APPROVED **[2020] IEHC 461**

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 547 J.R.

BETWEEN

RYANAIR DAC

APPLICANT

AND

AN TAOISEACH
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AER LINGUS LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 2 October 2020

INTRODUCTION

1. These proceedings seek to challenge the legality of travel advice published by the Government of Ireland in the context of the coronavirus pandemic. I use the term "advice" guardedly, in circumstances where one of the principal issues for determination in these proceedings is, in fact, whether the content of the government's public statements goes beyond mere travel advice and involves, instead, a form of *restriction* on travel.

2. The impugned travel advice includes not only guidance in respect of outward bound travel, but also extends to guidance to travellers entering the Irish State. Any person entering the Irish State is currently advised to restrict their movements for a period of fourteen days. This advice does not apply to travellers entering the Irish State from a small number of countries identified on the so-called "green list". As of 29 July 2020, however, the official website of the Department of Foreign Affairs had stated that "the Irish Authorities *require* anyone coming into Ireland […] to restrict their movements for 14 days" (emphasis added).

3. Ryanair contends that the publication of this travel advice is unlawful. For introductory purposes, the airline's case might be summarised as follows. First, it is said that what has been published by the Government of Ireland goes well beyond mere travel advice and, in truth, represents the imposition of *restrictions* on international travel. The language used in the government's public statements is said to be mandatory in nature. There is also said to be a coercive element to the travel advice in that, in some instances,

failure to comply with same entails a financial disadvantage. In particular, a person who has travelled abroad in breach of the travel advice is not entitled to avail of a concession under the social welfare legislation which facilitates foreign holidays by allowing recipients to claim jobseeker's benefit notwithstanding a temporary (two week) absence from the State.

4. Secondly, it is submitted, in the alternative, that even if the government's public statements can properly be characterised as mere travel advice, the form and procedure by which the advice has been published is unlawful. It is said that insofar as infectious diseases (as defined) are concerned, any advice to the public may only be given pursuant to the Health Act 1947 and/or the Health Act 1970. In practice, this would appear to mean that only the Minister for Health is authorised to provide public advice in respect of infectious diseases. Insofar as there may previously have been an executive power to provide such public advice, same is said to have been ousted by the intervention of the legislature in this field. Put otherwise, the existence of the relevant statutory powers is said to have displaced any inherent executive power.

5. Thirdly, Ryanair contends that the publication of the impugned travel advice is in breach of a number of provisions of the Treaty on the Functioning of the European Union. In particular, it is alleged that there has been a breach of the right of free movement, the right of establishment and the right to provide services. This argument is narrowly framed, and, again, confined to the *form* of the impugned travel advice.

6. The State respondents strenuously contest all of these contentions. Indeed, the State respondents submit that the proceedings should be dismissed *in limine*, and have raised a number of preliminary objections in terms of mootness, justiciability, and standing (*locus standi*). In order to properly understand these preliminary objections, however, it is necessary for the reader first to have an appreciation of the substantive legal issues

which Ryanair seeks to agitate in the proceedings. For this reason, the discussion of the preliminary objections will be deferred until *after* the discussion of the underlying merits. (The discussion of the preliminary objections commences at paragraph 132 below). This sequence is unusual, but makes sense in the present case because the preliminary objections are so enmeshed with the substantive merits that it would be artificial to attempt to separate them out. Put otherwise, the case could not have been disposed of by reference to the preliminary objections alone, and thus a discussion of the underlying merits is required in any event.

PROCEDURAL HISTORY

7. These proceedings take the form of conventional (non-statutory) judicial review proceedings pursuant to Order 84 of the Rules of the Superior Courts. The applicant for judicial review is the well-known international airline, Ryanair. A second airline, namely Aer Lingus, has been named from the outset of the proceedings as a notice party. As explained presently, the precise role of Aer Lingus in the proceedings has been a matter of some controversy.

8. An application for leave to apply for judicial review had been made on an *ex parte* basis to the High Court (Meenan J.) on 31 July 2020. The High Court directed that the respondents be put on notice of the application for leave. The parties ultimately agreed that there should be a "rolled up" or "telescoped" hearing of both the leave application and the substantive application. In practice, what this means is that, notwithstanding that leave has not yet been granted, the parties have all filed affidavits and submissions on the basis of a full hearing. This has been done *de bene esse*, i.e. the State respondents have not conceded that leave should be granted.

9. The flexible approach agreed to by the parties had the advantage that it was possible for the proceedings to be brought on for full hearing in a very short period of time, i.e. there was no unnecessary delay caused by having to have a separate and discrete hearing of the *inter partes* leave application, followed some time later by the substantive hearing (in the event that leave had been granted).

10. The case was fully argued before me for three days commencing on 15 September 2020. Given that this is a "rolled up" hearing, the formal order of this court will have to address the question of whether leave should be granted. If leave is granted, then the judgment will also determine the substantive application for judicial review.

11. As noted above, Aer Lingus has been a notice party to the proceedings from the outset. It is evident from the affidavits and written legal submissions filed on behalf of Aer Lingus that it intends *to support* the application for judicial review. This is an unusual but not unique position for a notice party to be in. It is more typical for a notice party to join cause with the respondents in opposing an application for judicial review. This is because the entitlement to be joined to judicial review proceedings as a notice party applies to persons who are "directly affected" by the judicial review proceedings (Order 84, rule 22). This category of persons is normally confined to those who would be *adversely* affected were the application for judicial review to be successful. (See, generally, *North Meath Wind Farm Ltd v. An Bord Pleanála* [2018] IECA 49). One obvious example is the position of the beneficiary of a planning permission. Such a person is entitled to be joined as a notice party to proceedings which seek to question the validity of that planning permission.

12. However, as correctly pointed out by counsel for Aer Lingus, there are examples in the case law where a notice party has *supported* an application for judicial review. Counsel cited, in particular, the role of the relevant Minister in *Kelly (Ted) v. An Bord Pleanála*

[2014] IEHC 400; of the Law Society in *Miley v. Flood (No. 1)* [2001] 2 I.R. 50; and of Eircom plc in *EMI Records (Ireland) Ltd v. Data Protection Commissioner* [2012] IEHC 264; [2013] 2 I.R. 669.

13. Leading counsel on behalf of the State respondents, Mr Frank Callanan, SC, queried the role of Aer Lingus in the proceedings. In particular, it was said that whatever about Aer Lingus' entitlement to participate at all, it certainly could not make submissions which went beyond the scope of the statement of grounds. Counsel objected that the written legal submissions filed on behalf of Aer Lingus sought a number of declarations which had not been sought by Ryanair in its statement of grounds.

14. I made a ruling on this objection on the morning of the first day of the hearing (Day 1 transcript, page 30). In brief, I held that Aer Lingus was entitled to participate in the proceedings as a notice party. Order 84 is drafted in very wide terms and it does allow for the possibility of companies or individuals who support an application for judicial review to be joined as notice parties. However, Aer Lingus' right of participation was more limited than had it joined the proceedings as a co-applicant. Any submissions made on its behalf had to be confined to the reliefs sought in the statement of grounds, and within the parameters of the arguments as set out in the written legal submissions filed on behalf of Ryanair. An applicant for judicial review will almost invariably refine its case in its written legal submissions from that pleaded in its statement of grounds. The case as presented in the written legal submissions will be narrower and more focused. A respondent is entitled to assume that the case to be argued at the hearing will be that as set out in the written legal submissions. It is not open to a notice party to seek to reinterpret the applicant's statement of grounds and to attempt to introduce in its (the notice party's) written legal submissions a different case than that of the applicant.

15. Aer Lingus was directed to file revised submissions omitting the claim for additional declaratory relief and the arguments in support of that claim. This was done promptly, and counsel on behalf of Aer Lingus, Mr Francis Kieran, subsequently made an extremely helpful and focused oral submission to the court, and one which finished well within the one hour allocated to him.

16. Finally, at the request of the court, the parties filed short submissions on 25 September 2020 on the question of whether the general power to make regulations under section 31 of the Health Act 1947 was available in the context of the coronavirus pandemic in circumstances where specific provisions for that disease have been introduced under section 31A. I return to this point at paragraph 64 below.

THE IMPUGNED "TRAVEL ADVICE" / PUBLIC STATEMENTS

17. The principal relief sought in the proceedings is as follows (at paragraph (d)(A) of the statement of grounds).

> "A. An Order of *Certiorari* by way of an application for judicial review setting aside the International Travel Restrictions announced by the Government on 21 July 2020 and as continue to be communicated by the Government as at 29 July 2020, which said International Travel Restrictions provide:-
>
> (a) That persons must not engage in international travel from the State (excepting Northern Ireland) save for essential purposes.
>
> (b) That everyone in Ireland must holiday at home in 2020.
>
> (c) That persons returning to the State having engaged in international travel (excepting Northern Ireland and a limited number of countries having a 'green' rating) must restrict their movements for a period of 14 days thereafter i.e. staying indoors in one location and avoiding contact with other people and social situations and including not using public transport."

18. (The complaint at sub-paragraph (b) above, that there was a requirement for everyone in Ireland to holiday at home was not pressed in argument before me).

19. As appears, Ryanair has chosen to describe the government's public statements as "the International Travel Restrictions". The State respondents, conversely, say that this is a mischaracterisation, and emphasise that the content complained of from the Department of Foreign Affairs' website appears under the heading "Important Travel Advice Update" and "General COVID-19 Travel Advisory in Operation".

20. I propose to use the shorthand "***the impugned travel advice***" or "***the government's public statements***" when referring to the content of the official government websites complained of by Ryanair. This shorthand is intended to be understood in neutral terms in circumstances where, of course, one of the principal issues for determination in these proceedings is precisely whether the content of the government's public statements goes beyond mere travel advice and involves, instead, a form of *restriction* on travel.

21. Before turning to consider the detail of the government's public statements impugned in these proceedings, it should be explained that the content of the official government websites is subject to constant review and updating. (See, in particular, the affidavit of Elizabeth McCullough, Director of the Consular Directorate in the Department of Foreign Affairs and Trade, sworn herein on 28 August 2020). The material which has been put before the court by Ryanair by way of its grounding affidavits represents merely a snapshot of the travel advice as it stood at the time the proceedings were instituted on 31 July 2020. The content has changed since, and, in particular, the use of the term "required", in the context of the restriction of movement, has been discontinued. As discussed at paragraph 161 below, I propose to determine the case on the basis of the content of the impugned travel advice as it stood at the conclusion of the exchange of the affidavits in these proceedings, i.e. as of the first week of September 2020.

22. There are, in effect, two strands to the impugned travel advice as follows. First, insofar as outward bound travel is concerned, the advice is to avoid non-essential travel overseas. A small number of countries (the so-called "green list") are exempt from this general advice.

23. The position was stated as follows, for example, on the Department of Foreign Affairs' website on 29 July 2020.

> "General advice to avoid non-essential travel and 'Normal Precautions' list of exemptions:
>
> In accordance with Government policy, which is based on official public health advice, the Department of Foreign Affairs continues to advise against non-essential travel overseas. This includes Great Britain but does not apply to Northern Ireland. It also includes all travel by cruise ship. However, as of 21 July, travel to a very limited set of locations is exempted from this advice. The security status for those locations to which non-essential travel can resume has been changed to 'normal precautions' ('green') rating. Individuals arriving in Ireland from these locations will not be required to restrict their movements on arrival. These locations are: […]"

24. The second strand of the travel advice is concerned with inward bound travel. In brief, the advice is to the effect that persons entering or re-entering the Irish State should restrict their movements for a period of 14 days. (This does not apply in respect of travel from Northern Ireland or from a country on the so-called "green list").

25. Much of the criticism made by Ryanair is directed to the content of the Department of Foreign Affair's website as it stood on 29 July 2020. Counsel placed emphasis on the following extract.

> "What to do on entering Ireland from abroad:
>
> The Irish Authorities require anyone coming into Ireland, apart from Northern Ireland and individuals arriving in Ireland from locations with a security rating of 'normal precautions' ('green'), <u>to restrict their movements</u> for 14 days, and this includes citizens and residents returning to Ireland. Restricting your movements means staying indoors in one location and avoiding contact with other people and social situations as much as possible. To ensure that this is being observed all passengers arriving to Ireland from overseas are obliged

> to complete a mandatory Public Health Passenger Locator Form and to submit it to the relevant authority at the airport of entry. For further details please see the Irish Government Advice Page. Exemptions are also in place for providers of essential supply chain services such as hauliers, pilots and maritime staff. Check the Irish Government Advice Page for full information on these requirements.
>
> Further advice for people who have recently returned from abroad is available from the HSE."
>
> **The underlined text signifies what appear to be hyperlinks in the web version*.

26. Counsel submits that the word "required" is mandatory in its terms. It is further submitted that this language has to be seen in the context of the subsequent reference to the obligation to complete a mandatory public health passenger locator form. The purpose of this form is stated to be to "ensure" that "this", i.e. the restriction of movement, is being observed. It is submitted that a person reading this paragraph would be left with the impression that there was a legal requirement not only to complete the form but also to restrict movement.

27. In reply, counsel on behalf of the State respondents submits that this "advice" has to be read in its overall context, and that Ryanair is not entitled to "cherry pick" extracts from the advice. Counsel points out that the passage set out above is an extract from a much longer section published on the website. Pointedly, the section is headed up "Important Travel Advice Update" and "General COVID-19 Travel Advisory in Operation". Thus, it is said, the reader would understand that all that followed is advisory only.

28. Moreover, it has been explained on affidavit that the wording of the relevant part of the advice has since been changed. (See, in particular, Ms McCullough's affidavit referenced earlier). Crucially, the word "required" has now been replaced by "advise", so that the sentence is now to the effect that the Irish Authorities *advise* travellers to restrict their movements.

> "What to do on entering Ireland from abroad:

The Irish Authorities advise anyone coming into Ireland, apart from Northern Ireland and individuals arriving in Ireland from locations with a security rating of 'normal precautions' ('green'), to restrict their movements for 14 days, and this includes citizens and residents returning to Ireland. Restricting your movements means staying indoors in one location and avoiding contact with other people and social situations as much as possible. To ensure that this is being observed all passengers arriving to Ireland from overseas are obliged to complete a mandatory Public Health Passenger Locator Form and to submit it to the relevant authority at their port of entry. For further details please see the Irish Government Advice Page. Exemptions are also in place for providers of essential supply chain services such as hauliers, pilots and maritime staff. Check the Irish Government Advice Page for full information on these requirements and further advice on returning from abroad."

**The underlined text signifies what appear to be hyperlinks in the web version*.

DETAILED DISCUSSION

PROPER CHARACTERISATION OF THE IMPUGNED TRAVEL ADVICE

29. The very first issue which falls for determination in this judgment is the proper characterisation of the impugned travel advice. This is because the dispute between the parties centres largely on whether the information published on the government websites represents merely advice, or, alternatively, whether it involves a form of restriction on travel (as contended for by Ryanair and Aer Lingus). Leading counsel on behalf of the State respondents, in opening his submission, suggested that the entire case was predicated on the "plain mischaracterisation" of the nature of the information published by and on behalf of the government as amounting to the regulation of domestic and international travel.

30. The gravamen of Ryanair's case is that restrictive measures, such as restrictions upon a person's movements within the State on even a temporary (14 day) basis, may only be introduced by way of legislation (whether primary or secondary). The Minister for Health has been authorised under section 31A of the amended Health Act 1947 to make regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19. Such regulations may provide, *inter alia*, for restrictions to be imposed upon travel to or from the State; and for the imposition of restrictions requiring persons to remain in their homes or in such other places as may be specified by the Minister.

31. Ryanair submits that this is the only method by which such restrictions on movement may be lawfully imposed, and that, crucially, the government may not invoke the inherent executive power of the State to do so. Notwithstanding this (asserted) limitation on the executive power, the government has nevertheless announced restrictions in what purport to be mandatory or directive terms.

32. This aspect of the legal challenge is encapsulated at paragraphs (e) 20 and (e) 26 of the statement of grounds as follows.

> "20. The method employed by the Government to communicate its International Travel Restrictions to the public (which, in the case of legislation would have been subject to due deliberation and public debate in the Oireachtas together with, perhaps, public comment in the media and, indeed, publication by means of a notice pursuant to Article 25.4.2 of the Constitution in the case of legislation) has been by way of the usage of mandatory and directive language. For example, the use of such language as 'The Irish Authorities require anyone ...', 'you will have to restrict your movements', 'will need to restrict their movements' and 'do not' are, each of them, terms connoting a mandatory situation. The public are entitled not to be confused as to the breadth of the powers of the Executive arising from the employment by the Executive of such directive and unequivocal mandatory instructions on behalf of the Executive and affecting the fundamental rights of citizens and other persons.
>
> […]
>
> 26. It is the case that (having regard to the effect of the International Travel Restrictions purporting to limit, by announcement and decree only, the outward and inward bound activities of persons), the Government has trespassed upon the constitutional prerogative to make laws vested in the Oireachtas and acted ultra vires and beyond the limits of the executive power of the State."

33. It has been necessary to refer to the statement of grounds in this regard, in circumstances where the State respondents have taken a pleading point to the effect that neither Ryanair nor Aer Lingus are entitled to make the case that the travel advice is unconstitutional because of what are asserted to be *errors* in the travel advice. With respect, this is not the case which Ryanair makes. This is not a situation where an applicant seeks a declaration that advice issued on behalf of the government is erroneous in that it misstates the law on a point. (This might arise in circumstances such as those of *Sherwin v. An Bord Pleanála* [2007] IEHC 227; [2008] 1 I.R. 561 where official guidance incorrectly describes the effect of legislation). Rather, the case made by Ryanair is more fundamental. It is that the government, by employing what Ryanair characterises as

mandatory or directive language, has purported to introduce *de facto* restrictions on movement which go well beyond the limits of the executive power of the State.

DISCUSSION AND DECISION ON PROPER CHARACTERISATION

34. For the purposes of these proceedings, the State respondents have accepted that legislation would be required in order to make it *compulsory* for a person to restrict his or her movements on a temporary basis upon their return from abroad. The Minister for Health is empowered to introduce secondary legislation to this effect pursuant to section 31 and section 31A of the Health Act 1947 (as amended). Put otherwise, the State respondents do not contend that temporary restrictions on movement, i.e. of the type currently *recommended* by the government in its published travel advice, could be made compulsory by reliance on executive power alone. A legislative basis would certainly be required were criminal sanctions to be imposed in the event of a failure to restrict movement. It should be emphasised, however, that while adopting this position for the purposes of these particular proceedings and in the specific context of the coronavirus pandemic, counsel indicated that the State respondents expressly reserved the right to argue, in a different case, for a wider executive power in extreme circumstances such as, for example, an outbreak of a deadly disease such as the Ebola virus.

35. The State respondents are thus content to defend these proceedings on the basis that the material published on the government websites is advisory in nature, and the State does not advance a fall back argument to the effect that mandatory restrictions on an individual's movement can be imposed other than by way of legislation (primary or secondary). (As discussed presently, the State respondents, correctly, submit that the

inherent executive power does entail an entitlement to provide advice on travel and public health).

36. The question of principle which arises in these proceedings is what the legal consequences would be were a government to create the false impression—whether by accident or design—that certain activities were restricted by law when, in truth, no such legislation was in force. It should be emphasised that the recent history of the Irish State indicates that such conduct on the part of a government rarely, if ever, occurs, and certainly not on a deliberate or conscious basis. It is nevertheless necessary to address this question of principle given that this is the charge laid against the current government by Ryanair.

37. In attempting to resolve this question, it may be helpful to commence by recalling some basic tenets of constitutional law. The Constitution of Ireland prescribes a tripartite division of powers as between the executive, legislative and judicial branches of government (Article 6). The sole and exclusive power of making laws for the State is vested in the Oireachtas (Article 15). As the case law on the validity of *secondary* legislation illustrates, the courts will, when called upon, intervene to ensure that primary legislation, which authorises a subordinate or delegate to make secondary legislation thereunder, does not involve an improper abdication of the law making power of the Oireachtas. (In many instances, the delegate will be a member of the executive branch of government). See, for example, *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381 (at 399) as follows.

> "Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution."

38. It would seem to be a logical extension of this case law to say that the courts should also intervene where a government has, by way of unequivocal statements, created the false impression that there is legislation in force which regulates certain activities when, in truth, there is no such legislation. Were this to happen, then the executive branch would be able to achieve a result which is similar in effect to legislation, i.e. members of the public might well be coerced into complying with the government's guidance in the mistaken belief that it is legally enforceable. This is especially so in the context of the coronavirus pandemic. The very fact that the government's guidance—to use a neutral term—on the measures to be taken to restrict the spread of coronavirus is, of necessity, constantly changing means that members of the public will rely heavily on official sources, such as government websites, to obtain information on what are the current requirements. It is unrealistic to expect that a member of the public will wade through reams of statutory instruments in order to determine what the precise legal requirements are at any given moment. The difficulties which a member of the public faces in ascertaining the legal requirements in force at any moment in time are compounded by the fact that different legal requirements may apply in different geographical areas. For example, special measures applied to counties Laois, Offaly and Kildare for a number of weeks. At the time of preparing this judgment, special measures apply to Dublin and Donegal. Moreover, in some instances, there has been a delay of a number of days before the relevant statutory instrument has been made publicly available.

39. In circumstances where members of the public will, inevitably, rely on official sources, such as government websites, there is an obligation upon the government to ensure that it does not publish information which creates the mistaken impression that certain recommended restrictions are legally enforceable if, in truth, there is no legislation in force to that effect. It would undermine the rule of law, and offend against the separation

of powers, were the government to do so. The legislative branch of government has made express provision for combating the coronavirus pandemic by its recent enactments, including, in particular, the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020. Part of the legislative approach is to allow for the making of secondary legislation by the Minister for Health. Crucially, however, the Minister's powers must be exercised in accordance with the principles and policies prescribed under the primary legislation, i.e. the amended Health Act 1947. Further, the making of secondary legislation is subject to the possibility of annulment by either of the two Houses of the Oireachtas under section 5 of the amended Health Act 1947. This ensures a level of parliamentary oversight.

40. The executive branch of government would not be entitled to short-circuit the statutory regime put in place by the legislative branch by creating the false impression that legally enforceable restrictions are in effect where this is not so. The allegation in the present case is that the impugned travel advice indicates, incorrectly, that there is a legally enforceable requirement upon individuals entering the State to restrict their movements for 14 days. It is said that if the government wishes to introduce such a form of temporary quarantine, then it may only do so lawfully by making secondary legislation in accordance with the amended Health Act 1947. The government may not seek to achieve the same practical result, i.e. widespread compliance with its travel advice, by creating the false impression that it is legally enforceable.

41. In principle, the making of unequivocal statements by the executive branch of government, through official channels such as the gov.ie website or that of the Department of Foreign Affairs, which purport to restrict the personal rights of individuals in the absence of primary or secondary legislation and under threat of compulsion, would be amenable to judicial review. Were it otherwise, the executive branch would be able

to introduce a form of *de facto* regulation or "soft" law by persuading members of the public that they were under a legal obligation to comply. This would trespass upon the domain of the legislative branch. Without presuming to offer an exhaustive definition of a "law" for the purposes of the "power of making laws for the State" under Article 15.2.1°, the *purported* introduction by the executive of a unilateral and non-consensual restriction of general application which affects the rights of individuals and which is asserted to be enforceable would approximate to "law" making. Different considerations would apply where the government seeks to assert an inherent executive power to restrict rights, but this is not an issue in the present case given the concession at paragraphs 34 and 35 above.

42. It should be emphasised, however, that the threshold which would have to be met before the courts would intervene on this basis is a very high one. A "clear disregard" of constitutional norms would have to be established by an applicant seeking relief. (See, by analogy, *McCrystal v. Minister for Children* [2012] 2 I.R. 726). It would not be enough that the information published by the government might be ambiguous, or in some isolated instances incorrect. Rather, it would be necessary for an applicant to demonstrate, on an objective basis, that the government's public statements, when read in the round, amounted to an unequivocal representation that there was a legal obligation to comply with rights-restrictive measures of general application, and that a failure to do so would be subject to legal sanction.

43. For the reasons which follow, I am satisfied that this very high threshold is <u>not</u> met on the facts of the present case, certainly not insofar as the impugned travel advice from August 2020 onwards is concerned.

44. It is a question of degree in any particular case as to whether information published by the government amounts to an unequivocal representation that there is a legal obligation

to comply with rights-restrictive measures. At one end of the spectrum, the publication of the detail of the restrictive measures will have been accompanied by the threat of enforcement or by statements to the effect that there is a legal requirement to comply. At the other end of the spectrum, it will have been expressly stated that the restrictive measures are advisory only, and that compliance with same is voluntary.

45. An example of a case lying at the mandatory end of the spectrum is provided by the New Zealand judgment relied upon by Ryanair, namely, *Borrowdale v. Director-General for Health* [2020] NZHC 2090. On the facts of that case, there had been a gap of some nine days between restrictive measures being announced by the government to combat coronavirus, and the putting in place of a legislative basis for those measures. During this interregnum, members of the government, including the prime minister, had represented that the measures were legally enforceable. For example, the prime minister had stated as follows.

> "Failure of anyone to play their part in coming days will put the lives of others at risk, and there will be no tolerance for that. We will not hesitate to use our enforcement powers if needed. We are in this together. I'm in no doubt that the measures I've announced today will cause unprecedented economic and social disruption, but they are necessary."

46. Moreover, the police commissioner had also represented that the measures were legally enforceable. In one particularly striking statement, the commissioner had threatened that persons not remaining at home might find themselves in a police cell.

> "We have numerous powers. We have powers under the Health Act, we may in fact have powers under the Civil Defence Emergency Act. But we also have our power under the Summary Offences Act.
>
> So if we're asking people to comply there is authority we can use. We hope not to use it, but we will. …
>
> The way I put it is, you're better to stay on the comfort of your own couch of your own home than be cooling yourself on a very cool bench in a police cell. …

> But what I can say is that if people don't do as they're directed, we'll be out there and we'll be ensuring that people are complying – because they need to be. This is about saving lives."

47. The High Court of New Zealand held that the government's public statements had limited rights and freedoms under the Bill of Rights: see paragraphs 196 to 198 of the judgment as follows.

> "The Crown also submits that a protected right is only limited if and when purported enforcement action is taken. It says the limit would become unlawful if that enforcement action was not, itself, authorised by law.
>
> We are unable to agree with that proposition, either. It underplays the authority of the Statements, which, in effect, limited New Zealanders' freedom of movement, assembly and association. People stayed home and in their bubbles because they believed they had to. It was the threat of enforcement – not actual enforcement – that gave rise to that belief.
>
> Were it otherwise, for example, a government proclamation forbidding attendance at church would not breach the right to religion and belief until a worshipper was arrested on a church doorstep. That cannot be right. Statements by those in power that require rights-restrictive actions, coupled with threats of enforcement, are sufficient to constitute a limit on those rights."

48. By contrast, the facts of the present case sit very much towards the opposite end of the spectrum. The most recent affidavits filed in these proceedings confirm that the version of the impugned travel advice, as published on the government websites as of August 2020, is framed in terms of a *request* to restrict movements for 14 days upon entry to the State. This request is made in the context of a section which is expressly headed up "Important Travel Advice Update" and "General COVID-19 Travel Advisory in Operation". I am satisfied, applying an objective test, that a person reading this material would <u>not</u> be left with the impression that the request was legally enforceable.

49. Ryanair has sought to argue that the impugned travel advice has to be seen in the context of other statements or actions by the government. It is submitted that certain classes of individual may suffer financial consequences if they do not follow the advice, and,

instead, travel abroad to a country which is not on the so-called "green list". In particular, it is said that a person who has travelled abroad in breach of the travel advice is not entitled to avail of a concession under the social welfare legislation which facilitates foreign holidays, by allowing recipients to continue to claim jobseeker's benefit notwithstanding a temporary (two week) absence from the State.

50. At the level of general principle, the publication by the government of unequivocal statements to the effect that the failure to comply with rights-restrictive measures will attract financial penalties *might* be found to give the misleading impression that the measures are legally enforceable. Put otherwise, there does not necessarily have to be a threat of *criminal penalties* in order to create a misleading impression. Crucially, however, a misleading impression would only arise where there is no legal basis whatsoever for the threatened financial penalties. The government is, at most, precluded from giving the *false* impression that restrictive measures—which are of general application and which restrict personal rights—are legally enforceable and represent "law" for the purposes of Article 15.2.1° if, in truth, there is no legislative basis for same. By contrast, the government is perfectly entitled to draw attention to legal consequences which are properly provided for under legislation (whether primary or secondary). This is the position in respect of the example cited by Ryanair, i.e. the loss of the "holiday" concession in respect of jobseeker's benefit. This measure has a proper legal basis. See the Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 9) (Absence from the State) Regulations 2020 (S.I. No. 242 of 2020). Ryanair has not sought to set aside this statutory instrument, and, in any event, it must be very doubtful whether the airline would have standing (*locus standi*) to do so. (I will return to discuss *locus standi* in more detail at paragraphs 142 *et seq*. below).

51. The existence of a statutory requirement to complete a passenger locator form does not have the legal effect of translating the travel advice into mandatory form. This statutory requirement is distinct from the travel advice. Pointedly, the obligation to complete the form applies irrespective of whether the passenger has entered the Irish State from a "green list" country or not. It cannot therefore be characterised as intended to enforce compliance with the "green list". The principal regulations, the Health Act 1947 (Section 31A – Temporary Requirements) (Covid-19 Passenger Locator Form) Regulations 2020 (S.I. No. 181 of 2020), have been amended on a number of occasions.

52. In summary, therefore, the information published on the government websites presents an accurate portrayal of the legal status of the travel advice. The advice to restrict movements is just that: advice. The government merely *requests* that persons entering the State from a country not on the "green list" restrict their movements for 14 days. There is no legal requirement to do so. If and insofar as the failure to observe the advice may result in a financial disadvantage for certain classes of individual, e.g. those in receipt of jobseeker's benefit, there is a proper legal basis for same which has not been challenged. The government websites do not characterise the travel advice as having a legal status which it does not actually enjoy.

53. (For the sake of completeness, it should be noted that Ryanair also sought to rely on an argument that a failure to comply with the travel advice might result in a financial loss to public servants in that they would be required to restrict their movements for 14 days and not return to work. This would necessitate the taking of unpaid leave or further annual leave. This issue was not, however, pleaded in the statement of grounds, and Ryanair, as applicant, has not discharged the onus of proof upon it by putting forward details of this alleged requirement).

PUBLIC ADVICE IN RESPECT OF INFECTIOUS DISEASES

54. Given my finding (above) to the effect that the government's public statements are framed in advisory, rather than mandatory, terms, it now becomes necessary to consider Ryanair's fall back argument. Ryanair contends that the procedure by which, and the form in which, the advice has been published is unlawful. More specifically, it is submitted that the existence of statutory powers governing the provision of public health advice has displaced any executive power to provide such advice.

55. The precise parameters of the complaint being made in this regard have evolved during the course of the proceedings. The complaint, as pleaded in the statement of grounds, is that the government's public statements do not constitute "the dissemination of information and advice on matters relating to health", within the meaning of section 71 of the Health Act 1970, by virtue of "their breadth and effect and/or the manner of their promulgation". The pleaded case thus appears to be to the effect that the government cannot rely on the Health Act 1970 to authorise the making of the impugned public statements. However, the case as argued at the hearing before this court was to the opposite effect: it was said that not only could the impugned travel advice have been lawfully provided by the Minister for Health under section 71 of the Health Act 1970, this was the *only* basis on which it could be provided. The existence of the statutory power ousted any executive power to do so. Put otherwise, the case had changed from saying that the powers under the Health Act 1970 could <u>not</u> be relied upon at all, to saying that they ought to have been invoked.

56. The case as argued also relied on a *separate* statutory provision, namely, section 31 of the Health Act 1947, which had not been referenced at all in the statement of grounds. Aer Lingus, in particular, placed emphasis on this latter statutory provision.

57. There was some debate at the hearing before me as to whether the failure to reference the statutory provision in the statement of grounds precluded Ryanair and Aer Lingus from relying on section 31 of the Health Act 1947. Counsel for Aer Lingus cited *Donoghue v. Director of Public Prosecutions* [2014] IESC 56; [2014] 2 I.R. 762 as authority for the proposition that the omission from a statement of grounds of an express reference to a specific provision of an Act does not necessarily preclude the applicant from relying on that section at the substantive hearing of the judicial review proceedings. On the facts of *Donoghue*, the applicant had made extensive reference to the relevant legislation (the Children Act 2001), and the Supreme Court was satisfied that the respondent could not have been taken by surprise by the making of reference to *other* provisions of that Act during the course of the hearing. Here, it is said that the statement of grounds similarly identifies the legislation at issue, namely the Health Act 1947 (as amended).

58. The omission of an express reference to a specific provision of an Act will not be fatal where, as in *Donoghue*, the nature of the case being made is clear and precise. The difficulty in the present proceedings, however, is that, on one view at least, the precise argument now being advanced had not been presaged by the statement of grounds. As discussed above, the case has evolved from saying that there is no statutory authority authorising the government's public statements, to a complaint that such statutory authority does exist and should have been invoked.

59. It is not necessary, however, to resolve this pleading point in circumstances where, as explained below, I am satisfied that the argument is not well founded on its merits. It would be unsatisfactory to resolve this aspect of the proceedings on a narrow pleading point, given that the "section 31" issue has been fully argued before me by all sides and the proceedings are, technically, at the pre-leave stage and thus capable of amendment.

60. Accordingly, I turn now to consider the merits of the argument.

61. The first suite of statutory provisions relied upon by Ryanair and Aer Lingus are to be found under the Health Act 1947. Reliance is placed on section 31, read in conjunction with paragraph 21 of the Second Schedule of the Act, as follows.

> 31.(1) The Minister may make regulations providing for the prevention of the spread (including the spread outside the State) of an infectious disease or of infectious diseases generally and for the treatment of persons suffering therefrom and the regulations may, in particular, provide for any of the matters mentioned in the Second Schedule to this Act.
>
> […]
>
> SECOND SCHEDULE.
>
> Matters for which Provision may be made in Regulations for the Prevention of the Spread of Infectious Disease.
>
> 21. The giving to the public of information and advice with respect to infectious disease by advertisements, notices, pamphlets, lectures, radio, cinema exhibitions or any other means.

62. The making of regulations is governed by section 5 of the Health Act 1947 as follows.

> 5.(1) The Minister may make regulations in relation to anything referred to in this Act as prescribed.
>
> (2) Regulations under this Act may be so framed as to apply in relation to the whole of the State or to part or parts only of the State.
>
> (3) Where regulations under this Act require records to be kept in relation to the health of individuals, such provision shall be made therein as the Minister thinks necessary or proper for ensuring that the parts of such records containing the names of such individuals shall be treated in a confidential manner and shall not be published save with the consent of such individuals.
>
> (4) No regulation which includes provision in respect of a payment to be made to or by the Minister shall be made by the Minister under this Act without the consent to such provision of the Minister for Finance.
>
> (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.

63. Ryanair and Aer Lingus attach much significance to this last sub-section, as it allows for parliamentary oversight.

64. For completeness, it should be noted that the *general* power to make regulations under section 31 is available in the context of Covid-19, notwithstanding the availability under section 31A of a parallel power to make regulations in the *specific* context of that disease. See section 31A(5) as follows.

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

65. The second statutory provision relied upon by Ryanair and Aer Lingus is section 71 of the Health Act 1970 (as amended), as follows.

> 71(1) The Minister may make arrangements for the dissemination of information and advice on matters relating to health and health services.
>
> (2) A health board shall, in respect of its functional area, develop and implement health promotion programmes, having regard to the needs of people residing in its functional area and the policies and objectives of the Minister in relation to health promotion generally.

66. The argument now made is that—insofar as infectious diseases (as defined) are concerned—public health information and advice may only be given pursuant to the Health Act 1947 and/or the Health Act 1970. It is further submitted that the actual *content* of the information and advice would have to be embodied in a statutory instrument before it could be provided to members of the public.

67. In practice, this would appear to mean that only the Minister for Health is authorised to provide information and advice to the public in respect of infectious diseases. On this analysis, no other member of the government—not even An Taoiseach—is entitled to make public statements which contain public health advice. Even the Minister for Health would be confined to speaking to the information and advice as set out in a statutory instrument.

68. The logic underlying this startling proposition is that the entitlement of the executive branch of government to provide public health advice has been ousted by the legislative branch. More specifically, it is submitted that by enacting legislation in this field, the Oireachtas has implicitly displaced any executive power to provide public health advice.

69. The principal authority cited in support of this submission is the judgment of the Supreme Court in *Laurentiu v. Minister for Justice, Equality and Law Reform* [1999] 4 I.R. 26. The central issue for determination in *Laurentiu* had been whether the conferring of a power on the respondent Minister to make secondary legislation regulating the exclusion or deportation of non-nationals from the State involved an improper abdication of the law making power of the Oireachtas, in breach of Article 15.2.1° of the Constitution of Ireland. The Supreme Court held that the delegation was invalid in circumstances where the parent legislation, namely, the Aliens Act 1935, did not properly prescribe principles and policies to control the exercise of the Minister's delegated power to make secondary legislation. The purported effect of the enactment of the Aliens Act 1935 had been to enable the Minister, and not the Oireachtas, to determine what aliens or classes of aliens should be deported. This was impermissible in the absence of a proper statement of principles and policies.

70. For present purposes, it is the discussion in *Laurentiu* of the executive power which is most relevant. The Supreme Court explained that the right to deport non-nationals inheres in the Irish State as a sovereign power. In the absence of legislation, this right falls to be exercised by the executive branch of government. However, it is open to the legislative branch to regulate this right. The position was stated as follows by Keane J. (as he then was) at page 93 of the reported judgment.

> "It cannot be too strongly emphasised that no issue arises in this case as to whether the sovereign power of the State to deport aliens is executive or legislative in its nature: it is clearly a power of an executive nature, since it can be exercised by the executive even in

> the absence of legislation. But that is not to say that its exercise cannot be controlled by legislation and today is invariably so controlled: any other view would be inconsistent with the exclusive law making power vested in the Oireachtas. The Oireachtas may properly decide as a matter of policy to impose specific restrictions on the manner in which the executive power in question is to be exercised: what they cannot do, in my judgment, is to assign their policy making role to a specified person or body, such as a Minister."

71. On this analysis, the change in the law effected by the impugned legislation i.e. section 5(1)(e) of the Aliens Act 1935, was not the conferring on the State of an absolute and unrestricted power to deport aliens: that power was already vested in the State. Rather, the impugned legislation had purported to allow that power now to be exercised by the Minister in whatever manner he chose (subject only to certain restrictions in the case of diplomatic and consular representatives and long term residents). It was the absence of a proper statement of principles and policies in the parent legislation which was fatal to the validity of the legislation.

72. The purported effect of the legislation was summarised in the following graphic terms by Denham J. (as she then was) at page 63 of the reported judgment.

> "The legislature grasped the power over aliens from the executive and then delegated inadequately to the Minister. It abdicated its power."

73. Ryanair and Aer Lingus rely on the judgment of the majority in *Laurentiu* in support of the proposition that the legislative branch, by enacting legislation in a particular field, may "seize" or "grasp" power from the executive branch of government. Put more prosaically, it is said that legislative intervention may regulate, or even displace, existing executive powers.

74. The proposition that the legislative branch of government may legislate for areas previously controlled by the executive power has been confirmed by the Supreme Court in *Barlow v. Minister for Agriculture* [2016] IESC 62; [2017] 2 I.R. 440. As explained by O'Donnell J., it had not been necessary for the purposes of that case to consider what,

if any, are the limits to such legislative power. See paragraph 37 of the judgment as follows.

> "Since the conduct of international affairs is an important executive function, the distinction between executive and legislative functions is also relevant in this case. That distinction is often blurred in the Irish context because the Executive sits in the legislature and more often than not effectively controls it and in particular the process of legislation. It is not therefore as important in practical terms to maintain the distinction between matters which can be controlled by executive decision and those which require to be regulated by public general legislation, as it is in other countries with a more complete separation between those powers. Second, it does not appear the precise boundary between executive and legislative functions is one fixed immutably by the Constitution. The Executive is responsible to the Dáil. The Oireachtas may, it appears, legislate for areas previously controlled by executive action. It is not necessary to consider what if any are the limits to such legislative power. It appears that the executive power in Irish law to date is, as Professor Casey observed, the residue which is left when the judicial and legislative powers are subtracted: Casey, Constitutional Law in Ireland (3rd ed., Round Hall, Dublin, 2000), pp. 230 and 231. Perhaps the clearest example of this is in the related field of the control of entry of persons to the State. Until the enactment of the Aliens Act 1935, this was an executive function. The Executive granted passports to Irish persons, and allowed entry into the State to those which it had either agreed in advance to permit to enter, or was prepared to permit entry. One of the features which made the case of *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 so intriguing was the fact that after the passage of the Aliens Act 1935, it appeared that little in substance had changed: the decision on entry or exclusion was one made by the Minister. But that case turned on the fact that while the same decision was made by the same person, it was now being made by a Minister, not in the exercise of an executive power, but rather as the delegate of the legislature. Crucially that meant that the legislature was required to set out principles and policies by which that power should now be exercised by the Minister, who was in this sense merely *persona designata*, that is, the person identified to exercise the power."

75. See also *N.V.H v. Minister for Justice & Equality* [2017] IESC 35; [2018] 1 I.R. 246; [2017] 1 I.L.R.M. 105 (at paragraph 11 of O'Donnell J.'s judgment).

> "Nor do I think that any inherent executive power could avail the applicant here. The control of entry to the State by non-citizens, and the range of activities in which they can engage while here, was as a matter of history a core function of the executive power. The question as to what extent that executive power can remain if

> legislation seeks to control the area is an interesting one rarely debated. But even if there remains a residual executive discretion after legislative regulation, it could not be operated to effect the repeal or amendment of a section of legislation which explicitly provided that an asylum seeker should not seek or obtain employment while in the refugee system. It was after all decided as long ago as 1610 in the *Case of Proclamations* (1610) 12 Co. Rep. 74 that the royal prerogative did not extend to repealing or overriding any legislation, and the same must be capable of being said, *a fortiori*, of the executive power in a constitution which recognises a separation of powers. […]"

76. Returning to the present case, I did not understand counsel for the State respondents to disagree, at the level of general principle, with the proposition that the legislative branch may introduce legislation which regulates what had previously been a power of the executive branch of government. (See §45 of the State respondents' written legal submissions). Rather, the dispute between the parties in the present case centres instead on whether the two pieces of legislation relied upon have the effect of ousting the executive power. This is, ultimately, a question of statutory interpretation and may require consideration of whether any particular canons of construction apply. Is there, for example, any presumption for or against legislation having this effect? Is a finding that the executive power has been ousted more likely where the legislation at issue engages fundamental rights?

77. The judgment of the Supreme Court in *Laurentiu* did not have to consider how the question of statutory interpretation should be addressed. This is because the dispute in that case had been confined to the validity of the delegation to the Minister, under the Aliens Act 1935, of a power to make secondary legislation. The Supreme Court had not been asked to address, in terms, the question of whether the enactment of the Aliens Act 1935 had ousted *entirely* the executive power to regulate immigration. Indeed, the judgments of the majority are careful to emphasise that the extent of the executive power of the State was not in issue. The judgments proceed on the basis that the purported

effect of the Aliens Act 1935 was to confer a power on the Minister to regulate matters of immigration, without having provided a proper statement of principles and policies.

78. It is, therefore, necessary to look elsewhere for guidance on the question of statutory interpretation. In this regard, Aer Lingus has cited the landmark decision of the House of Lords in *Attorney General v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508. There, the House of Lords held that the enactment of legislation, which regulated the temporary taking and occupation of property for the purposes of the defence of the realm, precluded resort to the royal prerogative to achieve the same result. On the facts, the government had taken temporary occupation of a hotel located in England during the first world war. The hotel was used for administrative purposes in connection with public defence.

79. The primary issue for determination in the proceedings had been whether the executive branch of government could justify their action in taking possession of the hotel, without payment of rent or compensation, under the sanction of the royal prerogative. The answer to this question turned, in part, on whether the royal prerogative had been abated, abridged or curtailed by the Defence Acts, which, relevantly, provided for statutory compensation where property had been commandeered.

80. The principles of statutory interpretation to be applied in determining whether legislation has had the effect of displacing a prerogative power were summarised as follows by Lord Parmoor (at pages 575/6 of the reported judgment).

> "The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. I think that the statutory provisions applicable to the interference by the Executive with the land and buildings of the respondents, bring the case within the above principle. It would be an untenable proposition to suggest that Courts of law could disregard the protective restrictions imposed by statute law where they are applicable. In this respect the

> sovereignty of Parliament is supreme. The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words, by necessary implication, or, as stated in Bacon's Abridgement, where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong. Statutes which provide rent or compensation as a condition to the right of the Executive to take over the temporary possession of lands or buildings on the occasion of public exigency come, in my opinion, within the category of statutes made for the advancement of justice and to prevent injury and wrong. This is in accord with the well-established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment. I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced."

81. As appears, the approach to statutory interpretation is more nuanced than that posited by Ryanair and Aer Lingus. It is not simply a question of identifying a potential overlap between a pre-existing executive power and subsequent legislation. Rather, it is also necessary to consider the subject-matter of the legislation, and, in particular, whether it introduces safeguards or protections in favour of an individual.

82. The principles in *De Keyser's Royal Hotel Ltd* are, of course, not directly applicable to the constitutional order under this jurisdiction. What is at issue in the present case is not the royal prerogative, but rather the powers of the executive branch of the government. Article 28.2 of the Constitution of Ireland provides that these powers are to be exercised by the Government.

> 2 The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.

83. Even allowing for this crucial distinction, the approach to statutory interpretation adopted in *De Keyser's Royal Hotel Ltd* has, nevertheless, some resonance. In particular, the emphasis on whether the legislation at issue regulates conduct which interferes with the

property or liberty of individuals chimes with domestic case law. A distinction appears to be drawn between the exercise of an executive power which would cut against protections afforded to an individual under legislation, and an exercise of an executive power which confers a *benefit* on an individual. The courts here have, on a number of occasions, held that the executive branch is entitled to establish non-statutory schemes which *benefit* individuals, even in parallel with existing legislation in the same field. The Supreme Court in *Bode v. Minister for Justice Equality and Law Reform* [2008] 3 I.R. 663 held that the executive branch, in the exercise of the inherent power of the State, was entitled to establish a non-statutory scheme (the so-called "Irish Born Child scheme") which conferred the benefits of residency upon a category of foreign nationals. The judgment distinguished such an *ex gratia* scheme from an arrangement where legal rights of individuals may fall to be considered and determined.

84. In *C.A. v. Minister for Justice and Equality* [2014] IEHC 532, the High Court rejected an argument that the executive branch had acted unlawfully by operating the so-called "direct provision" scheme for applicants for asylum without any express legislative authorisation. Mac Eochaidh J. held that the government had lawfully exercised its executive power under Article 28.2, and had not trespassed on the exclusive law making functions of the Oireachtas under Article 15.

85. The distinction between extra-statutory schemes which benefit individuals, and those which purport to impose obligations and burdens, has been emphasised by the High Court (Finlay Geoghegan J.) in *Gama Endustri Tesisleri Imalat Montaj A.S. v. The Minister for Enterprise Trade and Employment* [2005] IEHC 201; [2007] 3 I.R. 472.

86. (These cases are discussed in detail by Mr Conor Casey (Max Weber Fellow at the European University in Florence) in an excellent article, which has been cited by Aer Lingus in its written legal submissions: Casey (Conor), *Underexplored Corners:*

Inherent Executive Power in the Irish Constitutional Order (2017) 40(1) DULJ 1. Casey also discusses the question of what factors distinguish between (i) the creation of non-statutory executive-power-based rules and policy, and (ii) the promulgation of legislation, which is exclusively vested in the Oireachtas).

87. Insofar as is relevant to the issues which fall for determination in these proceedings, the following observations may be made arising out of this case law. The mere fact that there is a potential overlap between the field covered by pre-existing executive power and subsequent legislation does not necessarily result in the ouster of the executive power. The courts are prepared to countenance the possibility of executive powers being exercised in parallel to statutory powers. It is, ultimately, a question of statutory interpretation as to whether the subsequent legislation has—either expressly or by necessary implication—the effect of ousting the executive power. In interpreting the legislation, attention should be paid to its subject-matter, and, in particular, whether the legislation regulates governmental conduct which interferes with an individual's rights. If the legislation introduces safeguards or protections on such conduct, then the more likely it is that the legislative intent had been that the statutory procedure must be followed in all cases and that there is no parallel executive power remaining. The existence of the statutory procedure will not necessarily preclude executive action which confers a *benefit* on an individual.

88. Ryanair and Aer Lingus, therefore, put the matter too far when they suggest that the mere fact that there is an overlap between the content of the government's public statements and that which might be the subject of dissemination under the Health Act 1970 or of regulations under the Health Act 1947 means that the government were not entitled to rely on the executive power. Rather, it is necessary to consider in more detail the subject-

matter of the legislation and, in particular, whether it introduces safeguards or protections in respect of an individual's rights.

89. I turn now to apply these principles to the interpretation of the two pieces of legislation relied upon by Ryanair and Aer Lingus as ousting any executive power to provide public health information. The first in time is the Health Act 1947. This legislation authorises the Minister for Health to make regulations providing, *inter alia*, for the prevention of an infectious disease. Such regulations may, in particular, provide for any of the matters mentioned in the Second Schedule of the Act. The terms of paragraph 21 of the Second Schedule have already been set out earlier. As appears, regulations may provide for the giving to the public of information and advice with respect to infectious disease by advertisements, notices, pamphlets, lectures, radio, cinema exhibitions or any other means.

90. On Aer Lingus' interpretation, the Health Act 1947 envisages that the *content* of any information or advice must be embodied in the form of regulations before same can be given to the public. This, it is suggested, would allow parliamentary oversight in respect of the content of the information or advice. It is further submitted that this is the only procedure by which information or advice can be given to the public. The pre-existing executive power to do so is displaced.

91. With respect, this cannot be the correct interpretation of the relevant statutory provisions. In conferring a power upon the Minister for Health to make regulations, the Oireachtas authorised him to prescribe the procedure by which information or advice might be given to the public. There is no requirement under the statutory scheme that the *content* of that advice must be embodied in regulations. The following illustrate the type of things which might be the subject of regulations by virtue of the combined effect of section 31 and paragraph 21 of the Second Schedule. The Minister can make regulations requiring the

Health Service Executive, for instance, to provide information and advice. See, for example, the Infectious Diseases (Preventative Measures) (HIV PrEP) Regulations 2019 (S.I. No. 531 of 2019), whereby the HSE is required to provide "medical services relating to HIV PrEP", the definition of which includes the provision of advice and information on risk reduction. The provisions of the Health Act 1947 would also allow the Minister for Health, having consulted with the Minister for Finance in accordance with section 5(4), to authorise the making of payments to third parties in respect of the costs incurred in, for instance, publishing advertisements in newspapers.

92. Crucially, however, there is nothing in the wording of the statutory provisions which indicates a legislative intent to displace the executive power of the government to give information or advice to the public in respect of infectious diseases. The giving of such information or advice does not interfere with an individual's rights. This is not an instance, therefore, where the Oireachtas has enacted legislation in order to provide protections or safeguards to an individual who might otherwise be adversely affected by governmental action, and, by so doing, implicitly ousted any overlapping executive power. There is no inconsistency between the existence of a statutory power on the part of the Minister for Health to make regulations, and the continued existence, in parallel, of an executive power whereby the government can also provide information and advice in respect of infectious diseases.

93. I am satisfied that this is the correct interpretation, giving the relevant statutory provisions their ordinary and natural meaning. For the sake of completeness, I should add that I am also satisfied that the interpretation contended for by Ryanair and Aer Lingus would be "absurd" in the sense that that term is used in section 5 of the Interpretation Act 2005. (See *Irish Life and Permanent Plc v. Dunne* [2015] IESC 46; [2016] 1 I.R. 92, [35] to [45]). An interpretation of the Health Act 1947 which prohibited the government,

including An Taoiseach, from providing information and advice to the public in respect of an infectious disease would be contrary to the legislative intent as gathered from the provisions of the Health Act 1947 as a whole. The precise purpose of the legislation is to prevent the spread of infectious diseases. It would be contrary to this legislative purpose were the government to be precluded from speaking directly to the public on these issues. As the experience of the coronavirus confirms, the prevention of infectious diseases requires urgent action and the public health information may require regular revision in order to keep pace with our growing knowledge of the disease. The notion that public health advice has to be formally embodied in a statutory instrument before the government can speak to this issue, and only then through the Minister for Health, is absurd and cannot have been intended by the Oireachtas.

94. The case for saying that the provisions of the Health Act 1970 have displaced the executive power to provide public health advice is, if anything, even weaker. Again, the legislation does not introduce safeguards or protections in respect of an individual's rights. The effect of section 71 is merely to authorise the Minister for Health to make arrangements for the dissemination of information and advice on matters relating to health and health services. The section does not empower the Minister to make regulations in this regard, and, consequently, there is no provision for parliamentary oversight equivalent to that said to exist under section 5 of the Health Act 1947.

95. Moreover, the range of information which can be provided under section 71 of the Health Act 1970 is vast, encompassing as it does information and advice on all matters relating to health and health services. Had the legislature intended to introduce legislation which would preclude any member of the government (other than the Minister for Health) from publishing information and advice—such as on the benefits of physical exercise or the

need for a balanced diet—then it would have done so in explicit terms. Such a radical reduction in executive power cannot readily be implied.

96. In summary, therefore, the government enjoys an executive power to provide travel advice and/or health information and advice to the public. This executive power extends to include the giving of advice to persons entering the State to restrict their movements and/or social contacts for a temporary period in order to reduce the risk of spreading an infectious disease. This executive power has not been ousted by the provisions of the Health Act 1947 nor by the Health Act 1970.

SOURCE OF GOVERNMENT'S POWER TO PROVIDE ADVICE

97. It should be noted that, for the purposes of the "statutory ouster" argument discussed immediately above, Ryanair accepted in principle that "but for" the legislature's intervention, the government would have had power to provide advice and information to the public. It is not necessary, therefore, in order to resolve these proceedings to address in this judgment the vexed question as to the precise *source* of such a power. In particular, it is unnecessary to consider whether the provision of travel advice and/or public health information represents the exercise by the executive branch of a power inherent in a sovereign State (akin to the power to control immigration), or whether it derives from a third source, e.g. some form of general administrative power on the part of the executive branch to do that which is not prohibited. (See, generally, Harris, "'The Third Source of Authority' for Government Action Revisited" (2007) 123 L.Q.R. 225).

EUROPEAN LAW GROUNDS

98. Ryanair contends that the publication of the impugned travel advice is in breach of a number of provisions of the Treaty on the Functioning of the European Union ("***TFEU***"). In particular, it is alleged that there has been a breach of the right of citizens to free movement (articles 20 and 21); the right of workers to free movement (article 45); the right of establishment (article 49); and the right to provide services (article 56).

99. Counsel on behalf of Ryanair readily conceded that a Member State, such as the Irish State, is, in principle, entitled to derogate from EU law rights on the grounds of public health. This concession was sensibly made. Insofar as the right to free movement is concerned, for example, express provision is made under the Citizenship Directive (Directive 2004/38/EC) for measures restricting freedom of movement on the grounds of public health. See article 29 of the Citizenship Directive as follows.

> 1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.
>
> 2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.
>
> 3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

100. The World Health Organisation declared the novel coronavirus disease, Covid-19, to be a pandemic on 11 March 2020.

101. Counsel accepts that had the Minister for Health made regulations under section 31A of the Health Act 1947 (as amended) which imposed, for example, a requirement upon persons entering the State to restrict their movements for a specified period, i.e. a type of

quarantine, then this would have been consistent with EU law. The complaint made by Ryanair under the EU law heading, therefore, seems to be directed exclusively to the *form* of the impugned travel advice rather than to the substance of same. It has to be said, however, that it is difficult to discern from the pleadings what precise legal objection is being made in this regard.

102. The case as pleaded in the statement of grounds is premised largely on an alleged breach of the principle of legal certainty. The implication seems to be that if and insofar as the Irish State seeks to rely on a derogation from the various rights under the TFEU cited in the pleadings, then this can only be done by the enactment of legislation. This complaint was refined further in oral submission, wherein it was suggested that the power to derogate from the requirements of a treaty provision can be exercised only if the Member State complies fully with its own domestic constitutional order.

103. It should be noted that the reliefs sought in the originating notice of motion filed in the Central Office of the High Court on 4 August 2020 are actually narrower than those sought in the statement of grounds. The only relief referable to EU law to be found in the motion papers is as follows.

> "L. A Declaration by way of an application for judicial review that the Government's International Travel Restrictions, by their terms, stand in breach of the general EU law principle of legal certainty."

104. A separate complaint is made by Ryanair that some of the concepts employed in the impugned travel advice are vague and uncertain. In particular, it is pleaded that the government publications do not contain a legal definition of the concepts of "essential travel" and "essential work"; and do not explain what is meant by the request to "restrict your movements".

105. I address each of these arguments, in turn, below.

(i). Derogation must be in legislative form

106. The first argument is to the effect that any derogation from a treaty provision, e.g. from the right to free movement, must take legislative form. On this argument, a non-legislative measure, such as *advice* counselling against travel to certain countries in the context of a pandemic, is capable of representing a restriction on treaty rights, but is incapable of justifying a derogation from those rights precisely because it is not in legislative form. With respect, this argument, if followed through to its logical conclusion, would mean that a Member State which took the *lesser* step of merely publishing travel advice would be in a worse off position than a Member State which introduced legislation to close its borders and to impose mandatory quarantine. On the logic of Ryanair's case, only the second Member State could rely on the derogation on public health grounds. The fact that its travel advice was not in legally binding form would preclude the first Member State from availing of the derogation.

107. Counsel for the State argued, *reductio ad absurdum*, that if statute law were always necessary in order for a Member State to avail of a derogation, then all non-binding travel advice would, by definition, be in breach of the Treaty on the Functioning of the European Union. This point is well made. The fatal flaw in Ryanair's case is that it is premised on an erroneous interpretation of EU law as allowing for legally binding travel restrictions, but precluding non-binding travel advice. This is incorrect. The greater must include the lesser, and the Irish State is entitled as a matter of EU law to issue non-binding travel advice in the form that it has done.

108. Ryanair cited the judgment in *Copymoore Ltd v. Commissioners of Public Works in Ireland* [2013] IEHC 230 as supposed authority for the proposition that any derogation from EU law by a Member State must be in legislative form. The case concerned a challenge to a tender process which had been subject to the requirements of the (former) public procurement directive (Directive 2004/18/EC). On the facts, the Minister for

Public Enterprise and Reform had issued a circular which purported to make changes to an ongoing public procurement process. The High Court (Hogan J.) held that a circular may not compromise rights or entitlements deriving from European Union law (see paragraph 57).

> "The Minister can, of course, exercise the executive power of the State in Article 28.2 of the Constitution in order to give general directions to the public sector and may naturally generally do so by means of circular. But just as a circular may not alter or vary the general law, so too a circular may not compromise rights or entitlements deriving from European Union law. […]"

109. On the facts, the court held the circular had distorted the assumptions on which the entire tender process had been based, and thus inadvertently undermined a key objective of the public procurement directive.

110. In truth, *Copymoore Ltd* is not a derogation case at all. Rather, the case was concerned with an administrative measure, i.e. the Ministerial circular, which had the purported effect of breaching the requirements of a directive. The judgment is thus authority for the unexceptionable proposition that the executive power cannot be relied upon to disapply binding obligations under EU law. There is no suggestion in the judgment that the changes purportedly introduced by the Ministerial circular were authorised as a *derogation* provided for under the terms of the directive.

111. Ryanair's case is also internally inconsistent in that, on the one hand, it is premised on non-legislative measures being capable of involving a restriction on treaty rights (citing Case 249/81, *Commission v. Ireland*), yet, on the other hand, insists that a non-legislative measure is incapable of being relied upon as the basis for a lawful derogation from a treaty right. Put otherwise, the *form* of a measure, i.e. legislative or non-legislative, is treated as being crucial only in the context of derogation. No such distinction is, however, evident in the case law. Counsel on behalf of the State respondents referred, by way of illustration, to Case C-438/05, *Viking Line*, [2007] E.C.R. I-10779 and Case

C-341/05, *Laval*, [2007] E.C.R I-11767. In each of these cases, the Court of Justice held that collective industrial action which restricted a fundamental freedom guaranteed by the treaty was capable of being justified in the public interest. Neither judgment suggests that the fact that no legislative measure was involved precluded the possibility of a derogation being justified by an overriding reason of public interest, such as the protection of workers.

(ii). Derogation must comply with domestic constitutional order

112. The EU law argument was refined further in oral submission. Counsel for Ryanair, Mr Martin Hayden, SC, submitted that the power to derogate from the requirements of a treaty provision can be exercised only if the Member State complies fully with its own domestic constitutional order. (Day 2 transcript, pp. 66 - 73). However, as counsel for the State respondents, Mr Eoin McCullough, SC, correctly observed, this refined argument adds nothing to the case. If the impugned travel advice were found by this court to be in breach of the domestic constitutional order, then it would be set aside by reference to the grounds of challenge which allege a breach of national law. It would be neither necessary nor appropriate to go any further, and to make a separate finding in respect of the grounds which allege that this also represents a breach of EU law.

113. (As it happens, for the reasons set out earlier, I have concluded that the issuing of the public health information and advice is permissible under the domestic constitutional order).

(iii). The travel advice is not imprecise

114. Ryanair's argument that the terms of the impugned travel advice are imprecise is not well founded for the following reasons. First, the request that persons entering the State restrict their movements is elaborated upon in the relevant paragraph itself, as follows.

> "Restricting your movements means staying indoors in one location and avoiding contact with other people and social situations as much as possible."

115. Indeed, this formulation has been replicated in Ryanair's own statement of grounds at paragraph (d)(A).

116. Further elaboration of what is involved in the concept is to be found, by a hyperlink on the gov.ie website, as follows.

> "The request to restrict your movement means:
>
> - do not use public transport if possible. If you have no option but to use public transport, you must wear a face covering, […] The wearing of a face covering is required by law when using public transport, unless you have a diagnosed medical reason […]
> - do not visit others
> - do not meet face-to-face with anyone who is at higher risk from COVID-19"

117. Secondly, the concept of "essential travel" is largely self-explanatory. Such a concept is a standard term commonly used in the provision of travel advice not only in Ireland, but around the world. Pointedly, it is a term used by the European Commission in its communications on Covid-19. It is a simple and clear concept. The concept of "travel for essential work" is similarly simple and clear.

118. For the reasons set out above, I have concluded that the impugned travel advice is clear in its terms. Without in any way detracting from this conclusion, it should also be reiterated that the content of the government's published statements is advisory only. The case law relied upon by Ryanair—such as the judgment in C-183/14, *Salomie*, EU:C:2015:454—is concerned with the need for precision in the context of rights and obligations. See, for example, paragraphs 31 and 32 of *Salomie* as follows.

> "As the Court has held on numerous occasions, it follows, inter alia, that EU legislation must be certain and its application foreseeable by those who are subject to it. That requirement of legal certainty must

> be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them (judgment in *Ireland v Commission*, 325/85, EU:C:1987:546, paragraph 18).
>
> Similarly, in areas covered by EU law, the legal rules of the Member States must be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and to enable national courts to ensure that those rights and obligations are observed (see judgment in *Commission v Italy*, 257/86, EU:C:1988:324, paragraph 12)."

119. The impugned travel advice does not impose criminal or even civil liability, nor does it confer rights on individuals. It does not, therefore, have to meet the same standards of precision as would be expected of legislation. In particular, mere advice may legitimately be expressed at a higher level of generality than legislation.

Alleged breach of other freedoms not supported by evidence

120. The thrust of Ryanair's case as argued at the hearing before me was directed to the alleged impact of the impugned travel advice on the behaviour of potential passengers, which it is said has had a negative impact on the airline's business. These arguments are predicated on Articles 20 and 21 TFEU and the Citizenship Directive.

121. The case as pleaded, however, goes further and alleges that there has been a breach of the freedom of movement for workers under Article 45 TFEU. While it is, in principle, open to an *employer* to assert a breach of this article (Case C-350/96, *Clean Car Autoservice*, EU:C:1998:205), Ryanair has not put any evidence before the court which indicates that the impugned travel advice has had any impact on the free movement of the airline's own workers. The travel advice is not mandatory. Moreover, there is an express exemption from the requirement to complete a passenger location form in favour of aircraft crew. (See regulation 3 of the Health Act 1947 (Section 31A – Temporary Requirements) (Covid-19 Passenger Locator Form) Regulations 2020 (S.I. No. 181/2020)).

122. Ryanair similarly put no evidence before the court which indicates that the impugned travel advice has interfered with its freedom of establishment or its freedom to provide services (Articles 49 and 56 of the TFEU).

123. In any event, the impugned travel advice would not infringe any of those three treaty provisions in circumstances where any interference with, or derogation from, the rights is justified as a proportionate response to the public health crisis presented by the coronavirus pandemic.

CHARTER OF THE FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

124. Ryanair has alleged that the impugned travel restrictions involve a breach of its rights under Article 16 of the Charter, as follows.

> 16. The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

125. This provision should be read in conjunction with Article 52(6) as follows.

> 6. Full account shall be taken of national laws and practices as specified in this Charter.

126. The CJEU has held that the freedom to conduct a business is not an absolute right, but must be considered in relation to its social function. Consequently, restrictions may be imposed on the exercise of that freedom, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights. See, for example, Case C-544/10, *Deutsches Weintor eG*, EU:C:2012:526.

127. Article 52 of the Charter allows for the limitation of rights and freedoms. Ryanair contends, however, that the alleged breach of Article 16 cannot be justified under

Article 52(1) of the Charter because the impugned travel restrictions have not been "provided by law". Article 52(1) reads as follows.

> 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

128. The only authority proffered in support of this proposition is a passage from an Opinion of the Advocate General which was not subsequently endorsed by the Court of Justice. (Case C-70/10, *Scarlett Extended*, EU:C:2011:255).

129. The evidence before the court does not demonstrate that there has been any interference with Ryanair's freedom to conduct its business in accordance with EU law and national laws and practices. Ryanair remains free to conduct its business: the impugned travel advice does not affect the "essence" of the freedom to conduct its business. (See, by analogy, Case C-477/14, *Pillbox 38 (UK) Ltd*).

130. Any link between the impugned travel advice and the airline's business is too remote to "engage" Article 16 of the Charter. The fact that the State advises that non-essential travel to certain locations should be avoided or that precautions should be taken by persons returning from travelling abroad, does not restrict the freedom of those individuals to choose to travel nor the freedom of the airline to conduct its business. It must also be borne in mind that the existence of the coronavirus pandemic *per se* will have resulted in reduced passenger demand. Even in the absence of government advice, many individuals and companies will have decided to avoid travel for health and safety reasons.

131. Moreover, and in any event, the freedom is expressly delimited in terms of EU law and national laws and practices. The issuing of travel advice complies with both national law and EU law. In particular, it is authorised under article 29 of the Citizenship Directive.

PRELIMINARY OBJECTIONS REVISITED

132. Having carefully considered the substance of Ryanair's challenge, I have concluded that the application for judicial review should be dismissed on its merits. It will be recalled, however, that the State respondents have raised a number of preliminary objections to the proceedings. The logic of the State respondents' position is that Ryanair failed to meet certain preliminary, threshold requirements, and that, in consequence, it is not necessary for the court to embark upon an examination of the *substance* of the case.

133. I have deliberately deferred consideration of these preliminary objections to this point in the judgment. This is because in order to properly understand the preliminary objections it had been necessary for the reader first to have an appreciation of the substantive legal issues which Ryanair seeks to agitate in the proceedings. An examination of the preliminary objections at the start of the judgment would have lacked context.

134. For the reasons which follow, I am satisfied that none of the three preliminary objections raised are made out.

(i) Is travel advice justiciable?

135. The first objection made is that the issuing of advice by the government is not amenable to judicial review. Put otherwise, it is said that the issuing of advice is not justiciable before the courts. The implication here being that the giving of travel advice and/or public health advice is a matter for the executive branch of government and is not subject to review by the judicial branch. This proposition might have had some force had Ryanair sought to challenge the impugned travel advice on "rationality" or "reasonableness" grounds. Had the gravamen of Ryanair's challenge been that the criteria for selecting countries for inclusion on the "green list" were logically flawed or that the recommendation for a temporary quarantine upon entry into the State did not

have a scientific basis, then there might well have been an argument as to whether the court has any function in gainsaying travel advice and/or public health advice issued on behalf of the government. In truth, however, Ryanair's case had a much narrower focus and was directed to what might be described as procedural or jurisdictional issues. The principal complaint made by Ryanair is that the government's public statements represented more than mere advice, and, in consequence, involved a trespass upon the legislative branch of government's domain. Ryanair also argued, in the alternative, that the legal entitlement to provide public health advice in respect of infectious diseases is confined to the Minister for Health.

136. For the reasons set out earlier, I have concluded that these grounds of challenge are not well founded. Given the nature of the arguments made by Ryanair, however, it would not have been possible to dispose of the case by reference to a "bright line" rule that advice published by the government is never amenable to judicial review. This is because the precise issue in the case is whether the publications represented advice or not.

137. A loose analogy might be drawn with the judgment in *McCrystal v. Minister for Children* [2012] 2 I.R. 726. There, the Supreme Court had to consider whether a publication by the government which purported to provide neutral information in relation to a pending constitutional referendum was invalid for breaching the principle that the government is not entitled to expend public funds in support of a constitutional referendum. In order to determine whether there had been a breach of the constitutional regime, it had been necessary for the court to consider the nature of the information provided. Similarly, for the purposes of resolving the proceedings before me, it was necessary to consider the content of the government's published statements in order to decide whether they went beyond mere advice. It follows that the issues raised in the pleadings are justiciable.

138. It should also be noted that, in at least one instance, the travel advice has been incorporated by reference into secondary legislation. More specifically, a concession under the social welfare legislation, which facilitates foreign holidays by allowing recipients to claim jobseeker's benefit notwithstanding a temporary (two week) absence from the State, is now only available where the holiday is "in accordance with the Covid-19 General Travel Advisory in operation by the Department of Foreign Affairs". See the Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 9) (Absence from the State) Regulations 2020 (S.I. No. 242 of 2020).

139. The practical consequence of the travel advice having been incorporated by reference (as opposed to having been replicated in full in the regulations) is that the entitlement to avail of the concession will *change* from time to time in accordance with the content of the travel advice at any given moment. Had the travel advice applicable at the time the regulations were made been set out in terms in the regulations themselves, then this flexibility would have been lost.

140. The travel advice, *pro tem*, has thus been given specific legal effect in the context of social welfare payments. Were a legal challenge to the regulations to be brought by an applicant with *locus standi*, it could not be a complete answer to the challenge to say that the travel advice has been given in the exercise of the executive power and hence is not justiciable. Whereas this might be true of advice in general, the fact that the advice now has a specific legal effect on certain individuals, i.e. it restricts the availability of the "holiday" concession, means that it is, in principle, capable of judicial review. Were it otherwise, it would produce the anomalous result that had the travel advice been replicated in full in the regulations, it would be amenable to judicial review, but would be immune from judicial review if it is incorporated by reference only. This would be anomalous because it would privilege (i) advice which has been given indirect legal

effect by incorporation by reference in regulations, over (ii) advice prescribed in the text of regulations. There is no logical justification for this difference in treatment in circumstances where the impact on the affected individual is the same irrespective of where the advice is located.

141. In summary, given that the outcome of these proceedings turns largely on whether or not the government's published statements represent *advice*, it would not be appropriate to dismiss the case on a preliminary basis on the grounds that government advice is never justiciable. That would be to beg the question. This is especially so given the hybrid status the impugned travel advice has in the context of certain social welfare payments.

(ii). Locus standi

142. The second objection raised against Ryanair is that the airline does not have standing (*locus standi*) to advance certain arguments. In particular, objection was made that Ryanair is not entitled to invoke the rights of third parties said to be affected by the impugned travel advice (such as those in receipt of jobseeker's benefit). It is submitted that Ryanair, as a corporate entity, has no standing to invoke the fundamental rights under the Irish Constitution which, by their nature, inhere in human persons; nor to assert for itself the rights of other people, a constitutional *jus tertii*. Ryanair is not therefore entitled to invoke personal rights, such as the right to liberty or the right to travel within and outside of the State. The State respondents did accept, however, that Ryanair's commercial interests gave it standing to pursue what might be described as the "separation of powers" argument.

143. The State respondents cite *Cahill v. Sutton* [1980] I.R. 269; *Iarnnód Éireann v. Ireland* [1996] 3 I.R. 321, and *Friends of the Irish Environment v. The Government of Ireland* [2020] IESC 49 in support of their submission.

144. In response, counsel on behalf of Ryanair submits that the airline is not pleading that the impugned travel advice breaches the constitutional rights of others *per se*, but is instead pleading that measures affecting such rights must, according to the Constitution of Ireland, be done by law. Ryanair submits that the impugned travel advice amounts to restrictions on travel and, as such, ought to be in legislative form. The proceedings are said to present a question of law, not a question *in personam*.

145. More ambitiously, counsel submits Ryanair is in a "unique" position, being "a major facilitator" of people's ability to exercise their constitutional rights of free movement, to pursue a challenge to the impugned travel advice and has standing in accordance with the principles identified by the Supreme Court in *Friends of the Irish Environment* (at paragraphs 7.5 and 7.9 of the judgment).

Discussion and decision on locus standi

146. There is a large measure of agreement between the parties on the question of *locus standi*. Such disagreement as there is appears to be centred on a difference in understanding of the purpose for which Ryanair references the position of the recipients of social welfare and of persons employed in the public service.

147. The parties are agreed that Ryanair has standing to pursue what might be described as the "separation of powers" issues. In particular, Ryanair is entitled to argue that the impugned travel advice should have been issued in the form of regulations made pursuant to the Health Act 1947 (as amended). The evidence establishes that Ryanair has a commercial interest in the proceedings. It is also entitled, notwithstanding its status as a corporate entity rather than a natural person, to seek to ensure compliance with the separation of powers.

148. The position in respect of personal rights is more complicated. Whereas individual shareholders or employees of Ryanair might well have standing to challenge the

impugned travel advice by reference to its alleged impact on their right to freedom of movement within and without the State, it is difficult to understand how the corporate entity itself could have standing to maintain such a case.

149. The submission made by counsel on behalf of Ryanair, to the effect that the company is better placed to undertake the financial burden (including the potential liability of having to pay the legal costs of the other side if unsuccessful) of pursuing a constitutional challenge than an individual passenger, has the merit of pragmatism. However, the rules in relation to standing require more than mere financial might. The circumstances in which a corporate entity is entitled to pursue constitutional litigation have been very recently discussed by the Supreme Court in *Friends of the Irish Environment v. The Government of Ireland* [2020] IESC 49.

150. The judgment reiterates that the general rule is to the effect that, in order to have standing, a claimant must be able to show that rights which that claimant enjoys have potentially been interfered with (or are in danger of being interfered with) by the measure whose constitutionality is being impugned. Irish constitutional law does not recognise a so-called *actio popularis*, being an action brought, as it were, on behalf of the public as a whole. Nor does it recognise a so-called *jus tertii*, or an action in which a person seeks to rely on rights enjoyed by others.

151. The general rule on standing is, however, subject to exceptions. The Supreme Court in *Friends of the Irish Environment* examined two judgments where an exception had been allowed, namely, *Society for the Protection of Unborn Children (Ireland) Ltd v. Coogan (No. 1)* [1989] I.R. 734, and *Irish Penal Reform Trust Ltd v. Governor of Mountjoy Prison* [2005] IEHC 305. The first case concerned the rights of the unborn child, and thus would inevitably involve some other person or body seeking to vindicate those rights. The second case concerned an allegation that there were systemic deficiencies in

the treatment of prisoners with psychiatric problems. The High Court (Gilligan J.) held that prisoners with psychiatric problems were among the most vulnerable and disadvantaged members of society. Many prisoners might be ignorant of their rights and fear retribution if they challenged the prison authorities. Such prisoners might well be unaware of the constitutional right to receive a better standard of treatment. This put the particular category of prisoner in an extremely disadvantaged position and justified a relaxation from the general rule on standing.

152. The Supreme Court then turned to apply those principles to the facts of *Friends of the Irish Environment*. There, the applicant, an environmental non-governmental organisation, had sought to challenge the government's statutory plan for tackling climate change. Part of the challenge involved an allegation that the plan failed to vindicate the constitutional right to life and to bodily integrity. Counsel for the applicant conceded that, as a corporate entity, the applicant did not itself enjoy the rights sought to be relied upon. It was contended, however, that the case came within the exception to the general standing rule.

153. The Supreme Court rejected this submission, holding that the constitutional challenge in *Friends of the Irish Environment* was a far cry from the circumstances which would justify an exception.

> "I would accept, therefore, that there are circumstances in which an overly strict approach to standing could lead to important rights not being vindicated. However, that does not take away from the importance of standing rules in our constitutional order. The underlying position was reiterated in the recent decision of this Court in *Mohan*, which re-emphasised the need, ordinarily, for a plaintiff to be able to demonstrate that they have been affected in reality or as a matter of fact by virtue of the measure which they seek to challenge on the basis that it breaches rights. That remains the fundamental proposition. The circumstances in which it is permissible to accord standing outside the bounds of that basic principle must necessarily be limited and involve situations where there would be a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted.

> That leads to a consideration of the reasons why a corporate entity has chosen to bring these proceedings relying, as FIE does, on personal rights which it does not enjoy. Other than a suggestion that it was desire to protect individuals from a possible exposure to the costs of unsuccessful proceedings, no real explanation was given as to why an individual or individuals could not have brought these proceedings instead of FIE. There does not seem to be any practical reason why FIE could not have provided support for such individuals in whatever manner it considered appropriate. It seems to me that these proceedings are a far cry from the kind of circumstances which this Court accepted justified departure from ordinary standing rules in cases such as *Coogan* and *Irish Penal Reform Trust*. To hold that FIE had standing in the circumstances of this case would, in my view, involve a move to a situation where standing was greatly expanded and the absence of standing would largely be confined to cases involving persons who simply maintain proceedings on a meddlesome basis. I do not consider that there is a justification for such a wide expansion of our standing rules. Nor do I consider that FIE have put forward any adequate basis to explain why these proceedings could not have been brought in the ordinary way by persons who would undoubtedly enjoy the right to life and the right to bodily integrity on which reliance is placed. In those circumstances I would conclude that FIE does not have standing to maintain the constitutional rights based aspect of their case."

154. It seems to me that a similar logic would apply to any challenge to the constitutional validity of measures which is predicated upon an alleged interference with an individual's right to free movement within and without the State. Thus, for example, if a challenge is to be brought against the secondary legislation which restricts the "holiday" concession in respect of the payment of social welfare to holidays taken in accordance with the government's travel advice, then the appropriate applicant is an individual who is actually in receipt of jobseeker's benefit. Similarly, if there is to be a challenge to the guidance applicable to public servants, then such a challenge should be brought by an individual who is in receipt of a public service salary.

155. In truth, however, the case actually being advanced by Ryanair is subtly different. Ryanair is not directly challenging either the secondary legislation regulating the "holiday concession" or the circular regulating public service pay. Rather, these matters

are cited as supposed illustrations of the impugned travel advice having an effect on the rights of individuals. This has been done in rejoinder to the State respondent's argument that the advice has no legal effect. As explained at paragraphs 50 and 51 above, I have concluded that Ryanair's argument on the jobseeker's benefit is incorrect on the merits. Nevertheless, I am satisfied that Ryanair had *locus standi* to raise the argument, in the particular form in which it has been advanced in this case. Ryanair was not entitled to pursue the point about public servants' pay because it has not been pleaded in the statement of grounds.

156. Turning now to the related question of whether Ryanair has standing to raise the EU law arguments relied upon, my conclusions are as follows. Insofar as the right of free movement provided for under Articles 20 and 21 TFEU (and given effect to under the Citizenship Directive) are concerned, Ryanair does not have *locus standi*. These are rights inhering to the benefit of *individual* citizens of the European Union, and cannot be asserted, indirectly, by a corporate entity such as Ryanair.

157. As appears from the earlier discussion, I have considered the substance of Ryanair's "freedom of movement" arguments *de bene esse* notwithstanding my finding that the airline does not have *locus standi* to pursue this aspect of its case. I have taken this unusual approach because of the urgency of the proceedings: it would be unsatisfactory to have resolved this aspect of the case on a *locus standi* objection lest this finding be overturned on appeal with the consequence that the proceedings would then have to be remitted to the High Court for a hearing on the substance.

158. The case law on the free movement of workers confirms that an employer may be entitled to rely on rights conferred on individual workers under Article 45 TFEU. In particular, the right of workers to be engaged and employed without discrimination necessarily entails *as a corollary* the employer's entitlement to engage them in accordance with the

rules governing freedom of movement for workers (Case C-350/96, *Clean Car Autoservice*, EU:C:1998:205). Ryanair might, in principle, have had *locus standi* to pursue an argument based on the free movement of workers under Article 45 TFEU. In the event, however, Ryanair has not put any evidence before the court which indicates that the impugned travel advice has had any impact on the free movement of the airline's own workers. Moreover, there is an express exemption from the requirement to complete a passenger location form in favour of aircraft crew. (See regulation 3 of the Health Act 1947 (Section 31A – Temporary Requirements) (Covid-19 Passenger Locator Form) Regulations Passenger Locator Form Regulations (S.I. No. 181/2020)).

(iii). Mootness

159. The State respondents have pleaded that the proceedings are moot. More specifically, it is pleaded that the travel advice published on government websites is subject to continuous revision, and has already been amended, in the normal course, since 29 July 2020 (which is the version complained of in the proceedings). The judgments in *McDaid v. Sheehy* [1991] 1 I.R. 1 and *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274 are cited in support of this plea.

160. It is correct to say that the changing content of the information published by the government has resulted in the original form of complaint made by Ryanair having been overtaken by events. In particular, as discussed earlier, there has been a significant change in the wording of the travel advice published on the gov.ie website shortly after these proceedings were instituted, i.e. the change from "required" to "requested" (see paragraph 28 above). There was another significant development in the days immediately after the hearing before me concluded. More specifically, new regulations were brought in which, *inter alia*, preclude residents of the Dublin region from travelling to another county or to a State other than the State without reasonable excuse

(S.I. No. 352 of 2020). The is not, however, a penal provision for the purposes of section 31A.

161. It is not the function of the courts to provide advisory opinions, still less to provide rulings on a rolling basis as to the lawfulness or otherwise of the content of an official government website at any particular moment in time. It seems to me that the most practical way of approaching the proceedings is for this court to rule upon the content of the impugned travel advice as it stood at the conclusion of the exchange of the affidavits as of the first week in September 2020. Those affidavits have exhibited what was then the "current" version of the travel advice. The legality of this version was still a "live" issue in controversy between the parties. By focussing on this version of the impugned travel advice, this court seeks to avoid determining issues which are strictly speaking moot because of the evolving nature of the government's public statements. This approach allows the general legal principles to be stated (subject always to any appeal to an appellate court).

162. In any event, this is one of the rare cases where an exception to the general rule against deciding a moot is justified. The test to be applied in this regard has been set out as follows by McKechnie J. in *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274 (at page 299, paragraph 82)

> "(vii) matters of a more particular nature which will influence this decision include:-
>
> (a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for the case to retain its essential characteristic of a legal dispute;
>
> (b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;
>
> (c) the type of relief claimed and the discretionary nature (if any) of its granting, for example, certiorari;

(d) the opportunity for further review of the issue(s) in actual cases;

(e) the character or status of the parties to the litigation and in particular whether such be public or private: if the former, or if exercising powers typically of the former, how and in what way any decision might impact on their functions or responsibilities;

(f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law;

(g) the impact on judicial policy and on the future direction of such policy;

(h) the general importance to justice and the administration of justice of any such decision, including its value to legal certainty as measured against the social cost of the status quo;

(i) the resource costs involved in determining such issue, as judged against the likely return on that expenditure if applied elsewhere; and

(j) the overall appropriateness of a court decision given its role in the legal and, specifically, in the constitutional framework."

163. These proceedings raise important issues as to the separation of powers, and it is appropriate that the substance of same be addressed. The terms of the impugned travel advice are also a matter of ongoing controversy, even in their revised form. It seems, therefore, that the case meets the criteria at (a), (c), (f), (h) and (j) above.

CONCLUSION

164. The government acted lawfully in providing travel advice and public health advice in respect of the coronavirus pandemic on a non-statutory basis. The government is entitled, in the exercise of the executive power, to provide such advice to the public. Its entitlement to do so has not been ousted by the enactment of legislation in the field, such as the Health Act 1947 and the Health Act 1970.

165. As of August 2020, the information published on the government's official websites presented an accurate portrayal of the legal status of the travel advice and public health advice. The advice to avoid non-essential travel and to restrict movements on entry to the State is just that: advice. The government merely *requests* that persons entering the State from a country not on the "green list" restrict their movements for 14 days. As of August 2020, there had been no legal requirement to do so. If and insofar as the failure to observe the advice may result in a financial disadvantage for certain classes of individual, e.g. those in receipt of jobseeker's benefit, there is a specific legal basis for same under the social welfare legislation which has not been challenged. The government's official websites do not portray the travel advice or health advice as having a legal status which it does not actually enjoy.

166. The publication of travel advice and public health advice is consistent with EU law. In particular, it does not breach the right to freedom of movement provided for under Articles 20 and 21 of the Treaty on the Functioning of the European Union. Ryanair conceded that a Member State, such as the Irish State, is, in principle, entitled to derogate from EU law rights on the grounds of public health. This concession was sensibly made. Insofar as the right to free movement is concerned, for example, express provision is made under the Citizenship Directive (Directive 2004/38/EC) for measures restricting freedom of movement on the grounds of public health.

167. Finally, it is important to emphasise what this judgment is not about. Ryanair has been careful in its written and oral submissions to disavow any attempt to challenge the underlying merits of the impugned travel advice. Rather, the case as pleaded and argued is confined to what might be described as procedural or jurisdictional issues. Put shortly, Ryanair's principal complaint is that, as a matter of domestic constitutional law, the government in publishing the impugned travel advice exceeded its executive powers and trespassed upon the legislative power. These arguments have been rejected for the reasons detailed earlier. In consequence of the narrow focus of the case as pleaded and argued, however, this judgment has nothing to say in respect of the wisdom or otherwise of the travel advice. In particular, it has nothing to say on the methodology or criteria by which the "green list" of countries had been prepared.

FORM OF ORDER

168. Given that this is a "rolled up" hearing of the leave and substantive applications for judicial review, it is necessary to address the question of whether leave to apply for judicial review should be granted. The threshold for the grant of leave is set out in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374. This low threshold has been met in this case: the legal issues raised, in particular, the separation of powers point, are arguable and to some extent novel. The formal order will thus grant leave to apply for judicial review, but dismiss the substantive application in its entirety.

169. The attention of the parties is drawn to the statement issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other

> direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

170. The Legal Services Regulation Act 2015 provides that a party who is entirely successful in civil proceedings is entitled to an award of legal costs against a party who is not successful in those proceedings, unless the court orders otherwise. If the default approach were to be followed in the present case, i.e. if costs are to follow the event, then Ryanair would be liable to pay the costs of the State respondents (such costs to be measured by the Legal Costs Adjudicator in default of agreement) with no order for or against Aer Lingus as notice party. I would propose to confine the costs order to the costs of solicitor and two counsel. The proposed order would include all reserved costs and the costs of the written legal submissions.

171. If any party wishes to contend for a *different* form of order, then they should file written legal submissions by Monday 19 October 2020.

Appearances

Martin Hayden SC and Eoin O'Shea for Ryanair instructed by Arthur Cox Solicitors
Frank Callanan SC, Eoin McCullough SC, Suzanne Kingston and David Fennelly for the State respondents instructed by the Chief State Solicitor
Francis Kieran for Aer Lingus instructed by Mason Hayes and Curran LLP