in *Cityview Press Ltd. v. AnCO* ([1980] I.R. 381, 399):

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

**17.** Although much of the subsequent Article 15.2.1 case-law is technical and complex, the fundamental objective of the principles and policies test is to ensure that legislative power is not ceded by the Oireachtas under the guise of a delegated regulatory power. In this regard, Article 15.2.1 must be read in conjunction with Article 5. As the Divisional High Court said in *Collins v. Minister for Finance* [2013] IEHC 530:

> "It may be recalled that Dáil Éireann is described by Article 15.1.2 as a House of Representatives of the people. Budgetary allocation and the raising of taxation are, therefore, not only integral features of the operation of the democratic nature of the State prescribed by Article 5, but represent key features of the representative duty of each Dáil Deputy. It is by these decisions that the Dáil (and the wider Oireachtas) shape the very society in which we live. It is for this reason that the individual members of the Dáil are directly answerable to the People in the electoral process provided for in Article 16.
>
> Budgetary allocation is, therefore, a fundamental responsibility which Articles 5, 11, 17 and 28 of the Constitution cast upon the Dáil and its individual members. This constitutional responsibility may under no circumstances be abrogated, whether by statute, parliamentary

practice or otherwise. It must be stressed in this regard that Article 28.4.1 requires that the Government "shall be responsible to Dáil Éireann.".

**18.** While it is true that these comments were made in the context of a challenge to legislation permitting enormous budgetary allocations so that the banking system could be effectively re-capitalised, they nonetheless indicate what is at the heart of the Article 15.2.1 jurisprudence: namely, has the delegatee of the statutory power (in this case, the Government) been vested with what, in effect, is the capacity to make policy decisions of the kind which are properly the preserve of the Oireachtas?

**19.** These requirements have been ventilated at length in a series of subsequent cases of which decisions such as *McDaid v. Sheehy* [1991] 1 I.R. 1 and *McGowan v. Labour Court* [2013] IESC 21, [2013] 2 I.L.R.M. 276 are only among the most prominent.

**20.** In this context, a comparison of both *Cityview Press* and *McGowan* is instructive. In *Cityview Press* the plaintiff challenged s. 21 of the Industrial Training Act 1967, which empowered the defendant, *An Comhairle Oiliúna*, to make a levy order fixing the amount of the levy to be collected from each enterprise in a specified industry and used for training recruits to that industry. In the case of the printing industry, the relevant order specified a levy of one per cent of total emoluments on all employees less IR£20,000. The plaintiff's argument was that the Act did not provide the defendant body with any precise guidelines as to the basis on which the levy should be made, *i.e.* whether by reference to turnover, total salaries and wages or profits, or some other basis. This argument was rejected both in the High Court and Supreme Court by reference to the principles and policies test just articulated.

**21.** More recently, in *McGowan* the Supreme Court provided an explanation of why the section at issue in *Cityview Press* survived constitutional scrutiny ([2013] 2 I.L.R.M. 276, 290-291):

> "In the *Cityview Press* case, the delegation or authorisation under s. 21 of the Industrial Training Act 1967 may be said by some to be vague, but a number of important features were

identified, particularly in contrast to the position which applies under the Industrial Relations Act 1964. The area of authorisation was narrow. It was the power to fix the amount of the levy, the Oireachtas having already made the decision that An Chomhairle Oiliúna was to be funded by a levy on the relevant designated industrial activity. The body which was authorised to fix the levy was itself a public law body exercising powers constrained by statute. Accordingly any order made would be subject to consultation with the relevant industrial training committee (s.21(3)), review and approval by the Minister (s.21(4)) and laid before each house of the Oireachtas, either of which was entitled to annul it within 21 days (s.21(6)). Furthermore, as McMahon J. in the High Court observed:

> "There can be no doubt that s. 21 is so expressed as to as to confine the use of any money raised by a levy ordered to meeting any expense of AnCo in relation to the performance of its functions under the Act in respect of the designated industrial activity in respect of which the levy order was made".

For that reason, and indeed for more general reasons of public law, there could be no question of the money raised being used for any other activity or for example, as a form of taxation or covert revenue raising. The area of decision making accorded therefore to An Chomhairle Oiliúna under s.21 was limited in a number of respects. Its power to fix the quantum of the levy was restricted by the object for which the levy was to be fixed. It retained a discretion as to the precise manner in which the levy should be raised as indeed was argued, whether by reference to turnover, profits, or otherwise. But given the broader constraints just identified, that is a very limited power and furthermore raises no obvious issues of policy…. For present purposes however, it is only necessary to identify the significantly limited scope of authorisation that was in issue in that case."

**22.** In the judgment of the Court in *McGowan* delivered by O'Donnell J. the judge contrasted the powers conferred by the 1967 Act with the vastly more far-reaching powers provided for by the

Industrial Relations Act 1946 in the case of registered employment agreements, the constitutionality of which legislation was at issue in those proceedings. Once these agreements were reached between representatives of employers and employees, they were registered as registered employment agreements ("REA") with the Labour Court and became binding on an industry-wide basis. The agreements covered a range of areas in the field of employment law and practice and it was the very breadth of the delegation which caused the Supreme Court to hold that there had been a clear breach of Article 15.2.1. As the Court explained ([2013] 2 I.L.R.M. 276, 291-292):

> "The contrast with the scope of power afforded under the 1946 Act is instructive. If the 1946 Act conformed to the same pattern as that established in the Industrial Training Act 1967, then the relevant terms would be set by the Labour Court perhaps after consultation with other public bodies and subject to ministerial approval and Oireachtas review. Even if such a structure were in place the breadth of the power afforded would still be telling. A REA can make provision not merely for remuneration, as was the case in *Burke*, but can make provision for any matter which may be regulated by a contract of employment. Thus, it can determine wages, pensions, pension contributions, hours of work, health insurance, grievance procedures, discipline procedures, staffing levels, production procedures, approved machinery or equipment, and anything else in the employment relationship. It is in the words of Henchy J. in *Burke*, a delegation of a "most fundamental and far-reaching kind". It involves a fundamental part of the person's life (if an employee), and their business (if an employer).
>
> The extent of the delegation is also of significance. What is unusual and possibly unique is that the law making power granted under the 1946 Act is granted over a broad area of human activity to private persons, themselves unidentified and unidentifiable at the time of the passage of the legislation. When an employer such as the third named appellant is the subject of prosecution for breach of a registered employment agreement, that amounts to a clear

allegation that a part of the law of the State has been breached. In such a case the particular provision which it is alleged has been breached has been made by the private parties to the employment agreement which has been registered by the Labour Court. The Labour Court itself has no power of consultation or even (as is the case of an ERO made under Part IV of the 1946 Act) a power to comment and return the proposed order to the joint industrial council. Therefore, it is clear that this specific provision is being made, not by a subordinate public body governed by public law, but by participants in the industry who were empowered to make regulations for themselves and for all others within that industry who may be competitors and whose interests may not be aligned with the makers of the REA. This is not a grant of a power to make regulations over a limited area subject to explicit or implicit guidance and review. It is an unlimited grant of power in relation to employment terms, made to bodies unidentifiable at the time of the passage of the legislation and without intermediate review. On its surface therefore, this appears to be a fatal breach of Article 15.2.1. "Law" is undoubtedly being made for the State, and by persons other than the Oireachtas. No direct statutory guidance is given for the exercise of the power. On its face, the Act does not define who might be parties to the agreement, or impose any limitation on the content of such agreement other than that it should relate to the conditions of employment. Such a far-reaching conferral of law making authority can only be valid if it can be brought within the test outlined in *Cityview Press.* In the context of this case that can only be achieved if the process of registration by the Labour Court (which is essential to give statutory effect to an employment agreement) introduces sufficient limitation on the regulation making power granted by the statute to render that regulation no more than the filling in of gaps in a scheme established by the parent statute…..

It is plain however that subs.27(3)(d) is not adequate to provide sufficient limitation on the regulation making power of the parties to an agreement the registration of which is sought

pursuant to s.27, to render that exercise of power compatible with Article 15.2.1. It was sought to be argued on behalf of the respondents that the word "intended" should not be given its natural and ordinary meaning and that the Labour Court was empowered to refuse to register an agreement which it considered would have any of the effects set out in s.27(3)(d). There is no reason however to give a broad and artificial meaning to the phrase for the purposes of giving greater restrictive capacity to a section which is in its content extremely permissive. *While the promotion of employment, and the avoidance of inefficiency and costly machinery, are laudable and desirable objectives, they do not constitute a sufficient restriction on an otherwise unlimited power of regulation to bring the power conferred by s.27 within the constitutional limits.* In particular, there is no guidance given in relation to the concept of representativity. There is no obligation on the Labour Court or the parties to the agreement to consider the interests of those who will be bound by it and who are not parties to it. Furthermore, while the agreement once registered is binding on everyone in the sector, it may only be varied on the application of the original parties." (emphasis supplied)

**23.** In examining the application of the *Cityview Press* principles in this context, it is also helpful to examine the earlier judgment of Blayney J. in *McDaid v. Sheehy* [1991] 1 I.R. 1. This case involved a challenge to the constitutionality of the tax-raising procedure which had been provided for in s. 1 of the Imposition of Duties Act 1957. Section 1 allowed the Government to make orders amending the rates of customs or excise duty so that it could determine which goods were to be subject to a duty and, if so, the amount of such a duty. Section 2 of the 1957 Act then provided that such orders would have "statutory effect" for a maximum of two years after which they would need to be confirmed by the Oireachtas.

**24.** It is, perhaps, not surprising that in these circumstances s. 1 of the 1957 Act was held to be unconstitutional by Blayney J. as violating the *Cityview Press* principles. On this issue Blayney J. said ([1991] 1 I.R. 1, 9):

> "When this test is applied to the provisions of the Act of 1957, giving the Government power to impose customs and excise duties, and to terminate and vary them in any manner whatsoever, I have no doubt that the only conclusion possible is that such provisions constitute an impermissible delegation of the legislative power of the Oireachtas. The question to be answered is: Are the powers contained in these provisions more than a giving effect of principles and policies contained in the Act itself? In my opinion, they clearly are. There are no principles or policies contained in the Act. Section 1 states baldly that "the Government may by order" do a number of things, one of which is to impose a customs duty or an excise duty of such amount as they think proper on any particular description of goods imported into the State. In my opinion the power given to the Government here is a power to legislate. It is left to the Government to determine what imported goods are to have a customs or excise duty imposed on them and to determine the amount of such duty. And the Government is left totally free in exercising this power. It is far from a case of the government filling in only the details. The fundamental question in regard to the imposition of customs or excise duties on imported goods is first, on what goods should a duty be imposed, and secondly, what should be the amount of the duty? The decision on both these matters is left to the government. In my opinion it was a proper subject for legislation and could not be delegated by the Oireachtas. I am satisfied accordingly that the provisions of the Act of 1957, which I have cited earlier, are invalid having regard to the provisions of the Constitution."

**25.** The State's appeal from this decision was allowed by the Supreme Court on the ground that as the order in question had been subsequently confirmed by Act of the Oireachtas, the applicant was not prejudiced by the operation of the provision and, accordingly, had no *locus standi* to challenge it. Although the Supreme Court accordingly did not pronounce on the constitutionality of the section so that the comments of Blayney J. must be considered to be strictly *obiter*, this passage from his judgment is nevertheless instructive and relevant for the present case. It is also worth

observing that passage from Blayney J. has also been approved in subsequent case-law: see, *e.g.*, the comments of Geoghegan J. in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26, 39 and by the Divisional High Court in *Collins v. Minister for Finance* [2013] IEHC 530.

**The purpose of the principles and policies test**

**26.** In considering this wider constitutional question, it must first be recalled that Article 28.2 of the Constitution provides that:

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

**27.** The executive power provided for in Article 28 does not, of course, extend *in itself* to taking steps which would have the effect of criminalising certain conduct or actions. As Article 5 of the Constitution makes clear, the State is a democracy based on the rule of law. It follows that decisions of that kind must, in principle, be either legislative in nature or, if taken by the executive, have the appropriate legislative foundation.

**28.** This, however, is not to suggest that to give the Government the power by legislative enactment to make a control order in respect of certain categories of drugs would be *ex ante* unconstitutional. Such a power could doubtless be conferred on the Government by the Oireachtas, provided that clear principles and policies are contained in the parent Act, so that the exercise of executive power can then be measured against these statutory standards for vires: see *O'Neill v. Minister for Agriculture* [1998] 1 I.R. 539, 554 *per* Murphy J. Just as importantly, however, the grant of any such power of delegated regulation to the Government must be circumscribed by these appropriate statutory standards, so that any policy decision is ultimately determined by the Oireachtas.

**29.** As, however, the evidence of the then Chief Pharmacist at the Department of Health and Children, Ms. Marita Kinsella, before the High Court made clear, drug and pharmaceutical products are ever changing and new products are constantly coming on the market. In these circumstances, it

would be cumbrous to insist that any such new drugs or drug products which were dangerous or liable to misuse could *only* be banned by legislation subsequently enacted by the Oireachtas. The parameters of Article 15.2.1 should, accordingly, be interpreted to reflect this underlying reality. A similar point was acknowledged by McKechnie J. in *BUPA Ireland Ltd. v Health Insurance Authority* [2006] IEHC 431 (at para. 146):

> "…[I]n adjudicating upon an issue involving Article 15 of the Constitution, the courts must reflect the reality of the subject which the legislature is addressing and of the implementing method best chosen by it for that purpose. If what is involved, or sought to be achieved, is complex, technical or designed to operate as part of a dynamic and evolving model, capable of business like adjustment, then a subordinate body may be a much more suitable vehicle (indeed, on occasions, perhaps the only suitable vehicle) for the implementation and achievement of legislative objectives. If, on the other hand, the subject matter is easily capable of exact definition with established parameters then there may be no justification whatsoever in the exercise of delegatory power. So it all depends on the individual circumstances of a given case, which, however, must always be determined against the backdrop of a statutory framework in which "the principles and policies" of the legislator are set forth."

**30.** The essential question, therefore, is whether the 1977 Act contains such principles and policies. While, as O'Donnell J. acknowledged in *McGowan v. Labour Court* [2013] IESC 21, [2013] 2 I.L.R.M. 276, this may often be just a question of degree, the fundamental issue remains whether the delegatee of the power has in substance been given the power to make policy choices which are the preserve of the Oireachtas.

**31.** This was all impressively summarised by Hanna J. in his judgment in *Pigs Marketing Board v. Donnelly (Dublin) Ltd.* [1939] I.R.413. In that case, a challenge had been made to the price fixing

function which had been delegated to the board by the Pigs and Bacon Acts 1935 and 1937. In rejecting that claim, Hanna J. said ([1939] I.R. 413, 421-422):

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

**32.** I would pause here only to say that the reference to "directed by the Government" at the conclusion of that sentence should really be read as meaning as "directed by the Oireachtas." Hanna J. continued thus:

> "Now, what is the complaint here? What is the legislative power which it is suggested the Pigs Marketing Board exercises? It is the fixing of the hypothetical price. It has been submitted that, when the Pigs Marketing Board has constitutional power to fix the appointed price because they are directed to consider certain matters in determining it, as there is no schedule of topics to be considered by the Pigs Marketing Board in fixing the hypothetical price, they are in a position of legislators in that respect. But I cannot accept this view of the duties of the Pigs Marketing Board in reference to the hypothetical price, for the Legislature has directed them to fix, not any price, but the price which, in their opinion, would be the

> proper price under normal conditions. That is a statutory direction. It is a matter of such detail and upon which such expert knowledge is necessarily required, that the Legislature, being unable to fix such a price itself, is entitled to say: "We shall leave this to a body of experts in the trade who shall in the first place determine what the normal conditions in the trade would be apart from the abnormal conditions prescribed by the statute, and then form an opinion as to what the proper price in pounds, shillings and pence would be under such normal conditions." The Pigs Marketing Board, in doing so, is not making a new law; it is giving effect to the statutory provisions as to how they should determine that price."

**33.** It is against this general background that the present claim falls to be considered. In examining this question, it is necessary first to determine the proper construction of the 1977 Act.

**The proper construction of the 1977 Act**

**34.** In any construction of the 1977 Act, it must first be borne in mind that the entire Act (including the long title and its schedules) must be construed as a whole. Such a holistic interpretation is, in any event, consistent with the requirements of the presumption of constitutionality. The Court must also employ the double construction rule by opting, where possible, for a constitutional interpretation rather than one which would render the section unconstitutional.

**35.** It is, nevertheless, difficult to disagree with the fundamental contention of Ms. McDonagh S.C., counsel for the plaintiff, that the effect of both s. 2(1) and s. 2(2) of the 1977 Act is to give wide powers to the Government. Section 2(1) defines a "controlled drug" as "any substance, product or preparation" which is either listed in the Schedule to the 1977 Act "or is for the time being declared pursuant to subsection (2) to be a controlled drug for the purposes this Act." Section 2(2) provides that:

> "The Government may by order declare any substance, product or preparation (not being a substance, product or preparation specified in the Schedule to this Act) to be a controlled drug

> for the purposes of this Act and so long as an order under this subsection is in force, this Act shall have effect as regards any substance, product or preparation specified in the order as if the substance, product or preparation were specified in the said Schedule."

**36.** It will accordingly be seen that the Government is more or less at large in the making of any s. 2(2) order. Save that the Government is not permitted to make an order in respect of a substance, product or preparation already specified in the schedule to the 1977 Act, no principles or policies regarding the nature of the substances, product or preparations which can be declared by order to be controlled drugs are, however, contained in the section itself.

**37.** It is perfectly clear, of course, that, as has already been stated, the 1977 Act must be construed as a whole. In *East Donegal Co-operative Livestock Mart Ltd. v Attorney General* [1970] I.R. 317, Walsh J. observed that, where the constitutionality of any enactment of the Oireachtas is being challenged, the individual provisions of that legislation must be read in the context of the entire legislative scheme concerned. As Walsh J. observed ([1970] I.R. 317, 341):

> "The long title and the general scope of the Act [in question] constitute the background of the context in which it must be examined. The whole or any part of the Act may be referred to and relied upon in seeking to construe any particular part of it, and the construction of any particular phrase requires that it is to be viewed in connection with the whole Act and not that it should be viewed detached from it. The words of the Act, and in particular the general words, cannot be read in isolation and their content is to be derived from their context. Therefore, words or phrases which at first sight might appear to be wide and general may be cut down in their construction when examined against the objects of the Act which are to be derived from a study of the Act as a whole including the long title. Until each part of the Act is examined in relation to the whole it would not be possible to say that any particular part of the Act was either clear or unambiguous."

**38.** Counsel for the State, Mr. Barron S.C., contended that the power of the Government to make an order under s. 2(2) of the 1977 Act was implicitly curtailed by both the terms of the long title and the schedule, so that any order made under that sub-section would have to be have in respect of drugs which had the same character, properties and propensities as those controlled drugs already contained in the schedule to the 1977 Act. We may now proceed to examine these arguments in turn, commencing with the suggestion that the powers of the Government under s. 2(2) should be read as being circumscribed by being read *ejusdem generis* with the schedule.

**Whether the schedule of the 1977 Act should be read *ejusdem generis* so as to limit the scope of the s. 2(2) power.**

**39.** There is no question but that a schedule is part of an Act and falls to be construed as such: see, *e.g., McDaid v. Sheehy* [1991] 1 I.R. 1; *Rodgers v. Mangan* [1999] IEHC 238 and *Leontjava v. Director of Public Prosecutions* [2004] IESC 37, [2004] 1 I.R. 591. It is equally clear that there is a presumption that the same word bears the same meaning throughout the statute: see, *e.g., Minister for Justice, Equality and Law Reform v. SMR* [2007] IESC 54, [2008] 2 I.R. 242, 260, *per* Finnegan J., *BUPA Ireland Ltd. v. Minister for Health and Children* [2008] IESC 42, [2012] 3 I.R. 442, 477, *per* Murray C.J. It must be recalled that, in any event, s. 20(2) of the Interpretation Act 2005 provides that:

> "Where an enactment defines or otherwise interprets a word or expression, other parts of speech and grammatical forms of the word or expression have a corresponding meaning."

**40.** The critical point here, however, is that the very definition of the term "controlled drugs" contained in s. 2(1) of the 1977 Act is expressly premised on the basis of alternatives: either the controlled drug is *either* one which is contained in the schedule *or* is one which has been declared to be such by the Government by the making of an order under s. 2(2). The use of the words "either" and "or" in this definition clause clearly and unambiguously posit the existence of such alternatives.

**41.** In any event, such a construction of s. 2(1) of the 1977 Act is supported by the Supreme Court's decision in *Montemunio v. Minister for Communications, Marine and Natural Resources* [2013] IESC 40. Here the relevant words of certain fisheries legislation provided for the forfeiture following conviction of:

> "all or any of the following found on the boat to which the offence relates:
>
> (a) fish,
>
> (b) any fishing gear."

**42.** The Supreme Court held that the word "or" was plainly used in the disjunctive sense. As Hardiman J. put it:

> "Where two things are separated in speech or writing by the word 'or' they are distinguished from each other or set in antithesis by or; they are set up as alternatives to the other word or words so separated. It follows that the words so separated are not identical, but are different in nature or meaning….[As the legislation enacted by the Oireachtas provided that] the words 'or any' follow the word 'all'. On the ordinary and natural meaning of words, the effect of this addition is to create an *alternative* to the forfeiture of 'all' of the gear and catch."

**43.** In these circumstances, there is no basis at all for suggesting that the power of the Government to make an order under s. 2(2) of the 1977 Act must be read as being implicitly limited on some *ejusdem generis* basis by reference to the categories of drugs already listed in the schedule.

**44.** One might also observe that, given the difficulties in ascertaining the precise genus of the controlled drugs specified in the schedule, it seems unlikely that the Oireachtas had this in mind as a factor which might implicitly limit the capacity of the Government's power to make an order under s. 2(2) of the 1977 Act. If, for example, a new drug came on the market with physical or other properties or qualities quite different from those drugs already specified in the Schedule, it could hardly be suggested that it would be *ultra vires* on that account for the Government to make an order under s. 2(2) of the 1977 Act on the basis that the new drug did not belong to an existing

genus or category of drugs already contained in the schedule. I think that the reverse is rather the case, namely, that s. 2(2) of the 1977 Act was framed the way it was, namely, to give the Government the maximum freedom to make an order under that sub-section so that it was not constrained by the parameters of the existing categories of controlled drugs specified in the schedule.

**45.** It was also submitted that the power delegated by s. 2(2) of the 1977 Act is restricted by reference to two international conventions, namely, the United Nations Single Convention on Narcotic Drugs, 1961, and the United Nations Convention on Psychotropic Substances 1971.

**46.** In this regard, emphasis was placed in particular on s. 20 of the 1977 Act. This latter provision, however, simply provides in s. 20(1) that a person who aids or abets the commission "of an offence under a corresponding law in force in that place shall be guilty of an offence." Section 20(2) then provides:

> "In this section 'a corresponding law' means a law stated in a certificate purporting to be issued by or on behalf of the government of a country outside the State to be a law providing for the control or regulation in that country of the manufacture, production, supply, use, exportation or importation of dangerous or otherwise harmful drugs in pursuance of any treaty, convention, protocol or other agreement between states and prepared or implemented by, or under the auspices of the League of Nations or the United Nations Organisation and which for the time being is in force."

**47.** Section 20(3) then provides that any statement contained in a certificate of the of the kind envisaged in s. 20(2) "shall be evidence of the matters stated."

**48.** It may be observed that the passing reference contained in s. 20(2) to any treaty or convention "prepared or implemented by, or under the auspices of" the United Nations is simply for the strictly limited purpose of an evidential certificate in the context of what constitutes a "corresponding law" within the meaning of s. 20(1). There is, however, nothing in the long title to the Act or in any

relevant provision of the 1977 Act which indicates an intention by the Oireachtas to implement Ireland's obligations under either Convention in this Act or that substances identified in these Conventions should be declared as controlled drugs for the purposes of the 1977 Act.

**The Long Title**

**49.** There is little doubt but that the courts can – and do – regularly consult the long title of an Act in order to ascertain its purpose and scope. This is because, in the words of Murray C.J. in *BUPA Ireland* ([2012] 1 I.R. 442, 470), the long title:

> "….is intended to set out in general terms the purpose and scope of the Act, reflecting the origins of such a title as a parliamentary procedural device governing the scope of the Bill before parliament and within which any proposed amendments must fall."

**50.** Thus, as McCarthy J. said in *The People (Director of Public Prosecutions) v. Quilligan* [1986] I.R. 495, 524, the long title can be looked at to give the Act a "schematic interpretation" where such is warranted. A similar view was expressed by Murray C.J. in *BUPA Ireland* when he stated ([2012] 1 I.R. 442, 470):

> "Undoubtedly the long title may be an aid to the construction of an Act or a section of an Act in certain circumstances, particularly having regard to the purposes or objectives of an Act which in turn may provide a useful context within which to construe it."

**51.** In this vein, therefore, the courts have often looked at the long title of an Act in order to clarify its scope and extent, particularly where, for example, the long title expressly declares what the purpose of the Act actually is. A good example is supplied by the Freedom of Information Act 1997. The long title of that Act expressly declares what the objectives of that legislation actually are and it is, perhaps, not altogether a surprise that the courts have frequently resorted to a consideration of that long title in order to determine the scope of that particular Act: see, *e.g.*, *Minister for Agriculture v. Information Commissioner* [2000] 1 I.R. 309, 319 *per* O'Donovan J., *Sheedy v. Information Commissioner* [2005] IESC 35, [2005] 2 I.R. 272, *per* Fennelly J. and

*Governor and Guardians of the Rotunda Hospital v. Information Commissioner* [2011] IESC 11, [2013] 1 I.R. 1, 60, *per* Macken J.

**52.** There are, however, limits to the use of the long title. Specifically, the long title "cannot be used to modify or limit the interpretation of plain and unambiguous language": see *The People (Director of Public Prosecutions) v. Quilligan (No.2)* [1986] I.R. 495, 519, *per* Griffin J. and *JC Savage Supermarkets Ltd. v. An Bord Pleanála* [2011] IEHC 488, *per* Charleton J. This point was also made by Macken J. in *Pierce v. Dublin Cemeteries Committee (No.2)* [2009] IESC 47, [2010] 2 I.L.R.M. 73, 89 when she said:

> "in the event of any inconsistency between operative part [of the Act at issue] and its long title or preamble, the operative part must prevail."

**53.** Nor should one expect the long title to make provision "for specific matters", as this would be to accord "a long title an unprecedented status of a substantive provision": see *BUPA Ireland* ([2012] 1 I.R. 442, 470), *per* Murray C.J.

**54.** It is, accordingly, permissible to have regard to the long title of the 1977 Act in order to ascertain the true scope of the Government's powers under s. 2(2). As the long title declares the purpose and object of the 1977 Act as being "to prevent the misuse of certain dangerous or otherwise harmful drugs", this may be regarded as implicitly curtailing the ambit of the discretion otherwise conferred on the Government by s. 2(2). It cannot be said that the long title is in this respect inconsistent with anything contained in the operative provisions of s. 2(2) itself.

**55.** Accordingly, on this construction of the sub-section, it would follow that any order made by the Government pursuant to s. 2(2) which declared "any substance, product or preparation" to be a controlled drug would be *ultra vires* if the substance, product or preparation was not a "dangerous or harmful" drug. Even on this construction, however, certain fundamental difficulties remain.

**Does the 1977 Act contain sufficient principles and policies?**

**56.** We may now turn to the central question in this appeal, namely, does the 1977 Act contain sufficient principles and policies, such that, reverting to the test of Hanna J. in *Pigs Marketing Board*, in making the s. 2(2) order the Government is simply executing a policy standard so as to bring about, not its own views on these policy questions, but the result directed by the Oireachtas in enacting the legislation.

**57.** It may be accepted that there is nothing in s. 2 of the 1977 Act *itself* which provides the necessary principles and policies. It is true that the long title does provide some greater guidance which, as we have seen, must be taken to inform the scope and breadth of the s. 2(2) power. The fundamental difficulty here is that the 1977 Act determined that only "certain" dangerous or harmful drugs would be controlled, thus leaving important policy judgments to be made by the Government rather than by the Oireachtas.

**58.** One may immediately ask: how is to be determined which of these dangerous or harmful drugs are to be controlled and which are not? How can it be determined which drugs are "dangerous"? Again, one might ask: dangerous to whom? Is this standard to be measured by reference to the general public? Or would it suffice that the drug in question would be dangerous if consumed or used by certain sectors of society such as children or young adults? By what standards are the questions of whether particular drugs are "harmful" and liable to be "misused" to be assessed and determined?

**59.** Virtually every drug is potentially harmful and liable to be misused. Would it suffice for this statutory purpose if, for example, some common pharmaceutical product had been misused for time to time in the community, possibly with unfortunate and serious side-effects for those who did abuse the drug? Could the product be the subject of a s. 2(2) order if it caused serious medical problems in a minority of cases, even though the product itself was regarded as beneficial and wholesome by the medical community? What levels of "harm" and "misuse" need to be established before an order could properly be made under s. 2(2) of the 1977 Act? Could a particular drug be

properly made the subject of an order under s. 2(2) of the 1977 Act where there was a respectable body of scientific and medical evidence to the effect that the drug in question should not be controlled or that its beneficial properties strongly outweighed the risk of abuse by a minority of patients?

**60.** In his judgment in the High Court, Gilligan J. stated:

> "The rationale behind the principles and policy test as stated in many of the cases on this point is that the purpose of the legislative provision in question must be sufficiently clear to allow a litigant to effectively challenge by way of judicial review the delegated legislation or other administrative action taken under the Act."

**61.** While this is one of the objectives of the principles and policies test, it is, however, not the only the one and perhaps not even the most important such objective. As both Denham J. said in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26, 61 and the Divisional High Court observed in *Collins*, the objective of ensuring that, in the democratic society guaranteed by Article 5, policy decisions having a legislative character are taken by the body directly accountable to the People (namely, the Dáil and the wider Oireachtas) through the electoral process contemplated by Article 16 is, if anything, even more important and represents the very cornerstone of the entire separation of powers.

**62.** But even applying the test articulated by Gilligan J., I greatly doubt if that test could properly be met in the present case. The relevant test for this purpose was set out by Murphy J. in *O'Neill v. Minister for Agriculture and Food* [1998] 1 I.R. 539 in the following terms ([1998] 1 I.R. 539, 554):

> "In so far as the question of *ultra vires* is concerned, clearly the requirement is to look at the legislation with a view to identifying the principles and policies laid down by the Oireachtas for achieving the identified purpose of the legislation. This exercise should reveal both the scope of the Minister's power and the limitations placed on it."

**63.** Applying that test, therefore, by what standards, for example, could a court, faced with a challenge to the *vires* of any order made by the Government under s. 2(2), measure undefined and somewhat abstract concepts referred to in the long title such as "misuse", "harmful" and "dangerous" in the absence of any further guidance by way of principles and policies contained in the operative part of the 1977 Act itself? All of this, perhaps, is to say that it is rather asking too much of a long title to contain the guidance needed to meet the test set out by Murphy J. in *O'Neill*, since, to recall again the words of Murray C.J. in *BUPA Ireland*, one cannot realistically expect that the long title will contain the type of specific detail which is invariably only to be found in the substantive provisions of an Act itself.

**64.** One might also ask whether it would be open to the Government to employ s. 2(2) of the 1977 Act to ban other types of drugs which are in everyday use and which are potentially both harmful and liable to be misused? Alcohol and tobacco are the most common cases in point. Alcohol is a major factor in range of serious anti-social activities, including road traffic fatalities and accidents, domestic violence and other serious crimes such as assault and public order offences. Alcohol is addictive and the abuse of alcohol in Irish society is regrettably so prevalent that it presents major public health challenges, of which alcoholism and cirrhosis of the liver are among only the most prominent. Tobacco consumption is highly addictive and greatly increases the risk of lung cancer, heart disease and a range of other serious illnesses. On any view, both drugs are harmful and are liable to be misused.

**65.** It may well be that, as Ms. Kinsella observed in her evidence, it had never been intended or understood by the Minister for Health and Children (or, for that matter, the Government) that the powers conferred by s. 2(2) of the 1977 Act would be used to control substances of this kind which are in everyday use, but this subjective intention is quite irrelevant to the proper construction of the section. It may also be that, as Gilligan J. held in his judgment under appeal, tobacco and alcohol should be regarded as *sui generis* for this statutory purpose as when he stated:

> "The legislative context, historical perspective and the scheme of the Act all make it clear that this legislation aims to control substance which would have negative and detrimental effects on human health and society and is limited to those substances which are likely to be universally harmful to those who misuse them. It is clear that alcohol, for example, is not intended to be controlled by this legislation as there is a vast *corpus juris* of legislation and jurisprudence in this jurisdiction dealing with the regulation and licensing of the sale and consumption of alcohol. Legislative provisions must be read literally and, should that not be sufficient to derive an appropriate meaning from those provisions, a purposive or contextual approach should be taken but no reading of legislation can be pushed so far as to render the meaning derived from it an absurdity."

**66.** I would observe, however, that there is nothing as such in either the long title or the 1977 Act which states that only substances "which are likely to be universally harmful to those who misuse them" can, as such, be the subject of an order under s. 2(2) of the 1977 Act. Judged by the long title, it is simply sufficient that the substance is harmful (or, for that matter, dangerous) and is liable to misused. In any event, there can be little doubt but that both alcohol and tobacco are likely to be universally harmful to those who misuse them.

**67.** If, therefore, tobacco and alcohol are potentially outside the scope of s. 2(2) and the 1977 Act more generally, this can only be because of *some external source* – such as, as Gilligan J. remarked, a corpus of other legislation dealing with the sale, distribution and consumption of tobacco and alcohol – which would preclude such a course of action. The fact, however, that there would appear to be nothing within the parameters of the 1977 Act which would prevent the Government making an order under s. 2(2) in respect of either tobacco or alcohol may be taken as indicative in its own way of the scope of the sub-section and the extent of the policy choices which the Government are thereby empowered to make.

**68.** The special cases of tobacco and alcohol apart, it is nevertheless clear that, given the breadth of s. 2(2) of the 1977 Act, the Government is more or less at large in determining which substances or products should be declared to be controlled drugs. In the present case, the fundamental choice which remains with the Government for the purposes of s. 2(2) is which dangerous or harmful drugs are liable to misuse such that they should be declared to be controlled drugs. But there is almost no guidance given on this topic by the substantive provisions of the 1977 Act itself and the key words of the long title ("misuse", "certain", "harmful", "dangerous") are in themselves too general to be sufficient for this purpose. Adopting the words of Blayney J. in *McDaid*, this is "far from a case of the Government filling in only the details" insofar as the making of a controlled drugs order under s. 2(2) of the 1977 Act is concerned. Nor can the present case be compared with cases such *Pigs Marketing Board* or *City View Press* where prices or fees were set by reference to fixed objectives and standards contained in the parent legislation.

**69.** As we have already seen, in *McGowan* the Supreme Court thought that while statutory objectives such as "the promotion of employment, and the avoidance of inefficiency and costly machinery" contained in the relevant provisions of the Industrial Relations Act 1946 were "laudable and desirable objectives", they did not in themselves "constitute a sufficient restriction on an otherwise unlimited power of regulation to bring the power conferred by s.27 within the constitutional limits."

**70.** By analogy with these comments in *McGowan*, it can also be said that while terms such as "misuse", "dangerous" and "harmful" which are contained in the long title represent laudable and desirable objectives, they do not in themselves constitute a sufficient restriction on the more or less unlimited power of regulation vested in the Government by s. 2(2) of the 1977 Act in relation to what "substances, products or preparations" should be declared to be controlled drugs.

**The power of annulment**

**71.** It remains only to consider the power of annulment contained in s. 38(3) of the 1977 Act. This provides:

> "Every regulation and every order made under this Act (other than an order under section 8 (8) or an order referred to in section 11 or section 28) shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation or order is passed by either such House within the next twenty-one days on which that House has sat after the regulation or order is laid before it, the regulation or order, as the case may be, shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder."

**72.** It is true that the existence of a power of annulment of this kind is of some assistance in considering whether the legislation under challenge violates Article 15.2.1. I consider, however, that the presence of such a provision will rarely be a decisive consideration. While the existence of such a power is undoubtedly a valuable safeguard, it is not the particular safeguard which the Constitution requires, namely, that the law making power is reserved to the Oireachtas. As O'Higgins C.J. said in *City View Press* ([1980] I.R. 381, 399):

> "…the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated or permitted by the Constitution."

**73.** As *City View Press* makes clear, the fact that an order of this kind can subsequently be annulled by resolution of either House cannot in itself save a statutory provision which – as in the present case – otherwise clearly offends Article 15.2.1.

**Conclusions**

**74.** Summing up, therefore, for all the reasons stated in this judgment, the conclusion that s. 2(2) of the 1977 Act purports to vest the Government with what, in the absence of appropriate principles

and policies set out in the legislation itself, are in truth law making powers is, accordingly, unavoidable.

**75.** It follows, therefore, that I would allow the appeal and declare that s. 2(2) of the 1977 Act is repugnant to Article 15.2.1 of the Constitution and is therefore invalid. In the light of that finding of unconstitutionality in respect of s. 2(2), it follows equally that the 2011 Order must be judged to be invalid.

Finlay Geoghegan J.: I agree with the judgment of Hogan J.

Peart J.: I also agree with the judgment of Hogan J.

Approved

Gerard Hogan

NO REDACTION REQUIRED