UNAPPROVED
THE COURT OF APPEAL

Record Number: 2021/147

Faherty J.
Ní Raifeartaigh J.
Binchy J.

Neutral Citation Number [2023] IECA 138

BETWEEN/

CHAIN WEN WEI

APPELLANT

- AND -

THE MINISTER FOR JUSTICE AND THE COMMISIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

-AND-

Record Number 2021/148

BETWEEN/

TANG TING TING

APPELLANT

-AND-

THE MINISTER FOR JUSTICE AND THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 2nd day of June 2023

1. This case raises the issue of whether, for the purposes of s.4(3)(j) of the Immigration Act 2004 (hereinafter "the 2004 Act"), "public policy" is to be interpreted as meaning general Government policy or instead is to be defined as a variant of "national security". The question arises in circumstances where there are two conflicting High court judgments on the issue and where the High Court Judge in the instant case has certified the issue as a point of public importance.

2. The appellants are nationals of Malaysia and, accordingly, visa exempt for the purposes of entry into the State. Each of the appellants sought permissions to land and enter the State through Cork airport on 12 December 2020 in order to undertake an English language course which was to commence on 4 January 2021. Both were refused entry on 12 December 2020. Each of the appellants challenged the refusal of leave to land by way of judicial review. By Orders made on 23 March 2021, the High Court (Burns J.) dismissed the appellants' respective judicial review proceedings as against the respondents, from which Orders the appellants now appeal to this Court.

3. The entry of the appellants into the State was governed by s.4 of the 2004 Act.

4. Section 4(1) allows the first respondent (through an immigration officer) to give to a non-national permission to be in the State. Section 4 provides in relevant part:

> "4.—(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or

other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as “a permission”).

(2) A non-national coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission.

(3) Subject to section 2(2), an immigration officer may, on behalf of the Minister, refuse to give a permission to a person referred to in subsection (2) if the officer is satisfied—

(a) that the non-national is not in a position to support himself or herself and any accompanying dependants;

(b) that the non-national intends to take up employment in the State, but is not in possession of a valid employment permit (within the meaning of the Employment Permits Act 2003);

(c) that the non-national suffers from a condition set out in the First Schedule;

(d) that the non-national has been convicted (whether in the State or elsewhere) of an offence that may be punished under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty;

(e) that the non-national, not being exempt, by virtue of an order under section 17, from the requirement to have an Irish visa, is not the holder of a valid Irish visa;

(f) that the non-national is the subject of—

(i) a deportation order (within the meaning of the Act of 1999),

(ii) an exclusion order (within the meaning of that Act), or

(iii) a determination by the Minister that it is conducive to the public good that he or she remain outside the State;

(g) that the non-national is not in possession of a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality;

(h) that the non-national—

(i) intends to travel (whether immediately or not) to Great Britain or Northern Ireland, and

(ii) would not qualify for admission to Great Britain or Northern Ireland if he or she arrived there from a place other than the State;

(i) that the non-national, having arrived in the State in the course of employment as a seaman, has remained in the State without the leave of an immigration officer after the departure of the ship in which he or she so arrived;

(j) that the non-national's entry into, or presence in, the State could pose a threat to national security or be contrary to public policy;

(k) that there is reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national.

(l) that the non-national—

(i) is a person to whom leave to enter or leave to remain in a territory (other than the State) of the Common Travel Area (within the meaning of the International Protection Act 2015) applied at any time during the period of 12 months immediately preceding his or her application, in accordance with subsection (2), for a permission,

(ii) travelled to the State from any such territory, and

(iii) entered the State for the purpose of extending his or her stay in the said Common Travel Area regardless of whether or not the person intends to make an application for international protection."

5. Section 4(4) of the 2004 Act provides that an immigration officer who refuses to give a permission to a non-national pursuant to subsection (3) "shall as soon as may be inform the non-national in writing of the grounds for the refusal".

6. Upon arriving in the State on 12 December 2020, both appellants were refused permission to land by the respective immigration officers on duty on the day in question on the basis that the English language course which they were intending to undertake would not take place in person but rather would be conducted online.

7. It is common case that on 26 August 2020, with respect to the entry into the State of students intending to commence an English language course, each immigration officer in the State received an email in the following terms:

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

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

…

It is noted that, in response to the public health emergency, the INIS has granted certain exemptions to students, one of which is that they may take their classes online if their schools/colleges are closed. This exemption, however, applies only to

students who are already resident here. It does not extend to persons who are seeking to enter the State to pursue their studies.

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

8. At the time the appellants sought leave to land and enter the State on 12 December 2020, the country was in Level 3 lockdown due to the Covid-19 pandemic. It is not in dispute but that the country was expected to and did return to level 5 lockdown in early January 2021. Guidelines issued by the Government on 27 October 2020 relating to the English Language courses, having regard to the Covid-19 pandemic stated:

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

9. These directions had a particular backdrop. In January 2011 the Irish National and Immigration Service ("INIS") issued a "New Immigration Regime for Full Time Non-EEA Students, Guidelines for Language and Non-Degree Programme Students" (the 2011 Guidelines"). This scheme governs the conditions which apply to students partaking in an English language course. As deposed to by Mr. Paul Maguire, Higher Executive Officer in

the first respondent's department, the 2011 Guidelines were publicly available to all intending students on the INIS website. The scheme specifies that:

> **"It is not permissible for a student to come to Ireland to undertake a part-time course, or a distance learning course."** (Emphasis in original)

10. As the evidence in the case shows, upon presenting at Cork airport, Ms. Wei was asked a number of questions by the immigration officer (Detective/Garda Denis M O'Mahony) about the purpose of her coming to Ireland. He also inspected the letter dated 26 November 2020 from the college at which she intended to undertake the English language course which stated that due to the Covid-19 pandemic, classes were being delivered online until further notice. At para.4 of his affidavit D/G O'Mahony avers that "the Applicant stated that she was aware that the classes were to be delivered online but she hoped they would be classroom based in the future. I noted to the Applicant that this was contrary to the guidelines given to …[GNIB]".

11. On 12 December 2020 Ms. Wei was served with a notice pursuant to s.4(4)(j) of the 2004 Act setting out the grounds as to why she was being refused permission to land which were stated to be that "her entry into, or presence in the State could pose a threat to national security or be contrary to public policy". She was served with a notice pursuant to s.14 of the 2004 Act requesting her to remain in the Four Seasons, Kanturk on the night of 12 December 2020, to surrender her passport and to report to the Immigration Desk at Cork airport the following morning at 11.30am. She was also given a document setting out the provisions of s.12 of the 2004 Act which is the legislative basis for the demand made for Ms. Wei's passport.

12. The second appellant, Ms. Ting, upon arrival in the State on 12 December 2020 presented to immigration officer Detective/Garda James Nagle. In her affidavit, Ms. Ting avers that when asked whether her language course was to be online or in person, she had

replied that she was "not sure but that I thought that I could travel to Ireland to study. I was unsure as to whether my classes would be conducted online or in person". The evidence in the High Court established that D/G Nagle asked Ms. Ting if her classes were going to be held online or in person. D/G Nagle avers in his affidavit that Ms. Ting had a letter from the college dated 26 November 2020 but that that letter did not state whether the classes were due to held online. In oral evidence, Ms. Ting stated that her understanding upon her arrival in the State on 12 December 2020 was that the language course would be "in person" "because it's level 3" but she repeated her uncertainty in this regard. She testified that *after* the events in issue here her college had issued a letter on 12 December stating that the course would be "[f]ull time, 15 hours per week face to face".

13. According to D/G Nagle, Ms. Ting was provided with a notice pursuant to s.4(4) of the 2004 Act setting out the grounds as to why she was being refused permission to land which was stated to be that "her entry into or presence in, the State could pose a threat to national security or be a threat to public policy." She was provided with a notice under s.14 of the 2004 Act requiring her to overnight in the Four Seasons Kanturk, to surrender her passport and to report to the Immigration Desk at Cork airport the following day at 11.30am. She was also provided with a document setting out the provisions of s.12 of the 2004 Act.

14. It is common case that after the appellants departed the airport, both contacted a solicitor. The upshot of that was that on the evening of 12 December 2020, an urgent application was brought in the High Court in respect of each of the appellants seeking leave to apply for judicial review for orders of *certiorari* of the respective decisions refusing them leave to land and seeking injunctions prohibiting their removal from the State. The leave application was adjourned to 13 December 2020 and subsequently to 21 December 2020 when leave was granted.

15. In the Amended Statement of Grounds in both cases, the appellants pleaded that the notification of refusal of leave to land failed to comply with s.4(4) in that "it does not specify whether the "overarching" ground for the said refusal was "national security" or "public policy", which are separate and distinct grounds of refusal, albeit that they are related."

16. It was pleaded in respect of both appellants that there was an absence of reasons contrary to the clear intention of the Oireachtas. The particulars of error in this regard were set out as follows:

- The essential rationale for the decision to refuse leave to land was not patent from the terms of the decision, nor could it be inferred.
- There was no factual basis for the immigration officers' concerns recited on the face of the decisions.
- Neither the appellants nor their legal advisors could assess the compatibility of the refusal decisions with the legal test for reasonableness.

17. The following pleas were also advanced, namely that the respondents erred in law and/or acted *ultra vires* or acted unreasonably or irrationally in refusing the appellants leave to land on the basis that their entry to or presence in the State would pose a threat to national security or be contrary to public policy. This was in circumstances, it was said, of the respondents' failure to identify any personal conduct on the part of the appellants which posed a real and immediate threat to one of the fundamental interests of the State. It was further pleaded that the appellants were non-visa required non-nationals and that none of the provisions of the Health Act 1947, as amended, had been invoked against them. The respondents and each of them "acted unreasonably and/or irrationally and/or in breach of fair procedures and/or constitutional justice in refusing [the appellants'] application for

leave to land on the basis of an unpublished policy communicated between and amongst them by email dated 26 August 2020".

18. In the case of Ms. Wei, it was asserted that the notification failed to comply with s.4 of the 2004 Act in that it did not specify the factual basis for the concerns of the immigration officer such that it was comprehensible to Ms. Wei. In other words, it was claimed that the s.4(4) notice was defective for lack of specificity by the reference to both national security and public policy. In the case of Ms. Ting, it was said that the respondents failed to comply with s.4(4) by failing to give her a written notice.

19. Ms. Ting stated in the High Court that she did not receive the s.4(4) document. In any event, as is clear from the High Court judgment, the evidence established that Ms. Ting and Ms. Wei discussed the contents of this document after they left the airport, so nothing turns on this issue.

20. By their Amended Statements of Opposition, the respondents pleaded as follows:

- The decision to refuse the appellants leave to land was made by the second respondent in accordance with s.4 of the 2004 Act of which the appellants were fully informed in writing.
- It was a long-standing policy of INIS since the publication of the 2011 Guidelines that it was not permissible for a student to come to the State to undertake a course delivered online or by way of distance learning.
- A notice had been circulated to GNIB on 26 August 2020 to remind all immigration officers positioned at the point of entry to the State that the 2011 Guidelines still applied, in particular that the exception granted to non-EEA students already in the State did not extend to non-EEA students seeking entry into the State to undertake a course when that course was currently online due to the Covid-19 pandemic.

- The appellants had been refused entry into the State on the basis of s.4(3)(j) of the 2004 Act and that a written notice to that effect had been provided to the appellants and that it had been explained to them in clear and simple English that they were being refused entry to the State on the basis that the English course they were due to attend was due to be held online under further notice.
- It had "been explained to [the appellants] that it was Government policy not to allow first time students from outside of Europe to come here and study due to the worldwide Covid -19 pandemic where courses were delivered online".
- Adequate reasons were provided to the appellants at Cork airport on 12 December 2020 as to why they were refused leave to land.
- With regard to Ms. Ting, the s.4(4) notice had been prepared signed and stamped on 12 December 2020 and given to her in accordance with s.4(4) and s.18 of the 2004 Act. Insofar as Ms Ting claimed not to have received same, she was in receipt of it by 19 December 2020.
- That there was no basis for Ms. Ting to contend that there was no factual basis for the immigration officer's concerns recited on the face of the s.4(4) notice since the appellant had presented in person at Cork airport and had been informed orally and in writing of the reasons for the refusal for permission to land.
- The respondents did not err in law or act ultra vires or unreasonably or irrationally in refusing leave to land on the basis that the appellants' entry and presence in the State could pose a threat to national security or be contrary to public policy, in circumstances where s.4 of the 2004 Act confers a wide discretion on the respondents to refuse permission to land on the basis, *inter alia,* of public policy.

- There was no basis to the appellants' claim that they were refused entry on the basis of an unpublished policy common between the respondents in circumstances where the first respondent "regularly provides information and updates on its website and did so publish regular information relating to perspective English language students seeking entry into the State".
- The appellants were refused permission to land on the basis of the first respondent's 2011 Guidelines: the onus was the appellants to satisfy the conditions therein, which they failed to do.
- All prospective language students seeking permission to land in the State were required to demonstrate that they met the conditions set out in the 2011Guidelines and where the second respondent was not satisfied that the appellants met those conditions including that tuition fees had been discharged and that the appellants had access to €3,000 in available funds to meet the costs of studying in the State.

The High Court judgments

21. The High Court judgments delivered in respect of each application were largely similar. In each case, the trial judge first addressed the complaint that the s.4(4) notice was defective on the basis of an absence of reasons for the refusal to land. In both cases, the trial judge found that the requirement to give reasons was met. The appellants do not challenge this finding in these appeals.

22. The trial judge next addressed the question of whether it had been established, in light of the reasons for refusal given by the respective immigration officers, that the appellants' entry to and presence in the State was contrary to public policy. The case advanced by counsel for the appellants in the court below (and in this Court) was that it

had not been established that the appellants' presence in the State was contrary to public policy having regard to the correct meaning of public policy within the 2004 Act.

23. The trial judge's attention was drawn to two conflicting High Court authorities which analysed the meaning of "public policy" as referred to in s.4(3)(j) of the 2004 Act. First, in *Ezenwaka v. MJELR* [2011] IEHC 328, Hogan J. held, *inter alia,* that the words "public policy" *"do not simply mean contrary to existing Government policy, but rather connote a situation where the personal conduct of the immigrant poses a real and immediate threat to fundamental policy interests of the State".* In the subsequent decision of *Li and Wang v. Minister for Justice and Equality* [2015] IEHC 638, without reference to *Ezenwaka,* Humphreys J. concluded that "public policy" in s.4(3)(j) of the 2004 Act was *"'public policy'…in the widest possible terms"* and that *"[t]he reference to national security alongside public policy is perhaps unhappy as a matter of drafting".*

24. Faced with these two conflicting decisions, the trial judge commenced her analysis of the issue by first looking to the long title to the 2004 Act which states:

> "An Act to make provision in the interests of the common good for the control of entry into the State…"

25. She regarded it as a matter of note that neither Hogan J. in *Ezenwaka* nor Humphreys J. in *Li and Wang* had considered the use of the word "or" in s.4(3)(j). She stated:

> "27…Having regard to the use of the alternative ["or"], the Court, with the greatest of respect, does not agree with Hogan J that public policy is but a variant of national security and that it relates to personal conduct. It seems to me that two different concepts are at play within this sub-section: the first being that a non-national can be refused permission to land if her entry into or presence in the State could pose a

threat to national security; and the second being that a non-national can be refused permission to land if her entry into or presence in the State is contrary to public policy."

26. The trial judge noted that the public policy at issue in respect of the appellants was "the Government policy since 2011 that students from non-EEA countries are not permitted to enter the State for the purpose of partaking in an English Language course, if that course is being delivered online". She went on the opine that while the Covid -19 pandemic was the reason the appellants' language course was being delivered online it was not the reason for the public policy. As found by the trial judge in her judgment in the *Wei* case:

"28… The basis for the public policy is to regulate the admission of non-EEA students into Ireland. The question of admission to this State is a matter solely for the First Respondent to be determined in accordance with domestic law as provided for by s. 4(3) of the 2004. EU law has no application in this realm. It is a matter for the First Respondent to regulate the conditions under which persons can be admitted into the State. With respect to non-EEA students undertaking an English Language Course, the First Respondent has adopted a legitimate policy of not permitting a student enter the State if that course is to be conducted online. If such a student sought to enter the State, the First Respondent must be in a position to refuse permission to enter, on an individualised basis, so as to give effect to her function of regulating entry into the State. The list of grounds in respect of which entry can be refused is limited to those set out in s. 4(3) of the 2004 Act. The Oireachtas must have intended that the First Respondent would be empowered to refuse entry for legitimate policy reasons on an individual basis and accordingly, "public policy" as referred to in s. 4(3)(j) must refer to Government policy relating to the regulation of

entry into the State as opposed to relating to personal conduct on the part of a non-national which poses a real and immediate threat to fundamental policy interests of the State. Otherwise, the First Respondent would not be in a position to regulate entry into the State and give effect to the purpose of the Act.

29. Therefore, refusing the Applicant permission to land on grounds of public policy having regard to the reason stated by Detective Garda O'Mahony was permitted in this instance."

27. With regard to Ms. Wei's complaint that the s.4(4) notice was defective by reason of the non-specificity of "public policy", the trial judge held that this ground had not been made out. She found that the non-specificity argument could not render the s.4(4) notice invalid in light of the use of the alternative "or" in s.4(3)(j) and having regard to the requirement in s.4(4) itself to specify a ground contained in s.4(3) in the s.4(4) notice. In the view of the trial judge "the s.4(4) notice, in the instant case, appropriately records the wording of s.4(3)(j) as the ground for refusal". Thus, it was not defective.

28. In the High Court, there was dispute between Ms. Ting and D/G Nagle as to the reasons given to her for the refusal of permission to land. Ultimately, the trial judge found that Ms. Ting understood she was being refused permission to land because D/G Nagle was of the view that she was going to work without permission, that her English language course would be conducted online and that she did not have the necessary funds as required by the 2011 Guidelines.

29. In respect of both appellants, in the respective judgments the trial judge went on to find that refusing them permission to land on grounds of public policy having regard to the reasons given by the respective immigration officers was permitted. Accordingly, the appellants' grounds of challenge to the s.4(4) and s.14 notices had not been made out. The trial judge declined to grant the appellants any relief.

30. On 5 May 2021, the trial judge certified that her decisions in both cases involved a point of law of exceptional public importance and granted the appellants leave to appeal the decisions to the Court of Appeal in accordance with s.5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000. The point of law (identical in each case) was framed in the following terms.

> "For the purposes of s.4(3)(j) of the Immigration Act 2004, is "public policy" to be interpreted as meaning general Government policy or is it to be defined as a variant of national security, albeit wider and somewhat more flexible in its scope and reach than national security properly so called?"

The appeals

31. The appellants' notices of appeal contend that the trial judge erred in law:

1. In concluding that "public policy" within the meaning of S.4(3)(j) of the Immigration Act 2004 means and/or must refer to "Government policy".
2. In failing to consider, when interpreting S.4(3)(j), that paragraph (j) of subsection (3) of S.4 of [the 2004 Act] is, itself, separated by distinct para. numbers and semi colons from the other paragraphs in subsection (3), each of which paragraphs references or sets out a distinct set of circumstances the existence of any of which could lead to a refusal of leave to land in the State.
3. In failing to consider that if the Oireachtas had intended "public policy" to be considered separately from "national security", it would have separated the two concepts by including them in two separate paragraphs separated by a semi colon.
4. In treating the "or" in S.4(3)(j) of the 2004 Act as a disjunctive, rather than a conjunctive "or".

5. In failing to have regard to the legislative/parliamentary history of the 2004 Act and/or of S.4 thereof.

6. In departing from a previous decision of the same court in the absence of strong reasons for so doing.

32. Essentially, the sole issue brought to this Court for determination in these appeals is whether the trial judge was correct in determining that for the purposes of s.4(3)(j) of the 2004 Act, the term "public policy" is not a variant of national security but is instead a broader concept and broad enough to cover the general Government policy of the day.

Are the appeals moot?

33. At the outset of the hearing of the appeals, the Court raised the issue of the possible mootness of the appeals in circumstances where it was made clear to the Court that the appellants had in fact completed the English language course for which they had come to Ireland on 12 December 2020, and where the appellants were in fact enrolled for a second year as English Language students, as is the norm.

34. Counsel for the appellants submitted that the appeals were not moot as the refusal of leave to land meant there were real world consequences for both appellants. The respondents' position was that the appellants' appeals appeared moot to "a certain extent". Counsel for the respondents acknowledged however that it may be the position that there would be the consequences for the appellants to which their counsel alluded.

35. As to these consequences, in the High Court, in relation to both appellants the evidence established that there was a record in INIS, including a scan of the appellants' passports, of the fact that they had been refused leave to land. This is information which is automatically shared with the UK as part of the common travel area. It is also the case that each of the appellants' passports bears an internationally recognised symbol that indicates that they were refused leave to land in Ireland. This is in circumstances where Ms. Wei's

passport is not due to expire until April 2024 and Ms. Ting's October 2023. Counsel for the appellants also submitted that were the appellants to apply for a visa in visa required countries, they would invariably be asked if they had ever been refused leave to land. She thus emphasised that notwithstanding that the appellants had completed the language course they had come to Ireland to do and had embarked on a second-year course, their position was that they were still technically awaiting leave to land. She argued that had they been allowed leave to land on 12 December 2020, the appellants, who are students and thus ordinarily permitted to stay in the jurisdiction for a period of three years, would not, following the completion of their course, have to seek such leave to land again for the purposes of any further extension of their stay in the State, rather they could apply for an extension at their local GNIB office. The appellants' position, however, is that they are still, technically, at the border of the State. In further aid of the argument that the appeals are not moot, counsel relied on the fact that the trial judge had certified that her decisions involved a point of law of exceptional public importance. Counsel for the respondents did not demur in this regard.

36. It seems to me that while it is undoubtedly the case that the appellants having completed the English language course for which they came to Ireland on 12 December 2020 (and for which they sought leave to land on 12 December 2020) such that, in the words of McKechnie J. in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 IR 274, *"the essential foundation of the action"* has evaporated, there are, nevertheless, in this case sufficiently *"strong, compelling and persuasive reasons"* for the appeals to be heard and determined, not least of which is the fact that the refusals in issue in the proceedings still have ramifications for the appellants, as set out above. Certainly, as long as their current passports are extant, the refusals will be evident thereon. Moreover, even after the expiry of these passports the appellants run the risk of

being asked in visa required countries whether they have ever been refused permission to land and they will be obliged to declare the 12 December 2020 refusals. Thus, to paraphrase Haughton J. in *Kozinceva v. Minister for Social Protection* [2020] IECA 7, the controversy in the present cases potentially affects the appellants' future travel prospects. In other words, the realistic potential for future adverse consequences entitles the appellants *"if they establish the legal defects contended for"* (to quote Hunt J. in *Mukovska v. Minister for Justice and Anor* [2021] IECA 340) to pursue the within appeals irrespective of the fact that their objective in coming to the State in the first instance has been achieved.

37. In those circumstances and where, more particularly, the High Court Judge has certified that the decisions in both cases involve a point of exceptional public importance, I am thus satisfied that the appellants have a *bona fide* interest in appealing against the respective High Court Orders. That being the case, I turn now to the substantive issue in the appeals, namely whether the trial judge was correct in holding that two different concepts were at play in s.4(3)(j) and that "public policy" (as construed by the trial judge) "must relate to Government policy relating to the regulation of entry into the State as opposed to relating to personal conduct on the part of a non-national which poses a real and immediate threat to fundamental policy interests of the State".

Discussion

38. As the issue here is how "public policy" as it stands in s.4(3)(j) of the 2004 Act is to be interpreted it is useful to set out how the Court should go about the task of interpretation. At paras. 105-128 of his judgment in *Heather Hill Management Company CLG v. An Bord Plenala & Ors* [2022] IESC 43 (a judgment delivered subsequent to the hearing of the within appeal), Murray J. has eloquently drawn the requisite roadmap for this task, distilling as he does the requisite principles of interpretation from his analysis of

the case law (including *The People (DPP) v. Brown* [2018] IESC 67, [2019] 2 IR 1 (*"Brown"*), *Minister for Justice v. Vilkas* [2018] IESC 69, [2020] 1 IR 676 (*"Vilkas"*); *Dunnes Stores v. The Revenue Commissioners* [2019] IESC 50, [2020] 3 IR 480 (*"Dunnes Stores"*); *Bookfinders v. The Revenue Commissioners* [2020] IESC 50 ("*Bookfinders")*; and *The People (DPP) v. AC* [2021] IESC 74, [2021] ILRM 305 (*"AC*")). These principles are as follows:

- What the Court is concerned to do when interpreting a statute is to ascertain the legal effect to be attributed to the legislation by use of a set of rules and presumptions (i.e. the canons of interpretation) the common law (and latterly statute) has developed for that purpose.
- To that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. Those words are the sole identifiable and legally admissible outward expression of the Oireachtas' objectives. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.
- The Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose**.** The effect of the decisions in *Dunnes Stores* and *Bookfinders* is that the literal and purposive approaches to statutory interpretation are not hermetically sealed. To put it as McKechnie J. did in *Vilkas, "consideration of the context forms a part of the literal approach"*. Thus, the words in a statute must be viewed in context and will depend on the statute and the circumstances, but may include, in the words of McKechnie J. in *Brown* (at para. 94)*, "the immediate context of the sentence within which the*

words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/legislative history of the Act, including…LRC or other reports; and perhaps…the mischief which the Act sought to remedy". Both the context that is to be deployed to that end and the purpose so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language. The best guide to purpose is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information.

- Section 5 of the Interpretation Act 2005 is engaged only where there is obscurity, ambiguity or a failure to reflect the plain intention of the legislation when viewed as a whole.

39. Murray J.'s roadmap will duly be borne in mind when I turn to the statutory provision in issue here. Before doing so, it is useful both to refer to what is not in issue in this case, and to outline the arguments advanced by the appellants.

40. There is no controversy but that the 2004 Act applied to the appellants when they arrived at Cork airport on 12 December 2004 as prospective English language students seeking permission to enter the State. It is also not a matter of controversy that the list of grounds in respect of which entry to the State can be refused is limited to those set out in s.4(3) of the 2004 Act.

41. The appellants are not EU nationals, nor did they seek to enter the State in exercise of any rights under the EU Treaties or the Free Movement Directive. Accordingly, EU law was not engaged.

42. It is also of note that in the within proceedings the appellants do not challenge the constitutionality of the 2004 Act or any part of s.4(3). Nor do the appellants challenge the 2011 Guidelines or the Government policy encompassed therein.

43. Again, it is not disputed by the appellants that the policy in issue here has been in existence since 2011. Also of note is the fact that there has been no challenge to that policy to date and, as I have said, the appellants do not challenge it in the within proceedings. Furthermore, when the trial judge referred to the policy in question, it was quite clear that she understood that the policy preceded the Covid-19 pandemic. Moreover, she was aware that the policy had been made known to students from overseas *via* the Government's website which was updated regularly, including in relation to the Covid-19 pandemic.

44. The arguments which the appellants canvass in the within appeal have their premise in what the appellants say is the limited construction to be put on s.4(3)(j) of the 2004 Act. What the appellants contend is that given the construction which they urge is to be put on the term "public policy", standing as it does alongside "national security" in s.4(3)(j) of the 2004 Act, it is not open to the respondents to cite s.4(3)(j) as the statutory "root of title" for the 2011 Guidelines or, more particularly, the Government policy which was invoked on 12 December 2020 as the basis for refusing them leave to land.

45. Essentially, the appellants contend that the reference to public policy in s.4(3)(j) must be elided with "national security" as also appears in the subsection, both of which concepts, the appellants say, relate to some personal conduct on the part individual seeking entry to the State such as may warrant an immigration officer, on behalf of the Minister, refusing them permission to land. In short, the appellants submit that "public policy" as it appears in the subsection in issue must be construed as a subset of or connected to "national security".

46. The appellants' overarching submission is that in arriving at the decisions she did, the trial judge failed to apply and/or failed properly to apply the maxim *noscitur a sociis* to the construction of s.4(3)(j) of the 2004 Act. It is said that the consequences of this failure are that insofar as the entry into the State by non-EEA nationals is concerned, the judgments under appeal here have reset the clock to the position regarding the entry into the State of non-nationals that obtained pre-1935.

47. To put this latter contention in context, it is helpful at this juncture to set out both the pre-1935 position regarding the admission and expulsion of non-nationals to and from the State and the subsequent legislative history which led, ultimately to the enactment of the 2004 Act. In essence, pre-1935, the admission and expulsion of non- nationals was a matter of inherent executive discretion. The Aliens Act 1935 ("the 1935 Act") was introduced to regulate that power by way of legislation. The 1935 Act continued as the primary legislation governing the area until the Supreme Court delivered its decision on 20 May 1999 in *Laurentiu v. Minister for Justice, Equality and Law Reform* [1999] IESC 47, [1999] 4 IR 26.

48. In *Laurentiu*, the Supreme Court held that s.5(1)(e) of the 1935 Act, which gave the Minister the power to issue deportation orders, was inconsistent with Article 15.2.1 of the Constitution. This was because the 1935 Act failed to set out any principles and policies which would govern the Minister's decision-making in relation to the making of deportation orders. While the Supreme Court accepted that the Oireachtas had intended that non-nationals would be deported if the Minister considered that this was in the interest of the common good, it found that the delegation of power was impermissibly broad and constituted an abdication of the legislature's duties to set out policies and principles. For that reason, the Supreme Court found that s.5(1)(e) of the 1935 Act had not been carried over by Article 50 of the Constitution.

49. It followed that the decision in *Laurentiu*, albeit concerned with deportation powers, clearly raised doubts about the validity of other sub-sections of s.5 of the 1935 Act. Section 5(1)(a) of the 1935 Act had delegated a similarly broad power to that contained in s.5(1)(e) to the Minister in relation to making orders regulating leave to land. Section 5(1)(a) provided that the Minister may, "if and whenever he thinks proper do by order (in this Act referred to as an Alien's Order) all or any of the following things in respect of either all aliens or of aliens of a particular nationality or otherwise of a particular class or of particular aliens that is to say: (a) Prohibit the aliens to whom the order relates from landing in or entering into Saorstát Eireann."

50. Article 5 of the Aliens Order 1946 (as amended by the Alien's (Amendment) Order 1975) permitted an immigration officer to refuse leave to land to an alien when he or she forms the view that an alien was not in a position to support himself or was not in possession of a valid employment permit.

51. In *Kanaya v. MJELR* [2000] IEHC 29, [2000] 2 ILRM 503, a judgment delivered on 21 March 2000 in the wake of *Laurentiu*, Murphy J. noted that the statement of opposition had admitted that Article 5 of the Alien's Order was invalid as having been made under s.5(1) of the 1935 Act *"and thereby comprises an unconstitutional delegation of legislative power",* suffering as it did *"from the same constitutional infirmity as that identified in Laurentiu".*

52. As it happened, however, on 3 February 1999, prior to the decision of the Supreme Court in *Laurentiu* (and indeed prior to the observations of Murphy J. in *Kanaya*), Article 5 of the 1946 Order was amended by Article 5 of the Aliens (Amendment) (No.2) Order 1999 (S.I. No. 24/1999). Article 5 of the latter provided:

> "5. Article 5 of the Principal Order (as amended by the Aliens (Amendment) Order, 1975 (S.I. No. 128 of 1975)) is hereby amended—

(a) by the substitution of the following for paragraph (2):

‘(2) An immigration officer may refuse leave to land to an alien coming from a place outside the State other than Great Britain or Northern Ireland if the immigration officer is satisfied—

(a) that the alien is not in a position to support himself or herself and any accompanying dependants;

(b) that the alien, although wishing to take up employment in the State, is not in possession of a valid permit for such employment issued by the Minister for Enterprise, Trade and Employment;

(c) that the alien suffers from a disease or disability specified in the Fifth Schedule to this Order;

(d) that the alien has been convicted (whether in the State or elsewhere) of an offence punishable under the law of the place of conviction by imprisonment for a maximum period of at least one year;

(e) that the alien, not being a member of a class of persons designated by order of the Minister as not requiring a visa, is not the holder of a valid Irish visa;

(f) that the alien is the subject of—

(i) a deportation order or

(ii) an order excluding him or her from the State or

(iii) a determination by the Minister that it is conducive to the public good that he or she remain out of the State;

(g) that the alien has been prohibited from landing in or entering into the State by order of the Minister under the Aliens Act, 1935 (No. 14 of 1935);

(h) that the alien belongs to a class of aliens prohibited from landing in or entering into the State by order of the Minister under the Aliens Act, 1935 (No. 14 of 1935);

(i) that the alien is not in possession of a valid passport or other document which—

(i) establishes his or her identity to the officer's satisfaction,

(ii) was issued by or on behalf of an authority recognised by the Government, and

(iii) does not purport to have been renewed otherwise than by or on behalf of such authority;

(j) that the alien—

(i) intends to travel (whether immediately or not) to Great Britain or Northern Ireland, and

(ii) would not qualify for admission to Great Britain or Northern Ireland if he or she arrived there from a place other than the State;

(k) that the alien, having arrived in the State in the course of employment as a seaman or as a member of the crew of a ship or aircraft, has remained in the State without the leave of an immigration officer after the departure of the ship or aircraft in which he or she arrived;

(l) that the alien's entry into, or presence in, the State would pose a threat to national security or would be contrary to public policy;

(m) that there is reason to believe that the alien, with intent to deceive, seeks to enter the State for a purpose or purposes other than those expressed by the alien.'"

53. Furthermore, following the decision in *Laurentiu,* on 7 July 1999, the Oireachtas enacted s.2 of the Immigration Act 1999. This provided, at subsection (1):

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

54. The constitutionality of s.2 of the 1999 Act was challenged in *Leontjava v. DPP, Ireland and the Attorney General* [2004]IESC 37, [2004] 1 IR 591. It was argued by the applicants in that case that the Oireachtas could not enact legislation without first drafting a Bill to be examined by both houses, which was capable of being referred to the Supreme Court by the President in accordance with Article 26 of the Constitution. The applicants were successful before the High Court and on 22 January 2004, Finlay Geoghegan J. declared s.2 of the Immigration Act 1999 unconstitutional.

55. The State appealed the decision in *Leontjava* to the Supreme Court. However, on 13 February 2004 (before the Supreme Court gave judgment in *Leontjava*), the Oireachtas enacted the 2004 Act. Ultimately, the State succeeded in its appeal in *Leontjava,* with the result that leave to land in the State is now governed by both s.4 of the 2004 Act and Article 5(2) of the Aliens Order 1946 (as amended). For the purposes of the within appeals, however, we are concerned only with s.4 of the 2004 Act.

56. The 2004 Act was enacted and commenced in its entirety on 13 February 2004. As noted by O'Donnell J. (as he then was) in *Sulaimon v. Minister for Justice* [2012] IESC 63, at para. 19:

> *"It should be remembered that the Act was introduced with some haste in the period between the High Court decision and the subsequent Supreme Court appeal in Leontjava v. DPP [2004] 1 I.R. 591. The obvious focus of s.4 is not to set some general template for all permissions granted, but rather to make provision for the decision of immigration officers at point of entry to the State. That is the significance of the reference in s.4(l) to '…authorising the non-national to land or*

be in the State'. Indeed the shoulder note to the section refers to 'Permission to land'."

57. As John Stanley points out in his book *Immigration and Citizenship Law* (Round Hall 2017), Article 5(2) of the 1946 Order and s.4(3) of the 2004 Act "contain near identical criteria for refusal of leave to land, although (g) and (h) in the Aliens Order are not replicated among the grounds under s.4(3) of the 2004 Act." As observed by Humphreys J. in *Lei and Wang*, the 2004 Act provided the Minister with a primary piece of legislation to control immigration in the State.

58. Fundamental to the appellants' argument in these appeals is their contention that the Oireachtas did not just set out in the 2004 Act its principles and policies, but rather, by virtue of s.4(3), it *legislated* for each and every circumstance by which a refusal of leave to land could be made. Thus, in such circumstances, the question the appellants pose is whether it can be said that the Oireachtas intended to give the first respondent unbridled power to refuse entry into the State on the basis of a particular Government policy. The appellants say that s.4(3)(j) does not admit of such power. Counsel submits that if that very broad power had been given to the first respondent pursuant to s.4(3)(j) of the 2004 Act, then that would be tantamount to saying that the first respondent had power to legislate not *qua* delegate of the Oireachtas but rather as executive decision-maker *qua* Minister – in effect a return to the pre-1935 scenario in respect of the admission of non- nationals into the State.

59. The appellants further contend that it is entirely appropriate that reasons for refusal would be tightly defined in the 2004 Act given that refusal of leave to land can have serious consequences for the person involved. As provided for in s.5 in the Immigration Act 2003 (as amended), a direct consequence of such refusal is that a person may be arrested and detained in prison for up to eight weeks pending their removal from the State.

Moreover, that person will also be left with a permanent adverse immigration record which they will be obliged to disclose when seeking entry to other countries. It is said that the potential for the appellants to have been arrested and detained should also be a factor to constrain the Court to interpret s.4(3)(j) in the sense Hogan J. interpreted it in *Ezenwaka.*

60. The appellants submit that in enacting s.4 of the 2004 Act, the Oireachtas did not just ensure that its principles and policies in relation to the entry of non-nationals were outlined sufficiently clearly to guide the Minister in making relevant regulations, rather it went one step further and set out in full its policy in relation to the entry of non-nationals to the State. This, they say, is reflected in s.4(3) which governs the refusal of leave to land. They argue that in such circumstances, it would appear most unlikely that the Oireachtas would, in addition, have conferred power on the first respondent to refuse leave to land simply on the basis of an unspecified Government policy that by its nature varies from time to time, depending on the views of the Government that happened to be in power.

61. The appellants also say that it is not the case that s.4(3)(j) provides that the first respondent can apply *any* public policy. This is because of the "personal" nature of the s.4(3) criteria. Thus, they query why something so amorphous as "public policy" would be contained in the same subparagraph as "national security", with all of the latter's primary connotations with regard to defending and protecting the citizens of the State, if the Oireachtas did not intend public policy to be read in conjunction with national security. It is said that if the Oireachtas had intended national security and public policy to mean two separate things, there would have been no reason to include them in the same subsection. Moreover, the appellants say that if s.4(3)(j) is to be construed in the manner contended for by the respondents, then that raises the question why, having regard to the personal nature of each of the other criteria in s.4(3), the Oireachtas would have allowed a criterion into

s.4(3) that allowed the first respondent to provide for a refusal of leave to land that is unconnected to the conduct of the non-national in issue.

62. The case is also made that the Oireachtas could have made provision for further special factors to be set out in s.4(3), for example refusal of leave to land for "such reason as the Minister may prescribe", however, it did not do so. In those circumstances and relying on the interpretation of s.4(3)(j) she contends for, counsel for the appellants submits that the first respondent cannot hijack s.4(3)(j) in order to justify the refusal of permission to land in these cases. It is further submitted that if the first respondent wished to refuse persons such as the appellants leave to land, she could have amended the relevant Visa Orders to take account of public health considerations, in circumstances where s.31A of the Health Act 1947, as amended, gave the first respondent power to do so.

63. Hence, for the reasons just stated the appellants contend that it is not open to the first respondent to refuse leave to land pursuant to s.4(3)(j) based on the existence of the 2011 Guidelines. Counsel argues that had the Minister wished to put the 2011 Government policy into effect, the way to do so would have been to have allowed the appellants permission to land and enter the State for a limited period, and, thereby, oblige them to apply for a renewal of that permission pursuant to s.4(7) of the 2004 Act whereby the first respondent would not be constrained by the provisions of s.4(3), as found by the Supreme Court in *Hussein v. Minister for Justice and Equality* [2015] IESC 104, [2015] 3 IR 423. In that case it was held that there was "*no basis for implying any statutory constraint at all of a Minister's power under s.4(7) other than the very general ones mentioned above. The decisions made in the two cases (under s.4(3) and s.4(7)) are quite different and there is no reason a court should read the criteria laid down for the consideration of one decision, by an immigration officer, into the criteria of the exercise of another decision, of a different nature by the Minister."*

64. Counsel accepts that the immigration officers could have reasonably limited the duration of the appellants' stay for a period well below the year sought by them, having regard to the possibility if not the likelihood that level 5 Covid restrictions would be reimposed by the time they were to commence their language course on 4 January 2021. She argues that had the appellants been permitted to land for say two/three weeks, it would have been then open to them to apply to the GNIB in Cork, before their respective permissions expired, to extend those permissions. As level 5 restrictions would have been re-imposed at that point, with English language schools returning on online teaching, it would have been well within the discretion of the immigration officers to refuse to extend the appellants' permissions, having regard to the 2011 Guidelines and the policy of the first respondent as set out therein.

65. It is submitted that if the Court accepts the appellants' submissions, the appellants as non-visa- requiring Malaysian nationals were entitled to enter the State on 12 December 2020. Furthermore, in circumstances where none of the scenarios in s.4(3) arose, they should have been permitted to land in accordance with s.4(10), namely that each of them had relatives living in the State and had access to funds.

66. In essence, the case being made by the appellants is that it is obvious from the legislative history heretofore set out that the Oireachtas when enacting the 2004 Act was particularly live to the dangers of delegating overly broad powers to the Executive. Fundamentally, the appellants contend that the trial judge erred in holding that the first respondent's power to refuse leave to land on the basis of the 2011 Guidelines emanated from s4(3)(j) of the 2004 Act. They maintain that the trial judge in finding as she did, failed to apply or correctly apply the *noscitur a sociis* maxim when construing s.4(3)(j).

A plain reading of s.4(3)(j)

67. Adopting the roadmap outlined by Murray J. in *Heather Hill* and looking firstly to the plain meaning of the words contained in s.4(3)(j) of the 2004 Act , there can be no doubt that when read having regard to their ordinary and natural meaning, the terms "national security" and "public policy" admit of different concepts.

68. "Public policy" is defined in Murdoch's *Encyclopedia of Irish law* as follows:

> *"The principle in law that a person will not be permitted to do that which has a tendency to be injurious to the public, or against the public good. Certain acts are said to be contrary to public policy when the law refuses to enforce or recognise them on grounds that they are injurious to the interests of the State or the community eg the law will not enforce an illegal contract, or permit evidence to be given which could affect the security of the State…"* (emphasis added)

69. Murdock however is silent as to a definition of "national security". As the authors of *National Security in Ireland* (Bloomsbury Professional) observe, *"what 'national security' means has not been comprehensively set out in Irish law…"*. However, looking at the English jurisdiction, in Black's Law Dictionary (10th Ed.) the term "national security" is defined as *"[t]he safety of a country and its government's secrets, together with the strength and integrity of its military, seen as being necessary to the protection of its citizens."* According to the authors of *National Security in Ireland*, a further aspect of national security is intelligence gathering aimed at enhancing security and to be forewarned of possible threats to the State.

70. On the face of it, therefore, "public policy" and "national security", as the terms appear in s.4(3)(j), are eminently capable of being interpreted as different concepts. The appellants do not really challenge what a plain reading of these terms conveys. They assert

however that both the context and purpose of the 2004 Act and the juxtapositioning of "national security" and "public policy" in the same subsection of the 2004 Act have a particular resonance when it comes to interpreting "public policy" as it appears in s.4(3)(j). In opposing the appellants' argument, the respondents likewise rely on the context and purpose of the 2004 Act in maintaining that "public policy" in s.4(3)(j) cannot be confined in the manner suggested by the appellants.

71. According to the respondents, the two terms as they appear in s.4(3)(j) require to be read as independent concepts. This is so, they say, even when the terms are construed (as they must) in context and having regard to the purpose of the 2004 Act. I will return to the context and purpose of the 2004 Act in due course.

72. The respondents also assert that the appellants have not put forward any persuasive argument that the ordinary and natural meaning of the concepts of "public policy" and "national security" are synonymous or variants of one another. They submit that both concepts are expressly separated by the fact that a refusal to land pursuant to s.4(3)(j) must be based on a "threat" to national security, "*or"* where a non-national's entry or presence in the State is "contrary to public policy". The respondents rely especially on the fact that "national security" and "public policy" are separated by the disjunctive "or". They say that applying the ordinary and natural meaning to the words contained in the subsection the effect is that the concepts are alternative to one another (and were enacted to be so). Support for the respondents' position is found in the *dictum* of Hardiman J. in *Montemuino v. Minister for Communications* [2013] IESC 40:

> *"I consider that the Oxford Dictionary aptly states the contemporary meaning of the disjunctive 'or'. Where two things are separated in speech or writing by the word 'or' they are distinguished from each other or set in antithesis by 'or'; they*

are set up as alternatives to each other or words so separated. It follows that the words so separated are not identical but are different in nature or meaning."

73. Thus, a question to be considered here is whether, as far as s.4(3)(j) is concerned, Hardiman J.'s proposition is displaced once the subsection is construed having regard to the *noscitur a sociis* principle, as indeed the appellants effectively contend.

The noscitur a sociis principle

74. As explained by Henchy J. in *Dillon v. Minister for posts and Telegraphs* [1981] WJSC-SC 1589, the maxim *noscitur a sociis* means that *"a word or expression is known from its companions".* The nub of the maxim is that the meaning of an unclear or ambiguous word should be determined by considering the words with which it is associated in the context of how the word is associated and where it appears in the legislation.

75. It will be recalled that the trial judge held that it was significant that the terms "national security" and "public policy" in s.4(3)(j) of the 2004 Act were separated by the word "or" and for that reason she held that the meaning of one did not have a bearing on the construction of the other. She was satisfied that the "or" in s.4(3)(j) was disjunctive and therefore she did not address the application of the maxim *noscitur a sociis*. As can be seen, the respondents argue that the trial judge took the correct view that s.4(3)(j) of the 2004 Act contains two different concepts and that, accordingly, albeit not expressly stated by the trial judge, the maxim was therefore not engaged.

76. The appellants say, however, that it is implicit in the trial judge's judgment that had she concluded that the "or" was to be regarded as conjunctive rather than disjunctive, she would have followed the judgment of Hogan in *Ezenwaka,* and, to that extent, the appellants submit that the trial judge would have been correct to do so.

77. Section 4(3)(j) is one of twelve criteria listed in subsection (3), each of them separated by a semi colon. The appellants argue that had the Oireachtas intended that "public policy" was to be construed separately from "national security", then it would not have included the two terms in the same subsection within s.4(3). Instead, it would have included a semi colon after "national security" and would have included a thirteenth criterion dealing with "public policy". However, it did not do so.

78. Support for what the appellants contend for is found in the judgment of Hogan J. in *Ezenwaka*. This case concerned a non-national family who, through an error on the part of visa officers, had been granted visas to present at the border of the State to seek entry into the State even though they did not comply with the relevant IBC statutory scheme. They were refused entry on the grounds of public policy. In the High Court, Hogan J. considered the scope of s.4(3)(j) of the 2004 Act and stated at para. 13 of the judgment:

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

79. Based in part on the comments of Henchy J. in *Dillon*, Hogan J. went on to hold that the concept of "public policy" at issue under s.4(3)(j) of the 2004 Act was *"but another*

variant of the concept national security albeit wider and somewhat more flexible in its scope and reach than national security properly so called." For that reason, he held that the Minister could not refuse the applicants in *Ezenwaka* permission to land under s.4(3)(j) as there was no personal conduct on their part that could be said to pose a real and immediate threat to the fundamental policy interests of the State.

80. It is worth noting that in *Jin liang Li v. Governor of Clover Hill Prison* [2012] IEHC 493, Hogan J. also viewed "public order" as a variant of "national security", in the context of construing s.9(8) of the Refugee Act 1996. Section 9(8) provides, in relevant part:

> "Where an immigration officer or a member of the Garda Siochana, with reasonable cause, suspects that an applicant-
>
> (a) poses a threat to national security or public order in the State…
>
> he or she may detain the person in a prescribed place…"

81. Noting that the reference to "public order" is juxtaposed with the words "national security" in the very same sentence, Hogan J. opined that this had *"immediate implications for the meaning ascribed to these words".* With reference to *Dillon v. Minister for Posts and Telegraphs,* he found that *"this case at hand presents another textbook example of where noscitur a sociis as a principle of statutory interpretation comes into its own."* Thus, he found that the words "public order" in s.9(8) did not simply mean conduct which involves a breach of the State's immigration laws, *"but rather the personal conduct of the immigrant poses a real and immediate threat to fundamental policy interests of the State".*

82. Here of course, the issue is not the juxtapositioning of "public order" and "national security" but rather "public policy" and "national security". As can be seen, in *Ezenwaka,* Hogan J. was satisfied to apply the *noscitur a sociis principle* when construing these latter concepts in finding that "public policy" in s.4(3)(j) of the 2004 Act was but a variant of "national security".

83. The construction put by Humphreys J. *Li and Wang v. Minister for Justice &Equality* [2015] IEHC 638 on s.4(3)(j) of the 2004 Act was altogether different to that taken by Hogan J. in *Ezenwaka*. Humphreys J. did not engage with the maxim *noscitur a sociis. Li and Wang* involved a refusal by the Minister to accept an application for a long-term permission to remain in the State made by the parents of an Irish citizen who had come to the State with visitors' visas. Their entry was refused based on the Minister's policy which required applicants to make such applications from outside the State.

84. Addressing the Minister's policy Humphreys J. stated, at para. 27:

> *"…I am of the view that a primary purpose of the Act was to provide a clear statutory basis for the powers of the Minister to control immigration, given that the High Court had taken the view in Leontjava that the secondary legislation in this regard was in certain respects invalid. In addition the Court held that s. 5(1)(h) of the Aliens Act 1935 lacked principles and policies and was therefore unconstitutional. One must conclude that an additional primary purpose of the Act was therefore to provide clear principles and policies by which the Minister would be guided."*

85. At para. 43 of his judgment, Humphreys J. rejected the State's argument that the Minister was at liberty to refuse an application on a ground not specified in the 2004 Act. One of the bases for his rejection was Humphreys J.'s observation that "*the grounds in subsection 3 are in wide terms and in particular, para. (j) insofar as it refers to public policy, is, in the widest possible terms".*

86. At para. 47, Humphreys observed that while the reference to national security alongside public policy *"is perhaps unhappy as a matter of drafting",* the placing of "public policy" in s.4(3)(j) did not *"dilute or qualify the scope of the 'public policy' ground"*. He opined that the ground *"confers an extremely wide discretion on the*

Minister to determine whether, in her view, the presence of a particular non-national in the State is contrary to public policy, as determined by her".

87. Humphreys J. went on to state:

> *"Of course, such determination is subject to the usual criteria of constitutionality and legality but subject to that, the formulation of public policy in relation to immigration control is exclusively a matter for the Minister for Justice and Equality, who is responsible to Dail Éireann in that regard."* (at para. 47)

88. According to Humphreys J., the determination of whether the presence of a non-national in the State is contrary to public policy can *"only be made by reference to a particular fact situation and a particular time period, specifically that for which permission is sought"*. He opined:

> *48. ...Thus, it is perfectly open to the Minister to hold that it is not contrary to public policy for a particular non-national to be in the State for a limited period, say 90 days, but that it would be contrary to public policy for that person to be in the State for a longer period. It is also open to the Minister under para. (j) to take the view that it would be contrary to public policy for a particular applicant to be in the State for the purposes of making an application for permission to land, and that such permission should be sought from outside the State. There is no contradiction in this approach because it is entirely reasonable and legitimate for the Minister to adopt a conception of public policy which requires particular categories of application to be made from the applicant's home country. Indeed, the Minister has given a convincing basis in this case why this should be so, namely that if persons who came on 90 day visitor visas were entitled to apply for longer term permission to remain, without first returning to their home countries, this would necessitate a greater degree of scrutiny of applications for visitor visas*

which, in turn, would have a knock on effect which would act to the detriment of persons who genuinely wish to visit for short periods.

49. In concrete terms this would mean that, for example, a person who comes to Ireland on a visitor visa and applies for an extension while in the State may legitimately be told by the Minister that his or her presence in the State is contrary to public policy and that the application is, therefore, refused; but the same person, after they return to their country and make a similar application, may, if the Minister so decides, be told that their presence in the State would now not be contrary to public policy, because they have complied with conditions that the Minister has laid down in accordance with her legitimate conception of what constitute the requirements of such public policy. The fact situations and circumstances of the two applications are fundamentally for the reasons I have given."

89. He went on to note, at para. 51:

"... the Minister is conferred with a broad discretion to determine public policy by virtue of subsection 3(j). In accordance with that exceptionally wide power, she is perfectly entitled to form the view that public policy would be promoted by the imposition of conditions on a visa application and therefore that, at least in the absence of exceptional circumstances to the contrary, an application not in accordance with those conditions should be refused".

90. To my mind, the salient question to be determined here is whether, as effectively held by Hogan J. in *Ezenwaka*, the phrase "public policy" in s.4(3)(j) requires to be read by applying the maxim *noscitur a sociis*, or whether the subsection is to be read in the manner suggested by Humphreys J. in *Li and Wang*, namely that the subsection *"confers an extremely wide discretion on the Minister to determine whether…the presence of a*

particular non-national in the state is contrary to public policy" as determined by the Minister.

91. In aid of their arguments for a narrower construction of s.4(3)(j), the appellants cited Hogan J.'s reliance, in *Ezenwaka,* on the comments of Henchy J. in *Dillon v. Minister for Posts and Telegraph.* What was in issue in *Dillon* was an embargo contained in regulations made pursuant to the Posts and Telegraph Act 1908 on the posting, conveying or delivery of "any postal packet…having thereon, or on the cover thereof, any words, marks or designs of an indecent, obscene or grossly offensive character". The plaintiff Mr. Dillon was a Dail candidate who was entitled, pursuant to the regulations in issue, to avail himself of free postage facilities once compliant with the provisions of the regulations. Mr. Dillon's election brochure which contained the following, "Today's politicians are dishonest because they are being political and must please the largest number of people" was rejected as ineligible for the free postage. In proceedings brought by Mr. Dillon for interlocutory relief, the Minister defended his department's stance, *inter alia,* on the ground that the brochure was "grossly offensive".

92. Applying the *noscitur a sociis* maxim to "any words, marks or designs of an indecent, obscene or grossly offensive character", Henchy J. held that for something to be of a grossly offensive character, it had to be infected with indecency or obscenity and that it was not enough that it was thought to be displeasing or distasteful. The fact that the phrase Henchy J. was construing including words separated by "or" did not prevent him from reaching that conclusion. That was clearly so because the words in issue in *Dillon* were words which were not far from being synonymous with one another: the words in issue were naturally sequential. Accordingly, in *Dillon,* the "or" was properly considered as conjunctive.

93. For the purposes of construing s.4(3)(j), I do not think that *Dillon* is an apt comparator in circumstances where "national security" and "public policy" are capable of being regarded as two separate concepts, as indeed the trial judge observed. Unlike the words at issue in *Dillon*, the two expressions are far from synonymous with one another or naturally sequential, in contrast to the phrase containing the words "indecent, obscene or grossly offensive" with which *Dillon* was concerned.

94. Whilst both "national security" or "be contrary to public policy" are included in one subsection of the 2004 Act, in my view, each of these concepts is entirely capable of being seen as a separate and distinct concept and not requiring the application of the maxim *noscitur a sociis*. As Humphries J. opined, it was an unfortunate circumstance of drafting that put "public policy" in the same subsection as "national security", but I do not interpret their inclusion in the same subsection as intending to conflate the two concepts or to cut down the meaning of "public policy" in the manner suggested by the appellants.

95. I am satisfied that the ordinary and natural meaning of "national security" is both different and capable as being seen as different to the concept of "public policy", especially where neither concept is defined in the 2004 Act and in circumstances where the provisions of s.4(3)(j) of the 2004 Act are separated by the word "or". As Hardiman J. observed in *Montemunio v. Minister for Communications* **(**at para. 16):

> *"All legislation is expressed in words and, in principle, the meaning of legislation is that expressed in the ordinary and natural meaning of the words used.*"

In *Montemunio* the word "or" was viewed by Hardiman J. in the disjunctive sense.

96. In *Bederev v. Ireland* [2016] IESC 34, [2016] 3 IR 1, MacMenamin J. explained the approach in *Montemunio* in the following terms:

> *"In Montemunio…the word "or" was used in the disjunctive sense. It posed an alternative, as in the case of a child who may ask for X or Y for Christmas (see*

McLeod, Principles of Legislative and regulatory drafting Hart Publishing,2009), p.79.) The relevant words of the fisheries legislation in question in Montemunio…provided for the forfeiture following conviction of 'all or any *of the following found on the boat to which the offence relates: (a)* any *fish, (b)* any *fishing gear (emphasis added). It was in that context that Hardiman J. correctly held that the word "or" was, in that sense, and in the context of that legislation, antithetical and disjunctive. The words conveyed that, on a conviction, either of the entirety of the fish or equipment or just part of the fish or equipment might be forfeited, and this was a matter for the sentencing court's discretion".*

97. *Bederev* itself concerned the use of the word "or" in s. 2(1) of the Misuse of Drugs Act 1977. Section 2(1) defined a "controlled drug" as:

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

98. In *Bederev,* the Court of Appeal interpreted "or" in s.2(1) in the sense Hardiman J. had interpreted "or" in *Montemunio* and, thus, partly based on that interpretation, reasoned that there was no basis for suggesting that the power of the Government to make an order under s.2(2) of the Misuse of Drugs Act could be read as being implicitly limited on an *esjudem generis* basis, by reference to the categories of drugs listed in the Schedule.

99. The Supreme Court did not agree. With reference to s.2(1) of the 1977 Act, MacMenamin J. held that *"in the 1977 Act, the word 'or' is used, in a different and conjunctive sense, as in the case of a sign on a bus saying a seat is reserved for elderly or*

disabled people (see again McLeod, Principles of Legislative and regulatory drafting Hart Publishing,2009), at pp.79 and 80).” According to MacMenamin J., that was evident from s.2(2) which contained words attaching the Schedule referred to in s.2(1) to the body of the 1977 Act. In my view, there is nothing in the 2004 Act which suggests that the “or” in s.4(3)(j) is to be interpreted in the way “or” as it appears in s.2(1) of the 1977 Act was interpreted.

100. In aid of their submissions in the present cases, the appellants pointed to how the *noscitur a sociis* maxim was applied in *Kelly v. Commissioner of An Garda Síochána* [2013] IESC 47. There, O’Donnell J. (as he then was) employed the maxim to interpret the phrase “*frivolous, vexatious or without substance or foundation”* as it appeared in Regulation 35(2) of the Garda Disciplinary Regulations. Regulation 35(2) provides that an appeal board may refuse to consider an appeal where:

> “(a) the notice of appeal was not given within the period specified in Regulation 33(1), or
>
> (b) having considered the member’s statement of the ground or grounds of appeal, it is of the opinion that the case made by the member is frivolous, vexatious or without substance or foundation.”

101. At para. 38 of his judgment, O’Donnell J. addressed the interpretation of “frivolous, vexatious or without substance or foundation” by first observing that the test set out in the subsection was akin to the jurisdiction under Order 19, r.28 RSC to dismiss claims or appeals because they are frivolous, vexatious or disclose no reasonable cause of action or under the court’s inherent jurisdiction because they are bound to fail (*Barry v. Buckley* [1981] IR 306). Accordingly, the “without substance or foundation” test in regulation 35(2) was akin to the test of whether or not a case or appeal was bound to fail. O’Donnell J. considered that with the requisite tests for the striking out of proceedings in the civil

courts, the statutory test of "without substance or foundation" was one to be approached with caution particularly when the appeal jurisdiction was one on the papers alone and where the "end point" may result in the dismissal of a serving garda. He went on to state, at para. 39:

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

102. At para. 40, O'Donnell J. considered that *"while logically the concepts of 'frivolous, vexatious and without substance or foundation'"* were distinct concepts there was *"a significant degree of overlap between them"* such that in applying the test set out in Regulation 35(2), *"it is useful to consider the matter cumulatively"* (in other words conjunctively). Thus, it appeared to O'Donnell J. that the test set out in Regulation 35(2) was intended to apply in that context.

103. Albeit reliance is placed by counsel for the appellants on the dicta of O'Donnell J. in *Kelly*, I am not satisfied, however, that the fact that the maxim was applied in *Kelly* is dispositive of what it is in issue here in circumstances where the "*significant degree of*

overlap", which O'Donnell J. found between the concepts at play in *Kelly,* is not evident on a plain reading of s.4(3)(j) of the 2004 Act. It must also be recalled that O'Donnell J. referred only to the *possibility* of understanding a word from those surrounding it, something that, in my view, may not necessarily be applicable in other situations such as here where different concepts are at play and where the both context and purpose of the 2004 Act, read as a whole, are sufficient to displace the appellants' argument that "public policy" as it stands in s.4(3)(j) should be interpreted only in the immediate context of the sentence within which the words are used. Before turning to context and purpose, however, it is necessary to first deal with other arguments advanced by the appellants in support of their position.

European Union law and other international concepts as an aid to interpreting s.4(3)(j)

104. It will be recalled that in arriving at his conclusion in *Ezenwaka,* Hogan J. was guided by and applied an interpretation of "public policy" based on principles of EU law and, in particular, he had regard to the decision of the CJEU in Case C-482/01 *Orfanopoulos,* [2004] ECR 1-5257. The case involved the deportation of a national of a Member State in which deportation followed automatically under the national law due to a previous criminal conviction involving drugs. In discussing public policy, the CJEU stated that such a person could not be automatically deported on public policy grounds without proper consideration and assessment of the personal conduct of the individual, confirming previous precedents (*Calfa* [1999] ECR I-00011). At para. 66, it stated:

> *"Concerning measures of public policy…, in order to be justified, they must be based exclusively on the personal conduct of the individual concerned…Previous criminal convictions cannot in themselves justify those measures. As the Court has held, particularly in Bouchereau, the concept of public policy pre-supposes the existence, in addition to the perturbation of the social order which any*

infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society."

105. In *Bouchereau* [1977] ECR 1-01999, the CJEU had held that a narrow approach should be applied in the context of EU Directives since the definition of public policy varies across countries, and the court would not create a singular definition.

106. The comments of the CJEU in *Orfanopoulos* were made in the context of a derogation on public policy grounds from the free movement provisions of the Free Movement Directive. Thus, as Hogan J. observed, public policy in such circumstances "*would have to be interpreted with an exactness and strictness that might not necessarily be applicable in the case of a refusal under the 2004 Act"*. Albeit such strictness might not be applicable in interpreting the 2004 Act, Hogan J. was nevertheless of the view that *"any decision to refuse admission to the State on s.4(3)(j) grounds must be based on the personal conduct of the non-national concerned*".

107. In so far as public policy might be a reason to refuse permission under s.4(3)(j), Hogan J. referenced by way of example the decision of the English Court of Appeal in *R. (Farrakhan) v. Home Secretary* [2002] EWCA Civ 606, [2002] Q.B. 1391. There, public policy elided with personal conduct such to deny Mr. Farrakhan entry to the UK *"by reason of the risk posed to British fundamental interests"* because of Mr. Farrakhan's *"notorious opinions"* which *"might provoke disorder".* Thus, it found that the Secretary of State exercised *"a power expressly conferred on him…[and] did so for the purpose of the prevention of disorder…"*

108. However, Hogan J. considered the factual matrix in *Ezenwaka* very different to that at play in *R. (Farrakhan) v. Home Secretary*. While he accepted that the Government was fully entitled as a matter of policy to restrict the operation of the IBC Scheme and to take the view that the admission of the Ezenwakas into the State did not come within the scope

of the policy, it could not do so pursuant to s.4(3)(j) as *"the concept of public policy in the context in which that phrase appears in s.4(3)(j) is a very different one". "Neither Mrs. Ezenwaka nor her children pose a threat to Irish public policy in that particular sense of the term".* Manifestly, therefore, Hogan J. viewed "public policy" in s.4(3)(j) of the 2004 Act as a variant of "national security" by reference to EU law.

109. Insofar as Hogan J. found support for his approach to the interpretation of s.4(3)(j) by reference to how public policy is to be interpreted for the purposes of the Article 27 of the Free Movement Directive, the respondents argue that EU principles are not an apt comparator with s.4(3)(j) of the 2004 Act. On the other hand, counsel for the appellants points to *HAH v. SAA* [2017] IESC 40, [2017] 1 IR 72 where, in order to ascertain the public policy at issue in the *HAH* case (in essence, whether public policy permitted the recognition by the State of the second bigamous marriage conducted abroad of a man it had recognised as a refugee), O'Malley J. looked to the Constitution, Irish legislation, the policy of the Executive and "other sources" such as EU law, the ECHR and other international instruments. In *HAH*, O'Malley J. did not regard Government policy *simpliciter* as the exclusive source of the public policy in question. Counsel for the appellants also points to instances in the Irish legislative regime concerning immigration where public policy has been equated with the international public law concept of *"ordre public".* This, she says, is evident from how the Geneva Convention is given effect to in the Refugee Act 1996 ("the 1996 Act"). For example, provision is made for the expulsion of refugees pursuant to s.17(2)(a) of the 1996 Act if the Minister considers that "in the interest of national security or public policy (*"ordre public"*) it is necessary to do".

110. Moreover, pursuant to s.21(1)(g) of the 1996 Act, a person's refugee status may be revoked on the grounds, *inter alia*, that the refugee in question "is a person whose presence in the State poses a threat to national security or public policy (*"ordre public"*)". Other

examples of where the phrase "national security or public policy (*"ordre public"*)" appear are s.4(2) of the 1996 act (refusal to issue a travel document) and s.18(5) (refusal of family reunification permission) to name but a few. Many of these provisions are replicated in s.56(7)(a) of the International Protection Act 2015.

111. In the first instance, and notwithstanding the appellants' submissions, I am not persuaded that Hogan J.'s reliance, in *Ezenwaka*, on EU case law when construing the meaning of "public policy" in s.4(3)(j) is dispositive of the within appeals in favour of the appellants. First and foremost, the 2004 Act is solely domestic legislation and, thus, EU law is not engaged. Secondly, as Hogan J. himself acknowledged, the comments of the CJEU in *Orfanopoulous*, upon which the learned judge relied, were made in the context of a derogation on public policy grounds from the free movement provisions of the Free Movement Directive, hence, as Hogan J. observed, the concept of public policy *"would have to be interpreted with an exactness and strictness that might not necessarily be applicable in the case of a refusal under the 2004 Act".* I accept however that the learned judge goes on to qualify his latter remark by saying that *"any decision to refuse admission to the state in s.4(3)(j) grounds must be based on the personal conduct of the non-national concerned*". With respect to the learned judge, I cannot agree with this statement, for reasons which I will shortly set out.

112. Furthermore, I do not consider that the appellants' reliance on the fact that in the 1996 Act "public policy" is equated to "*ordre public*" assists the appellants in any significant regard. Article 32 of the Geneva Convention provides: "The Contracting States shall not expel a refugee lawfully on their territory save on grounds of national security or public order". It must be recalled that the gravamen of the Geneva Convention is the principle of *non-refoulement*. It is thus not surprising that given the provisions of Article 32 of the Geneva Convention, which deals with the expulsion of a refugee from the

Contracting State of refuge on the grounds of national security or "public order" *i.e. "ordre public*", that "public policy" as it appears in the 1996 Act necessarily admits of a narrow construction and that it falls to be construed as pertaining to matters more akin to issues of national security than the ordinarily wider concept of "public policy". Indeed, express recognition of this is evident in the 1996 Act where the words "*ordre public*" appear in brackets after the words "public policy". In the purely domestic 2004 Act, there is no such qualification.

The Immigration Act 1999 as an aid to interpreting s.4(3)(j)

113. Counsel for the appellants highlights the fact that the terms "national security" and "public policy" are used side by side in the Immigration Act 1999 ("the 1999 Act"). She points to s.3(6) of the 1999 Act which provides that in determining whether to make a deportation order in relation to a person, the Minister shall have regard, *inter alia*, to "considerations of national security and public policy" (s.3(6)(k)). Pursuant to s.4(1) of the 1999 Act, the Minister may make an exclusion order if he considers that it is in "the interests of national security or public policy" to do so. Counsel also points out that s.3(6)(j) of the 1999 Act lists the "common good" as a separate matter for consideration when there is a proposal to deport, which suggests, counsel submits, that at least for the 1999 Act, the term "public policy" meant something other than the "common good". It is submitted that the juxtapositioning of "national security" and "public policy" (as well as the separate categorisation of "the common good") in the 1999 Act again reinforces that what is intended by the words "national security" and "public policy", when they appear in the same subclause, is the protection of the fundamental interests of the State rather than Government policy generally. Thus, in light of how "public policy" is understood for the purposes of the 1996 Act and the 1999 Act, counsel for the appellant urges on the Court

Hogan J.'s interpretation of "public policy" in *Ezenwaka* as the logical interpretation of s.4(3)(j) of the 2004 Act.

114. I do not consider that the separate listing in the 1999 Act of "national security and public policy" and "the common good" (ss.3(6)(k) and s.3(6)(j) respectively) is a factor that necessarily impels this Court to put a narrow construction on "public policy" in s.4(3)(j), as the appellants contend. In the first instance, the purpose of the 1999 Act is different, as reflected in its long title: It reads:

> "An Act to make provision in relation to the control of non-nationals, to amend the Aliens Act, 1935, and the Refugee Act, 1996. And to provide for related matters".

115. I am also of this view not least because of the comments of MacMenamin J.in *Luximon v. Minister for Justice* [2018] IESC 24, [2018] 2 IR 542. While there are clear *"terminological 'echoes'"* between s. s.3(6)(k) of the 1999 Act and s.4(3)(j) of the 2004 Act, as MacMenamin J. observed the two Acts provide for entirely different matters: in the 1999 Act the contextual subject matter is deportation whereas the 2004 Act *"can best be seen as regulating prima facie lawful entrants coming into the State".* As he opined, at para. 39:

> *"…there are no words to be found in s.4 of the 2004 Act which either explicitly or by implication, 'refer back', in statutory terms, to s.3 of the 1999 Act, or provide that s.4(7) is to be read in conjunction with, or subject to s.3. The Immigration Act, 2004, as a whole, makes no such reference either."*

It is also of note that in s.3(6)(k) of the 1999 Act, "considerations of national security and public policy" are linked by "and" unlike the position in s.4(3)(j) of the 2004 Act. The different objects of the 2004 Act and the 1999 Act are apparent from their respective long titles.

Context and purpose as aids to interpretation

116. In the case of the 2004 Act, the long title provides:

> "An Act to make provision, in the interests of the common good, for the control of entry into the State, the duration and conditions of stay in the State and obligations while in the State of non-nationals and to provide for related matters".

117. One of the objects of the 2004 Act as identified in its long title is to make provision in the interests of the common good (i.e. the public good) "for the control of entry into the State". Thus, in my view, given the principles and policies underlying the 2004 Act, the term "public policy" when given its ordinary and natural meaning and having regard to the context and purpose of the Act properly accommodates the view adopted by the trial judge here, namely that there can be a Government policy in terms of how and in what manner a non-EEA national is permitted to enter the State to study. I hasten to add (and indeed as observed by Humphreys J. in *Li and Wang*) that the determination of whether the presence of a non-national in the State is contrary to public policy can only be made by reference to a particular fact situation and a particular time period, specifically that for that which the permission is sought. I will return to the particular factual matrix in play in the present cases in due course.

118. There are, potentially, matters other than the "personal conduct" of an entrant into the State that may affect the interests of "the common good". That being the case, it seems to me that to restrict "public policy" in the manner suggested by the appellants would not be consistent with the objective sought to be achieved by the 2004 Act as set out in its long title. Interpreting "public policy" in the manner sought by the appellants would run counter to the context and purpose of the 2004 Act.

119. The phrase "public policy" as it appears in s.4(3)(j) requires to be given the construction put on it by Humphreys J. in *Li and Wang*. This construction offers an interpretation of s.4(3)(j) of the 2004 Act which is consistent with the context and purposes of the 2004 Act as evidenced by its long title, the principles of Irish law and the nature of ministerial decision-making. Having regard to the object and purpose of the 2004 Act, refusal of entry on "public policy" grounds admits of a flexible concept which permits decisions on public policy to be made extraneous to considerations of "national security". They are, therefore, separate concepts.

120. Support for the contention that "public policy" in s.4(3)(j) of the 2004 Act is a distinct concept in and of itself is found in the decision of the Supreme Court in *Sobhy v. The Chief Appeals Officer* [2021] IESC 81. There the applicant had entered and worked in the State legally. A change in the law required her to apply for a visa for which she was rejected. She continued working for several years without a permit while continuing to pay income taxes and PRSI to the Revenue. She was eventually permitted to work legally in 2019 and attempted to claim maternity benefits but was denied because she had not worked sufficient years, discounting the illegal years she was paying taxes. Writing for the Supreme Court, Baker J. held that Ms. Sobhy was not entitled to the benefit of maternity payments. The learned judge also held that more legislative guidance was required since the court did not wish to make it attractive for employers to employ illegal workers. In the course of her judgment, Baker J. referred, *inter alia*, to the purpose of the 2004 Act. She stated:

> *"…the statutory regime created by the Acts of 2003 and [the 2004 Act] contain, and seek to further, <u>the public policy of the regulation of immigration</u> and employment of undocumented persons in the State. <u>That statutory purpose is</u>*

directed towards the common good and the furtherance of the protection of the borders of the State" (at para. 119) (emphasis added).

The policy in issue here

121. The policy in question here (of excluding on-line language course students from entry into the State for such study) is a perfectly rational one. Thus, given the construction I have put on s.4(3)(j) of the 2004 Act, it was lawful and proper for Government to formulate the policy encompassed in the 2011 Guidelines as a basis upon which to refuse leave to land on "public policy" grounds, as envisaged by s.4(3)(j). As Mr. Maguire avers in his first affidavit, the policy adopted by the first respondent was taken in the national interest and the common good. This goes to the very essence of the purpose of the 2004 Act (as stated in the long title), which is to make provision in the interest of the common good for the control of entry to the State. This is consistent with the reasoning adopted by Humphreys J., at para. 48 of *Li and Wang.*

122. In the present cases, the Covid-19 pandemic was the precipitating factor for the refusal to grant the appellants leave to land pursuant to the 2011 Guidelines. The refusal of entry came about during a period of unprecedented national circumstances and was applied to meet the exigencies of those circumstances.

123. The policy in force as of 12 December 2020 (and which has its origins in the 2011 Guidelines which, I repeat, are not challenged in the within proceedings) cannot be regarded as a rigid policy. This is evidenced by the fact that it is capable of amendment, and in circumstances where the policy was not applicable to students already in the State who were hitherto accessing courses face-to-face but who had to access courses online when the pandemic struck. Albeit the State was at Covid level 3 when the appellants arrived in the State, the published position of the first respondent was that "prospective students seeking to enter the State should wait until in-person tuition has been resumed".

Furthermore, the notice published on 27 October 2020 warned that failure to wait until in-person classes resumed may result in students being refused leave to land.

124. In view of the conclusions I have reached, as set out above, it must follow that the appellants' argument, namely that since there was nothing in their conduct as warranting refusal to land the first respondent could not avail of s.4(3)(j) of the 2004 Act, must fail. For the reasons I have set out above, it was thus not necessary for the first respondent (or the immigration officers), when implementing the Government policy in issue here, to have had regard to the appellants' conduct in order to exercise the discretion provided for in s.4(1) of the 2004 Act.

125. It is important, however, to emphasise that while I have not found any frailty in the policy in force in the State on 12 December 2020 to restrict online language students from entry into the State for the purpose of such study, that is not to say that the discretion to refuse entry on public policy grounds under s.4(3)(j) of the 2004 Act is to be regarded as an open-ended power. Indeed, the legislative history to which I have already referred suggests that the discretion vested in the first respondent was never meant to be open-ended. However, I find it unnecessary in these appeals to opine on where the outer limit may lie with regard of refusal of entry on "public policy" grounds. Suffice it to say that for present purposes, for the reasons set out above, I am satisfied that that outer limit, whatever it may be, was not breached by the policy in issue here.

A re-setting of the clock?

126. Before this Court, the appellants contended that if the High Court's interpretation of s.4(3)(j) is to be preferred by the Court, then that both resets the clock to the position that pertained pre-1935 and leaves s.4(3)(j) "in *Laurentiu* territory". I am satisfied, however, that the trial judge's interpretation of s.4(3)(j) does not have the effect of re-setting clock to pre-1935. Nor does it mean that the subsection suffers from the same frailties as were

identified in *Laurentiu*. The appellants' arguments harken back to a time where there were no principles or policies at all in the 1935 Act to guide the Minister. This is not now the situation in circumstances where the policies and principles are set out in the 2004 Act. Furthermore, as I have said already, it is not the case that the first respondent has by virtue of s.4(3)(j) free reign. He is constrained by the very purpose of the 2004 Act as set out in its long title. Thus, his power pursuant to s.4(3)(j) is not an unfettered discretion: it must be applied for the common good. Here, as I have said earlier, the two appellants do not challenge the policy set out in the 2011 Guidelines but rather the use by the first respondent of the provisions of s.4(3)(j) to apply that policy in circumstances where the appellants say that the reference to "public policy" in s.4(3)(j) admits of a much narrower focus and where it is argued that the term "public policy" in s.4(3)(j) must be construed by reference to the maxim *noscitur a sociis.* For the reasons already set out, however, I have found that the application of the maxim was not required. To echo O'Donnell J. in *AC*, where, when viewed in context and having regard to the subject matter and objective of the 2004 Act, a plain meaning of the terms "national security" and "to be contrary to public policy" as found in s.4(3)(j) of the 2004 Act is apparent, *"then effect must be given to it unless it would be plainly absurd that it could not have been intended"*. No such absurdity arises here.

The operation of the policy vis a vis the appellants

127. The policy in force in December 2020 applied individually to the appellants. They came to the State to do a 25-week English language course which they hoped would be face-to-face, but the providers of the course could not deliver it face-to-face in light of the Government policy in force at the time, namely that language courses were going to be conducted online. After Christmas 2020, the country was once again going to be in level 5 lockdown. Furthermore, there was no irrationality in the policy being applied to the

appellants – the first respondent was applying the policy to the individual facts of the appellants who were not going to be embarking on a face-to-face language course.

128. Given the principles and policies set out in the 2004 Act, and given the object of the Act, namely, to regulate entry into the State (for the common good), the policy in force in December 2020 by the first respondent was within the ambit of public policy provided for in s.4(3)(j). While I accept that the policy in issue here has the potential to be exercised irrationally, unreasonably or in an inflexible manner, those thresholds were not met here, in my view.

Summary

129. In construing s.4(3)(j) as she did, the trial judge had regard to the long title to the 2004 Act as an important contextual point which gives voice to the intention of the Act to control the entry of non-nationals into the State in the interests of the common good, something which guides the first respondent in his decision-making and instructions to immigration officers. While the term "public policy" is not defined in the 2004 Act, neither was it defined in the Aliens Order 1946 which the 2004 Act adopted in large part.

130. The trial judge did not err in declining to follow *Ezenwaka*. Nor did she err in holding that:

i. The question of admission to the State of non-EEA nationals is a matter solely for the first respondent to be determined in accordance with domestic law as provided for by s.4(3) of the 2004 Act.

ii. EU law has no application in this realm.

iii. It is a matter for the first respondent to regulate the conditions under which persons can be admitted into the State.

iv. With respect to non-EEA students undertaking an English language course, the first respondent has adopted a legitimate policy of not permitting a student to enter the State if that course was to be conducted online.

v. If such a student sought to enter the State, the first respondent must be in a position to refuse permission to enter, on an individualised basis, so as to give effect to his function of regulating entry into the State, in order to give effect to the purpose of the 2004 Act.

vi. The Oireachtas must have intended that the first respondent would be empowered to refuse entry for legitimate policy reasons on an individual basis and accordingly, "public policy" as referred to in s.4(3)(j) must refer to Government policy relating to the regulation of entry into the State, as opposed to relating only to personal conduct on the part of a non-national which poses a real and immediate threat to fundamental policy interests of the State.

vii. Otherwise, the first respondent would not be in a position to regulate entry into the State and give effect to the purpose of the Act.

viii. As regards its interpretation, two different concepts are at play within s.4(3)(j): the first being that a non-national can be refused permission to land if her entry into or presence in the State could pose a threat to national security; the second being that a non-national can be refused permission to land if her entry into or presence in the State is contrary to public policy.

131. Each of the above findings logically and principally flows from the powers granted to the first respondent under s.4(3) and from the context and purpose of the 2004 Act itself.

132. For the reasons set out, I would dismiss the appellants' appeals.

Costs

133. The appellants have not succeeded on any of the grounds in the appeal. It follows that the respondents should be awarded their costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 21 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 21-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

134. As this judgment is being delivered electronically, Ní Raifeartaigh J. and Binchy J. have indicated their agreement therewith and with the orders I have proposed.