THE HIGH COURT

[2023] IEHC 347

[Record No. 2021 350 JR]

BETWEEN

KIRSTIE MCGRATH

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR FOREIGN AFFAIRS, THE MINISTER FOR HEALTH, IRELAND & THE ATTORNEY GENERAL

RESPONDENTS

-and-

[Record No. 2021 349 JR]

BETWEEN

NIAMH MULREANY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR FOREIGN AFFAIRS, THE MINISTER FOR HEALTH, IRELAND & THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms Justice Bolger delivered on the 22nd day of June, 2023

1. This is an application for *certiorari* and declaratory reliefs on foot of the applicants' detention for the purpose of mandatory quarantine and their criminal prosecution for having resisted being brought to a designated facility, in breach of S.38D(l)(C) of the Health Act 1947 as amended. The applicants were detained pursuant to an order made by the Minister for Health on 26 March 2021, that mandatory quarantine in a designated facility was required for persons travelling to Ireland from the United Arab Emirates ('UAE').

2. The applicants did not challenge the scheme of mandatory quarantine, which they accepted had a statutory basis in s. 38B, as amended by s. 7 of the Health (Amendment) Act 2021. Neither did they challenge the appropriateness of the Minister's decision to designate the UAE. Rather the applicants narrowed their grounds to two claims:

(i) The power of the Minister for Health to order the designation of States breaches the principles of the separation of powers and the rule of law and runs contrary to the requirements of Articles 15.2 and 38.1 of the Constitution. The designation ought to have been made by way of a statutory instrument so as to ensure parliamentary supervision and scrutiny.

(ii) The power of review by a designated appeals officer constitutes an impermissible exercise of the judicial function, contrary to Article 34.1 of the Constitution and is not saved by Article 37.1.

3. For the reasons set out below I am refusing this application.

Relevant Statutory Provisions

4. Section 5 of the Health Act 1947 ("the Act") allows the Minister to make regulations which must be laid before the Oireachtas:

"5. (1) The Minister may make regulations in relation to anything referred to in this Act as prescribed.

…

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

5. S.31A of the Health (Amendment Act) 2020 amended the Act to allow regulations to be made in response to the Covid-19 pandemic. S.31A(2) set out what the Minister had to have regard to in making such regulations, all of which related to public health issues.

6. Further amendments were made by the Health (Amendment) Act 2021 ("the 2021 Act"). Section 7 made provision for mandatory hotel quarantine by inserting sections 38B to 38M into the 1947 Act. Section 38E allowed the Minister to designate a State for mandatory hotel quarantine and required the Minister to have regard to the same considerations as for making regulations under S31A as well as additional considerations set out in S.38A(2).

7. Section 38E provided:

"38E. (1) Subject to subsection (3), the Minister may designate in writing any state (in this Act referred to as a 'designated state') where there is known to be sustained human transmission of Covid-19 or any variant of concern or from which there is a high risk of importation of infection or contamination with Covid-19 or any variant of concern by travel from that state.

(2) The Minister shall, as soon as practicable after a designation is made under subsection (1), ensure that the fact of such designation is published on a website maintained by the Minister or the Government

(3) When making a designation under subsection (1), the Minister shall-

(a) have regard to the matters referred to in paragraphs (a) and (b) of section 31A(2) and paragraphs (a) to (e) of section 38A(2), subject to the modification that a reference in those paragraphs to Covid-19 shall be taken to include a reference to a variant of concern,

(b) have regard to the advice of the Chief Medical Officer of the Department of Health, and

(c) consult with the Minister for Foreign Affairs and such other Minister of the Government as the Minister considers appropriate having regard to the functions of that other Minister of the Government.

(4) The Minister shall on a regular basis review the situation in a state designated under subsection (1) and, shall, having regard to the matters referred to in subsection (3)(a) and (b) and having consulted in accordance with subsection (3)(c), revoke, in writing, a designation where appropriate".

8. Section 38B(16) provided for a review of a person's mandatory quarantine by a designated appeals officer:

"A person 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".

9. Section 38B(17) provided for the decisions that a designated appeals officer could make:

"(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—

…

or

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

10. The procedures to be followed in respect of a request for review of quarantine under section 38(16) were set out in the Health Act 1947 (Section 38G - Rules and Procedures for Review of Quarantine) (COVID-19) Regulations 2021 (SI No 143/2021).

11. The application of the s.38E regime was subject to a sunset clause in s.9 of the 2021 Act which provided:

"(2) Subject to subsection (3), this Act shall come into operation on such day or days as the Minister for Health may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions.

(3) Sections 2 , 7 and 8 —

(a) may, during the relevant period only, be the subject of an order under subsection (2), and

(b) where they are the subject of such an order, shall, subject to subsection (6), continue in operation during the relevant period only.

(4) In this section, "relevant period" means—

(a) the period of 3 months commencing on the day following the passing of this act"

Because of the application of that sunset clause, these provisions do not appear on the revised version of the 1947 Act available online.

Background

12. On 22 March 2021, the Minister designated the UAE and 32 other states as per s. 38E(1), having had regard to the advice of the Chief Medical Officers and to the other matters specified in section 38E(2). The designation was published on the government's website; www.gov.ie. Two days later, the applicants travelled to the UAE from Dublin on 24 March 2021 for a week's holiday and were due to fly home on 31 March. When they presented for their return flight in the airport in Dubai on 31 March, they were told they would not be permitted to board unless and until they had pre-booked a stay in a designated hotel in Dublin and paid for the hotel in advance. They could not afford to pay for the quarantine hotel and were anxious to return home to their children. They were refused permission to board their scheduled flight but eventually returned to Dublin on 2 April. Upon their arrival they were told that they would be brought to a bus to bring them to a designated hotel for the purpose of quarantine, but they refused to go. They were arrested and charged with an offence of resisting being brought to a designated facility under s.38B(7) in breach of s.38D(1)(c) as inserted by s.7 of the Health Amendment Act 2021. They were remanded in custody with consent to bail and were subsequently released on bail by the High Court on 4 April 2021 and immediately brought to a hotel for mandatory quarantine. They applied to the designated appeals officer for a review of their quarantine and were refused. They made no further requests for review. They were released, in accordance with the statutory provisions, on 13 April 2021.

13. The applicants currently stand charged before the District Court with an offence pursuant to s.7 of the Health Amendment Act 2021. The DPP has confirmed that that prosecution will proceed unless the applicants are successful in these proceedings.

Applicant's submissions

Designation of UAE ought to have been enshrined in a statutory instrument

14. The power to make regulations under the 2021 Act and the fact that The Minister for Health was required to have regard to the same matters when designating a state for mandatory hotel quarantine, suggests that the power to designate States was also intended to be by way of regulation. The order designating the UAE pursuant to S.38E(1) of the 1947 Act was therefore required to be enshrined in a regulation or in a statutory instrument, pursuant to 5(5) of the 1947 Act. This would have had the effect that the Order would be laid before the Houses of the Oireachtas for approval, as is required by Article 15.2 of the Constitution.

15. Retention of ultimate control by the Oireachtas of powers delegated under legislation is a vital component of the separation of powers. The rule of law requires that where a measure compromises fundamental freedoms and imposes restrictions, it must either be done by primary legislation or formal secondary legislation, i.e., a statutory instrument. The more invasive and rights-affecting a measure is, the greater the level of parliamentary intensity and formalisation there ought be. The applicants rely on the *dicta* of Charleton J in the Supreme Court in *NECI v Labour Court* [2021] IESC 36, [2021] 2 I.L.R.M. 1, Keane J in the Supreme Court in *O'Neill v Minister for Agriculture* [1998] 1 I.R. 539, [1997] 2 I.L.R.M. 435, and Simons J in the High Court in *Ryanair v An Taoiseach* [2020] IEHC 461, [2020] 2 I.L.R.M. 437.

16. The applicants therefore submit that designation function afforded to the Minister under s.38E amounts to a legislative power. As per the description of Simons J. in *Ryanair*, they say it introduces a "unilateral and nonconsenual restriction of general application which affects the rights of individuals". This subordinate legislative power can be distinguished

from the delegation to a statutory decision-maker of an administrative power to be exercised in individual cases, for example, the power to make a deportation order. Applying the reasoning of Keane J. in *O'Neill*, such a power cannot be exercised on a stand-alone basis, and requires to be enacted by way of secondary legislation in order to have the force of law. Subordinate legislative powers should include, as noted by Charleton J., "the nature of the scrutiny afforded democratically intensified according to their impact and significance". An interpretation of s.38E which absolved the Minister of a requirement to make regulations in respect of a designation would, at a minimum, lead to significant doubts about its constitutionality. The double construction rule of statutory interpretation must apply. On a purposive interpretation of the Act as a whole, and having regard to the lack of clear words absolving the Minister of the requirement to enact a regulation, the applicants' interpretation is reasonable and must be preferred.

17. In the alternative, if the Court finds that the section cannot be construed as requiring that a designation must be enshrined in a regulation, they submit that the section is unconstitutional having regard to Article 15.2 of the Constitution which prohibits bodies other than the Oireachtas from legislating.

Power of review of a 'designated appeals officer' constitutes an impermissible exercise of the judicial function

18. The applicants rely on the checklist of the characteristic features of the administration of justice set out in *McDonald v Bord na gCon* [1965] I.R. 217, qualified by O'Donnell J (as he then was) in *Zalewski v WRC & Ors* [2021] IESC 24, [2022] 1 I.R. 421. This longstanding test was outlined in *Zalweski* as follows;

> "1. The resolution of dispute or controversy as to the existence of legal rights, or a violation of the law;
> 2. A process involving a determination or ascertainment of the rights of parties, or the imposition of liabilities, or the infliction of a penalty;
> 3. A final determination, (subject to appeal), of legal rights or liabilities, or the imposition of penalties;
> 4. 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;
> 5. The making of an order by the court which, as a matter of history, is an order characteristic of courts in this country." (para. 41)

19. Applying the *McDonald* criteria to the mandatory quarantine appeals process, the applicants say that the process entailed each aspect:

(1) There was a dispute between the applicants and the relevant executive bodies of the State, in respect of the obligation to undergo mandatory quarantine.

(2) The function of the designated appeals officer was to resolve this dispute as to the existence of legal rights: whether the applicants were entitled to their liberty or whether the State had a right to continue to detain them.

(3) There was no appeal. The determination of the appeals officer was final.

(4) The refusal of release meant that the detention continued. The decision to continue the detention could be enforced by the Gardaí under the Act, if an attempt was made to frustrate it.

(5) Decisions in respect of loss of liberty, particularly in respect of a faultless civil detention, have traditionally been reserved to the courts.

20. The courts have traditionally reserved to themselves decision-making functions in respect of loss of liberty, the best example of which is that decisions in respect of bail must be taken by the courts, not just because they relate to criminal matters (as required under Article 37.1) but because a decision in respect of loss of liberty is quintessentially a judicial function; Keane J. in *O'Mahony v Melia* [1989] I.R. 335, [1990] I.L.R.M. 14. There is little distinction to be drawn between the manner of exercise of the two functions of granting bail and directing release from mandatory quarantine, both of which involve a consideration of evidence, and a discretion by the appeals officer as to whether detention should continue.

21. Therefore, the power under s.38B is the exercise of a judicial power by a non-judicial body within the meaning of Article 34.1 of the Constitution. It is not saved by virtue of Article 37.1 since the deprivation of liberty could not be described as a power which is limited in nature. Section 38B(16) is an impermissibly unconstitutional exercise of the judicial function.

The State's submissions

The UAE was lawfully designated by the Minister

22. The State emphasised the important public health reasons behind the introduction of the quarantine programme including preventing the undermining of the national vaccination programme by risking transmission of new variants into the community. The statutory definitions of "statutory instrument" confirm that designation is a form of same and, even if not technically a statutory instrument', it is a form of delegated legislation that is not unlawful in any respect. They rely on the definition of "statutory instrument" in s. 2(1) of the Interpretation Act 2005 and in the Statute Law (Restatement) Act 2002 which are satisfied by a designation in writing by the Minister pursuant to s.38E(1). The long title of the 2021 Act references both regulations and designation. If the legislature had intended to require the designation to be by regulation, it would have said so.

23. Sections 38B to 38M enjoy a presumption of constitutionality and the onus lies on the applicants to establish that any impugned sections are repugnant to the Constitution. The applicants seek to establish a new constitutional requirement that all delegated legislation must be laid before the Oireachtas that is not supported by the authorities. Secondary legislation only needs to be laid before the Oireachtas where the Oireachtas so provides. The Oireachtas was plainly satisfied for the Minister to make the designation provided for by s.38E without it having to be laid before the Oireachtas pursuant to s. 5(5) of the Act. *NECI* does not require all secondary legislation to be laid before the Oireachtas. The critical context of *NECI*, which is absent here, was the breach of Article 15.2.1 due to the excessive delegation of legislative power. There is no universal requirement for delegated legislation to be laid before the Oireachtas. At most it is just one factor to be considered as part of the principles and policies test, which the applicants have not invoked in these proceedings as there is no allegation that section 38E constitutes an excessive delegation of legislative power.

The Designated Appeals Officer Review is not a Judicial Function

24. The function performed by designated appeals officers under s. 38 cannot be said to amount to the administration of justice and the *McDonald* criteria are not satisfied. There is no "dispute or controversy'' before the reviewer; rather, the reviewer simply assesses a traveller's request for a review of their quarantine. There is no determination or final determination (subject to appeal) of legal rights as multiple requests for review could be made. An assessment by the reviewer cannot be enforced by the court or the executive power of the State in the same way as a court order. The relevant jurisdiction of the court remains fully intact in the form of the Article 40.4 procedure and judicial review. The review does not establish a parallel jurisdiction to that enjoyed by the court as it does not involve the assessment of the legality of the detention.

25. Without prejudice to the foregoing, the respondents submit that if the court were to find an administration of justice, it would be permitted under Article 37.1 of the Constitution. They rely on the decision in *Zalweski* where the Supreme Court recognised the scope of the

issues arising and the availability of an appeal or confirmation by the court as indicators of limited judicial power. A review of the constitutionality of the section 38B review process must therefore have regard to the entirety of the relevant processes and procedures, including the availability of review by the High Court in exercise of either its power of judicial review or an Article 40.4 inquiry.

Submissions of the DPP on the issue of bail

26. The DPP made separate submissions on the issue of bail as the administration of justice which the applicants sought to compare to mandatory hotel quarantine. The basic entitlement to bail is founded on the presumption of innocence in criminal law, which renders it very different to the premise underpinning quarantine. Bail arises because no evidence, process, or established facts have been produced at that time and the person charged with an offence is presumed to be entitled to release pending trial. It is only where evidence-based objections that meet a very high standard are placed before the court that the *The People (Attorney General) v O'Callaghan* [1966] I.R. 501 presumption in favour of bail can be rebutted. Quarantine is entirely different as it occurs where there has been a detailed analysis of a health crisis at home and abroad, expert opinion has been canvassed and political consultation has taken place.

Discussion and Decision

The legal basis for the applicants' detention

27. The Oireachtas enacted the Health (Amendment) Act 2021 on 7 March 2021 to establish a temporary regime of mandatory quarantine and in so doing, it gave the Minister the power to designate states for it. Mandatory hotel quarantine was a draconian measure during an unprecedented public health emergency that the Oireachtas had decided should be put in place on the basis that the Minister would decide which states should be designated and when, subject to the Minister's obligation to have regard to identified considerations set out at s. 31A(2)(a) and (b) and 38A(2)(a) to (e), the advice of the CMO (s. 38E(3)(b)) and political consultation (s. 38E(3)(c)), all of which had been decided on by the Oireachtas.

28. The legal basis for the applicants' detention during their period of mandatory hotel quarantine is in the legislation and not in the Minister's designation of the UAE. Once the legislation was enacted on 7 March 2021, the applicants, like everyone else, ran the risk of having to undergo mandatory hotel quarantine if they travelled abroad and wished to return to Ireland thereafter. Indeed, that risk was even more stark for the applicants given that they travelled to the UAE on 24 March 2021, two days after the Minister had designated that state and had published his decision on www.gov.ie. The fact that the applicants' own online research in advance of their decision to travel did not alert them to this fact is not something that can assist their challenge to the manner in which the UAE was designated.

29. Whilst the 2021 Act was introduced during, and as a result 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. There are a number of statutory powers of detention for a person arrested without a warrant for periods of time up to 48 hours including s. 4 of the Criminal Justice Act 1984, s. 30 of Offences Against the State Act 1939 (as amended by the Offences Against the State (Amendment) Act 1988, s. 2 of the Criminal Justice (Drug trafficking) Act 1996 and s. 50 of the Criminal Justice Act 2007.

The designation of the UAE by Ministerial decision and not by statutory instrument

A Legislative Basis for the Minister's Decision

30. The applicants contend that the designation of the UAE should have been done by regulations and, because it was not, the order was of no legal effect. The applicants' arguments are, in effect, an inversion of the more usual argument made that a decision went beyond the policies and principles of the relevant legislation and was, therefor, *ultra*

vires, such as was successfully made in the cases of *O'Neill v. Minister for Agriculture* [1998] 1 I.R. 539, *NECI v. Labour Court* [2021] IESC 36, [2021] 2 I.L.R.M. 1, and *Ryanair v. An Taoiseach* [2020] IEHC 461, [2020] 2 I.L.R.M. 437 . That jurisprudence recognises the need for parliamentary scrutiny of the creation of legal rights or obligations, and has its origins in the constitutional principle of the rule of law and the separation of powers which, in turn, recognise the need for ultimate control over powers delegated by the legislature to be retained by the Oireachtas. The question the courts usually have to address when the delegation of such power is challenged, is whether there is guidance in the primary legislation for the decision being made in the secondary legislation. For example, in *NECI*, the headnote stated at para. 7:-

> *"The question, then, is whether the Oireachtas has set sufficient standards… The range of choices may arise from statutory provisions"*

And, at para. 8:-

> *"the underlying policy of Chapter 3 of the 2015 Act was to create a statutory framework containing sufficient guidance to assist the Labour Court in arriving at conclusions consistent with criteria and values identified in the Chapter itself … The fact that the choices vested were broad did not, in itself, turn those choices into legislation*

31. However, the authorities do not condemn the exercise of a power that was created by the legislation. The flaw identified by the courts in the authorities relied on by the applicants was the absence of a legislative basis for the powers that were being exercised. In *O'Neill*, there was no legislative basis, in *NECI*, the delegation of legislative power was found to be lawful in part as the ultimate control of this power was retained by the Oireachtas, and in *Ryanair*, there was an excessive exercise of executive power, that would amount to an exercise of legislative power, such that regulations would be required.

32. Here, s. 38E clearly provided for the designation of states for mandatory quarantine., to be done by way of a decision to be made by the Minister pursuant to s. 38E. The Oireachtas did not make a s. 38E(1) designation by regulation but instead decreed that it would be done by the Minister. Either way, the designation of states merely activated the mandatory hotel quarantine that the Oireachtas had already provided for, so there was none of the lack of legislative basis as arose in *O'Neill*, and *Ryanair*. The Minister's decision was the application of the power that the Oireachtas had implemented, and could only be activated once he had attended to the matters required of him by the legislation.

The Sunset Clause

33. Not only did the Oireachtas apply its scrutiny to the power of designation in s. 38E(1), it also provided for an additional layer of scrutiny by imposing a sunset clause at s. 9 of the 2021 Act. This meant that the entire system of mandatory hotel quarantine provided for in s. 38E(1), including the Ministerial power to designate states for mandatory hotel quarantine, had to come back before the Oireachtas after the lapse of three months. This ensured a definite legislative scrutiny after three months, referred to by counsel for the Minister as *"the democratic input"*. Had the power to designate states been authorised by regulations, as the applicants claim should have been done, no such further automatic scrutiny by the legislature would have occurred. Regulations can only come back before the Oireachtas in accordance with s. 5(5) of the Act where "a resolution annulling the regulation is passed by use of such House within the next subsequent twenty-one days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder". Thus, the annulling of a regulation is far more restrictive than the regime put in place by the sunset clause of s. 9 of the 2021 Act. Had the UAE been designated by regulations, as the applicants say should have been done to ensure parliamentary scrutiny, it could only have come before the Oireachtas if a resolution has been passed within the 21 days after the regulation had been laid before the Oireachtas. Instead, the UAE was designated for

mandatory hotel quarantine by ministerial decision as provided for in the 2021 Act, the long title of which describes it as :-

> "An Act, to make exceptional provision, in the public interest and having regard to the manifest and grave risk to human life and public health posed by the spread of the disease known as Covid-19 and variants of that disease and in order to mitigate, where practicable, the effect of the spread of that disease; to amend the Health Act 1947 to make further and better provision for the enforcement of regulations under section 31A of that Act; to provide for the mandatory quarantine of persons coming into the State from certain areas from where there is known to be sustained human transmission of Covid-19 or any variant of concern, or from which there is a high risk of importation of infection or contamination with Covid-19 or any variant of concern by travel from that area; to provide for the designation of such areas by the Minister; to provide for the mandatory quarantine of persons coming into the State who fail to comply with certain requirements relating to testing for the disease; to provide for the designation of facilities for such quarantine; to provide for the conveying of persons to those facilities; to provide for the making of service agreements to facilitate such quarantine; to provide for alternatives to such quarantine for persons coming into the State where such persons indicate an intention to apply for international protection or where such persons are children who are not accompanied by an adult; and to provide for related matters."

34. This sunset clause at s. 9 is relatively unusual in limiting the application of a statutory regime to a period of three months or such further period (not exceeding three months) specified in a resolution passed by each House of Oireachtas. When the relevant period was first extended by the Oireachtas on 31 May 2021, there were 21 speeches during the Seanad debate and, before it was extended for the last time in August 2021, there were eleven speeches in the Dáil and nine speeches in the Seanad. This demonstrates that the control that Charleton J. said in *Bederev v. Ireland* [2016] IESC 34, [2016] 3 I.R. 1 , (at para. 49) should be *"retained by the legislature"* was retained by the Oireachtas through the operation of the sunset clause in s.9.

The statutory requirements for the exercise of the Minister's power of designation

35. The Oireachtas determined it was in the public interest for the Minister to be able to designate a state for mandatory hotel quarantine, subject to the Minister complying with the requirements of that statutory power as set out in s. 38A(2). Those requirements are different to the requirements for introducing regulations provided for in s. 31A of the Act. The Oireachtas went to the trouble of making the requirements for designation more extensive than for the making of regulations, including:

- the additional requirement to consult with the Minister for Foreign Affairs (subs. (3)(c)) and to regularly review, where appropriate, revoke a designation (subs. (4)).
- Before making the regulations, the Minister may consult with any other person he considers appropriate (s. 31A(3)(b)), but when it comes to designating a state, that discretion to consult becomes mandatory as he is required by s. 38E(3) to have regard to the matters referred to at s. 31A(2)(b).
- There is a different notification process. Section 3(b) of the Statutory Instruments Act 1947 requires regulations to be published in Iris Oifigiúil and sent to specified libraries whereas s. 38E(2) only required a designation by the Minister to be published on a website maintained by the Minister or the Government.

36. The Oireachtas also ensured that the ambit of any designation was confined to the identification of a state to which the provisions of the legislation would apply. In contrast, s. 31A provides for a far wider range of matters in relation to which regulations may be made, set out in s. 31A(a) to (k) and includes that (i) *"any other measures that the Minister considers necessary in order to prevent, limit, minimise or slow the spread of COVID-19"* and that (k) *"such additional, incidental, consequential or supplemental matters as the*

Minister considers necessary or expedient for the purposes of giving full effect to the regulation".

37. Those differences confirm that the Oireachtas intended designation to be by a different process to the making of regulations, with different and additional requirements. It could not be said that the Oireachtas intended designation was to be done by regulation simply because s. 5(1) provided that the Minister *"may make regulations in relation to anything referred to in this Act as prescribed"* as the applicants have asserted.

38. The applicants, in effect, contend that the Constitution requires all delegated legislation to be laid before the Oireachtas. I do not agree. A statutory instrument is a form of delegated legislation that is laid before the Oireachtas, exactly as is required by s. 5 of the Health Act 1947. It does not follow that all and any delegated legislation must be treated in the same way. It is up to the Oireachtas to decide what delegated legislation it does or does not require to be laid before it for its scrutiny. The Oireachtas' motivation in determining whether it wanted or needed to scrutinise a decision may be linked to the scope of the delegation, as explained by O'Donnell J. in *DPP v. McGrath* [2021] IESC 66, [2021] 3 I.R. 785:-

> "[70] ... The scope of the area of delegation may, therefore, be a relevant and important consideration. If the area is narrowly defined and confined, It may be concluded that the Oireachtas was content to permit decisions to be made within that confined area without seeking to control the specific decision. As the authors of Kelly point out, at para.4.2.45, 'focusing on the breadth or narrowness of the delegation may be a useful heuristic; the idea that, with a narrow delegated area, the legislature has considered the possible choices and found them all acceptable is appealing, and might help explain the result in cases such as *Cityview*".

Similarly, in *O'Sullivan v Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 1 3 I.R. 751, O'Donnell J observed at para 41:-

> ""An apparently wide delegation may be limited by principles and policies clearly discernible in the legislation. On the other hand, a very narrow area of delegation may require very little in terms of principles and policies in parent legislation, on the basis that by delegating an area with only a limited number of possible solutions the Oireachtas was plainly satisfied that any one of those outcomes could be chosen consistent with the policy of the Act, and properly be decided on by a subordinate body which might have access to further detailed information, or indeed on the basis that the outcome might be more easily adjusted within the scope left to the subordinate, in the light of changing circumstances"

39. Here, the Minister was given very little margin in designating states as the legislation imposed requirements on what he needed to consider, who he had to listen to and with whom he had to consult.

40. The plain words of s. 38E confirms the Oireachtas' intention that designation of states could be done by ministerial decision and did not require a regulation to be set before the Oireachtas.

41. This interpretation that the Oireachtas always intended designation of states to be by ministerial decision, is supported by the long title of the Act, which clearly identifies both regulations and designation of areas by the Minister as two of the statutory powers that the Oireachtas has implemented in dealing with the COVID-19 crisis.

42. In conclusion, the Oireachtas intended the designation of states for mandatory hotel quarantine, as provided for in the 2021 Act, to be done by ministerial decision after compliance with a long list of mandatory requirements. The Oireachtas was clear in what it

was doing and how it wanted to deal with the public health emergency. The Oireachtas did not intend this power to be done by regulations. In providing for delegated legislation by ministerial decision, it was acting within the constraints and requirements of Article 15.2 of the Constitution.

43. Section 38E enjoys a presumption of constitutionality. Upon the application of the double construction rule (*East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] I.R. 317), where there are two interpretations, only one of which is constitutional, that is the one I must adopt. I do not consider there is any ambiguity in the interpretation of the relative legislative provisions here but, even if there is, I am satisfied that there is a valid and constitutional interpretation as set out above and, insofar as is necessary, I prefer that one.

44. The applicants are not entitled to the reliefs they seek arising from the designation of the UAE for mandatory hotel quarantine by ministerial decision rather than by regulation.

The Designated Appeals Officer and the administration of justice

45. The applicants claimed that the designated appeals officer was involved in the administration of justice in exercising their jurisdiction under s. 38B(16) as their review satisfied all of the criteria set out in *McDonald v. Bord na gCon* as qualified by *Zalewski.* They argued that because the decision of the designated appeals officer resulted in the loss of their liberty it was quintessentially a judicial function. They rely heavily on drawing an analogy with a decision on bail, which was found by Supreme Court in *O'Mahony v. Melia* to be a judicial act. They say it cannot be saved by Article 37.1 of the Constitution because the deprivation of their liberty could not be a power limited in nature.

46. The designated appeals officer's function was not to decide whether the applicants were required to quarantine in a hotel, but was to review their application for an exemption from what was otherwise their legal obligation to remain in quarantine. Thus, the applicants' detention and consequent deprivation of liberty did not have its legal origins in the decision of the designated appeals officer to refuse their application for a review but rather by virtue of s. 38B of the Act as an automatic consequence of their having travelled to Ireland from the UAE at a time when the Minister had designated the UAE for mandatory hotel quarantine. Everyone travelling from the UAE at the same time as the applicants, were required to undergo mandatory hotel quarantine unless they were able to satisfy the designated appeals officer that they came within one of the exceptions provided for in s. 38B(17). If they could establish they came within one of those exceptions, their quarantine would cease.

47. The applicants seek to draw an analogy with a decision to grant or refuse bail, which the law requires to be made by a judge. That is a difficult analogy for the applicants to draw as the two processes are grounded in different factual and legal circumstances. The court has had the benefit of very useful submissions from counsel for the DPP on how bail operates and, from that, has drawn the following conclusions:-

(i) A person applying for bail enjoys a presumption of innocence from which flows a presumption in favour of release. The burden of proof rests on the State to prove exceptional circumstances such that a person charged with an offence should not be released on bail pending their trial.

This contrasts with a person in mandatory hotel quarantine who is detained upon their arrival in the State by operation of law as a result of a temporary regime the State put in place following public health concerns, expert opinion and political consultations. There is an evidence-based presumption of non-release which can be rebutted if a person satisfies the designated appeals officer that they come within one of the statutory exceptions

(ii) A person accused of a crime is presumed to be innocent until proven guilty. They are also assumed not to have voluntarily undertaken the risk of being wrongly charged with an offence.

By contrast, a person required to undergo mandatory hotel quarantine has assumed a risk of mandatory hotel quarantine by choosing to travel to or from a state during a global pandemic and at a time when the State had indicated the possibility of mandatory hotel quarantine for such persons and had decided that it was necessary to restrict travellers' liberty to prevent new variants of Covid-19 from entering the State.

(iii) Mandatory hotel quarantine was imposed due to public health concerns and carried no element of targeted condemnation or censure from a public body, as may arise for a person charged with a criminal offence who wishes to apply for bail.

(iv) Conditions can be attached to bail such as signing on requirements, curfews and limits on where a person can go and what they can do. If those conditions are breached the State can limit any potential adverse consequences by imposing more onerous conditions or even by revoking bail.

Whilst conditions could be attached to quarantine, such as a requirement to quarantine at home, if those conditions are breached it could be very difficult to limit the potential adverse consequences for public health. If a new variant of the virus was transmitted into the community, it would be too late to neutralise the consequences of non-adherence to the requirements of quarantine.

(v) Bail may continue for a long period of time before a trial takes place thereby requiring a greater sensitivity as regards the restrictions imposed on a person's freedom. Mandatory hotel quarantine is time limited to fourteen days (or possibly less or slightly more depending on PCR test results).

48. Thus, an application for release on bail is a very different creature, both factually and legally, than an application for a review of a person's mandatory hotel quarantine. The Minister suggested that a closer analogy to the powers of the designated appeals officer are the Minister's powers of remission of a prison sentence, described by the Supreme Court in *Brennan v. Minister for Justice* [1995] 1 I.R. 612, [1995] 2 ILRM 206 as *"the executive administration of mercy rather than the judicial administration of justice and in my view does not fit with the characteristics identified in McDonald"* (at p. 13). A similar view was taken by the Supreme Court again in *O'Neill v. Governor of Castlerea Prison & ors* [2004] I.R. 298, where the applicant sought a declaration that they qualified for early release under the Criminal Justice (Release of Prisoners) Act 1998, which was enacted to allow for the release of prisoners in accordance with the Good Friday Agreement. Keane C.J. made the following observations about the power of release in Irish law, at para. 41:-

> "The power to release itself, whether exercised on what might be called conventional grounds of a compassionate or humanitarian nature or for purely political considerations, as in the case of releases effected for the purpose of giving effect to the Belfast Agreement, is a quintessentially executive function and one which is discharged by it, in the words of Finlay C.J. speaking for this court in *Director of Public Prosecutions v. Tiernan* [1989] I.L.R.M. 149 at p. 153, as 'A matter of policy pursued by the Executive at given times and subject to variation at the discretion of the Executive.'"

That language echoes the language of the 2021 Act, which refers to *"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"* in the long title, as well as the political consultation the Minister is required to have before deciding to designate a state for mandatory hotel quarantine.

49. I have found the analogy drawn by counsel for the Minister with the process of remission and release more apt than that drawn by counsel for the applicants with bail. Both remission and mandatory hotel quarantine involve the imposition of detention by operation of law from which a person applies for release with no automatic entitlement to be released, by seeking to come within humanitarian-type grounds justifying their release from detention. Bail involves an application for release by a person who has not been sentenced to a period of detention and who enjoys a strong presumption in favour of release, against a background of a constitutionally protected presumption of their innocence. Bail involves a complex legal process in which a person whom the Gardaí or DPP has seen fit to charge with a crime, is entitled to have a decision on their liberty determined by a judge who will be familiar with the constitutional protection of their presumption of innocence, the presumption of release and the need for evidence to satisfy the highest standard required under the *O'Callaghan* principles that there may be some interference with the administration of justice. It is, therefore, entirely proper that bail is categorised as a judicial function. However, there is no need for a similar level of sophistication in making a decision on remission or a review of mandatory hotel quarantine, both of which are far closer to an executive function than a judicial one.

50. In *Croke v. Smith (No. 2)* [1998] 1 I.R. 101 the constitutionality of s. 172 of the Mental Treatment Act 1945, which permitted the detention of a patient, was challenged by way of a case stated by the Circuit Court. Hamilton C.J. concluded that the exercise of those statutory powers of detention was not the administration of justice. He noted the statutory obligation placed on the medical superintendent to *"regularly and constantly review"* a patient and that, if that did not occur, the intervention of the court could be sought. This is not dissimilar to the obligation on the part of the Minister pursuant to s.38E(4) to regularly review the situation in a State he has designated and to revoke such designation where appropriate.

51. My conclusion that the review decision of the designated appeals officer is not the administration of justice is also supported by the application of the *McDonald* criteria:-

(i) A dispute as to the existence of legal rights or a violation of the law.

I do not consider the review conducted by the designated appeals officer to be such a dispute because they never determined whether a person traveling from the UAE should have been required to quarantine but, rather, whether they had properly been so required or whether they fell into a humanitarian-type exception that might have justified allowing them to quarantine at home rather than in a hotel. There is no dispute about the requirement to quarantine in a hotel but simply a review of why a person might be exempted from that requirement. That is not a dispute between a citizen and the State such as would bring it into the space of a judicial function.

(ii) A determination of the rights of parties or imposition of liabilities or penalties.

No one traveling from the UAE, at the time the applicants were required to quarantine, had the right not to quarantine, unless they fell into one of the exempted categories such as an aircraft pilot, other aircrew, maritime master or maritime crew as per the 2021 Act. The obligation of quarantine descended on everyone traveling from the UAE and it was not within the gift of the designated appeals officer to impose it or to decline to impose it. The purpose of the review was to ascertain whether the applicants did in fact

come within the category of a person traveling from the UAE or came within one of the exemptions permitted to certain persons or to a person in certain circumstances which entitled them to cease mandatory hotel quarantine. That does not equate to the determination of rights or the imposition of liabilities or penalties.

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

The decision of the designated appeals officer was not a final decision because the applicants were free to make as many more applications for a further review as they may have wished. Whilst their review decision form seemed to suggest otherwise, there is nothing in the legislation preventing further or repeated applications. The right of any applicant to make further applications for review was confirmed by the Minister's deponent, Mr. Goodman, in his affidavit grounding the Minister's Statement of Opposition and was not challenged by the applicants.

(iv) The enforcement of rights or liabilities or the imposition of a penalty by the courts.

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 at a time that the UAE had been designated by the Minister. Whilst they were charged with a criminal offence pursuant to the Act for having refused to go to the hotel for mandatory quarantine, that predated the designated appeals officer review decision and had nothing to do with it.

52. Finally, there has been no subtraction from the jurisdiction of this Court by the review decision of the designated appeals officer. The court retains its jurisdiction pursuant to Article 40.4 and judicial review, both options remaining open to all persons detained in mandatory hotel quarantine at all times, as evidenced by the number of such applications (including this one) that were made by such persons detained in mandatory hotel quarantine at that time.

Article 37

53. If I am wrong in my analysis that the role of the designated appeals officer was not the administration of justice, then I am satisfied that any such administration of justice is permitted by Article 37.1 as no more than *"the exercise of limited functions and proven of a judicial nature"*. In *Zalewski*, the Supreme Court found the exercise by the WRC of its powers were significantly limited by the availability of judicial review and that that saved the exercise of those powers from falling within Article 34 as an administration of justice. O'Donnell J. confirmed, at para. 112, that:-

> "It is, and has always been, accepted that there are administrative functions which can be carried out by non-judicial bodies, albeit that they may be required to act judicially and are bound by the rules of constitutional justice. Article 37 was not required to render such functions and powers constitutional. It follows, necessarily, that what Article 37 validates is something which, in the absence of the Article, would be considered an administration of justice and exclusively consigned to the courts, and not a mere component of the administration of justice such as, for example, the right to hear evidence or require the attendance of witnesses. In broad terms, therefore, what Article 37 permits is a State-mandated decision-making function to be exercised by persons other than judges, which suggests a capacity to determine some disputes, at least, conclusively. Whatever Article 37 permits, it must be

> capable of being the administration of justice which means, at a minimum, a State-supported decision-making function capable of delivering a binding and enforceable decision."

He went, at para. 117, to emphasise the importance of the WRC being subject to judicial review:-

> "While this might be said to be common to any body exercising a power or function under public law today, that does not mean that it is not a significant limitation on the exercise of the powers and functions of such a body. It is worth recalling that the extensive exercise of the jurisdiction of the High Court by way of judicial review for jurisdiction, error of law and, to some extent at least, of fact, unreasonableness, proportionality, the taking into account of irrelevant considerations, or failing to consider relevant considerations, compliance with the Constitution and the E.C.H.R., and much more, is largely a feature of the development of the law in the latter part of the 20th century."

54. The applicants dispute the relevance of the availability of judicial review as it does not allow a *de novo* appeal. That does not limit either the application or the power of judicial review as a safeguard particularly when combined with the additional availability of an Article 40 inquiry, accurately described by counsel for the Minister as a *"powerful mechanism"*, for a person detained in mandatory hotel quarantine.

55. In any event, further support for the sufficiency of the supervision of this Court by way of judicial review can be found at para. 118 of O'Donnell J.'s judgment in *Zalewski*, where he held:-

> "Nor, if the availability of an appeal is viewed as a limitation bringing the jurisdiction within Article 37, can I see that there is a fundamental constitutional distinction between an appeal, the form of review provided for under the Residential Tenancies Act 2004, for example, which limited a court to considerations of whether there was a want of procedural fairness or a manifestly erroneous decision, and the type of appeal and review which applies in this case, particularly when the review of what is a limited administration of justice can be expected to be rigorous."

Thus, there is an effective system of judicial scrutiny over the review decision of the designated appeals officer in the form of judicial review and an Article 40 inquiry. Clear support for this can be seen in the decision of the Supreme Court in *Croke v. Smith (No. 2)* (discussed above at para. 50) where Hamilton C.J. pointed out that the decision to detain a patient was " subject to review by the High Court, whether by way of an application for judicial review or by way of a complaint made to the High Court in accordance with the provisions of Article 40.4.2 of the Constitution." (at p. 131). More recent and perhaps even more pertinent support can be found in the decision of Edwards J. in *VTS v. HSE & ors* [2009] IEHC 106. This was an Article 40 inquiry into the detention of a patient pursuant to the then provisions of s. 38 of the Health Act 1947, who had infectious TB and could not be effectively isolated at home. Edwards J. rejected the argument that s. 38 was unconstitutional and concluded:-

> "A detainee may have recourse at any time to the High Court within the context of Article 40.4.2° of the Constitution for the purpose of seeking an inquiry into the lawfulness of his or her detention. The combination of (i) such safeguards as already exist within the section, (ii) the presumption that the section will be operated constitutionally, and (iii) the existence of a readily accessible remedy for the person affected if it is not in fact operated constitutionally, provides an adequate level of protection for the personal rights of detainees. I therefore dismiss the claim of constitutional invalidity. " (at pp. 158-159)

56. Counsel for the applicants seeks to distinguish this decision as engaging a different statutory regime. I do not agree. A statutory regime for mandatory quarantine to prevent the transmission of TB may not be identical to that designed to prevent the spread of COVID-19 and new variants thereof, but it is certainly an appropriate and persuasive precedent.

57. I have also had regard to the fact that the availability of judicial review has been found by the CJEU in the judgment of 31 January 2013, *H. I. D. and B. A. v Refugee Applications Commissioner and Others,* C-175/11 EU:C:2013:45 to constitute an effective remedy under Article 47 of the Charter. The applicants did not pursue any arguments of EU or Convention law separate to the arguments they made in reliance on the Constitution but, nevertheless, I consider this to be a valuable and useful additional indicator of the relevance of the remedy in judicial review that was available to the applicants to challenge their mandatory hotel quarantine and/or the designated appeals officer's refusal of their application for a review pursuant to s. 38(16).

58. Finally, I refer to the 'on all fours' decision of O'Moore J. in *Heyns v. Tifco* [2021] IEHC 329 which is a brief written decision on an Article 40 inquiry conducted over a weekend in very urgent circumstances in which the applicant challenged a review decision of the designated appeals officer not to release her from a mandatory hotel quarantine imposed under the same statutory regime as applied to the applicants here. O'Moore J. concluded that the applicant was detained in accordance with law and that the challenged aspects of the Health Act 1947 implementing the system of mandatory hotel quarantine were not unconstitutional. Whilst the seven-paragraph decision does not set out the full judgment or reasons for the decision due to the urgency of the situation, it is very clear that O'Moore J. upheld the system of mandatory hotel quarantine as a lawful detention and in accordance with the Constitution.

59. I therefore refuse the reliefs sought by the applicants challenging the jurisdiction of the designated appeals officer to decide on their application for a review of their quarantine in accordance with sections 38(16) and (17) of the Act.

Mootness

60. For the avoidance of doubt, I confirm that I do not accept the Minister's contention that the applicants' proceedings are moot because the entire regime of mandatory hotel quarantine has now come to an end. The applicants have been charged with an offence under s. 38D(1)(c) for having resisted being brought to a designated facility under s. 38B(7). That prosecution is on hold pending the outcome of these proceedings, but the DPP has confirmed her intention to proceed with that prosecution in the event of the court finding against the applicants in the reliefs they are seeking. Whilst I found against them, I do not consider their claims to be moot, not least because, as a result of my rejection of their claims, I am told that the prosecution will now proceed.

Pleading point

61. The applicants' notice motion and statement of grounds seeks a declaration that, *inter alia*, s. 38E(2) is unconstitutional. The remainder of the pleadings make it clear that their challenge was to s. 38E(1) and not s. 38E(2). While I found that the section is not unconstitutional, I wish to make it clear that I approach the case on the basis of the applicants' challenge having been made to s. 38E(1) and the existence of what was clearly a typographical error did not cause any confusion to the court as to the nature of the well-structured and clearly crafted claims of the applicants.

Conclusion

62. For the reasons set out above, I refuse the applicants' relief they have sought. I will put the matter in for mention on 11 July 2023 for the making of such final orders as may be required.

Counsel for the applicants: Michael P. O'Higgins SC, John Fitzgerald SC, Mark Lynam BL, Keith Spencer BL

Counsel for the second to fifth respondents: Michael Cush SC, Catherine Donnelly SC, Emile Burke-Murphy BL

Counsel for the first respondent: Kate Egan BL