

## Suggested Structure for Studying Non-Delegation Doctrine

This sheet is intended to provide some guidance for how to understand the case-law on non-delegation in a *somewhat* thematic fashion. It is hoped students might find the topic easier reading it this way.

### The Main Test

*Cityview Press v An Comhairle Oiluna ("AnCO")*: Principles and Policies Test – Note the notion of overall legislative control also

### Examples of the Test In Operation

*McDaid v Sheehy*: Absolute lack of principles and policies in s.1(1) of Impositions of Duties Act, 1957 – Note legislative retrospective validation of previous Orders

### The Ultra Vires / Intra Vires / Presumption of Constitutionality Issue

To understand the presumption of constitutionality in more detail – you can download a wonderful article by \*ahem\*...me...from the website. At pp 6-8 there is a little bit on the presumption and you can forget about the rest, unless you find it particularly riveting. For the moment you can find a link to it in blog section.

Anyway, remember the point here; secondary legislation falls if it is ultra vires but that means there is no constitutional problem. If it is *intra vires* then the question is whether the parent statute permitting it is constitutional or not and the Court prefer to read parent statutes as not permitting unconstitutional delegation and thus saving them from challenge. Two cases, in particular, were examples of this: *Harvey v Minister for Social Welfare* and *Cooke v Walsh*. A third example is *Mulcreavy v The Minister for the Environment* but remember this case was only a report of an application for leave to apply for judicial review and is not a substantive determination. It is relevant because it shows the continued vitality of the approach in *Harvey* and *Cooke*.

These cases should also make you remember that the rationale of the principles and policies test is that in applying such no Minister is really “making law” contrary to Article 15. Thus, if a Minister goes against the clear and stated intention in legislation then, by definition, he has gone beyond the principles and policies contained therein. If the Act *might be read to allow* this by saying on the one hand “free education for all” and then on the other by saying “the Minister may make regulations”, any regulations which undercut the notion of “free education” would probably be void but would most likely be found to be ultra vires. Can you suggest why?

### Administrative Powers

Two cases; *Re Article 26 and the Health (No.2) (Amendment) Bill, 2004* and *Casey v Minister for Arts, Heritage, Gaeltacht and the Islands* should always make you remember that “problems” do not arise when the impugned powers can be classed as administrative only.

### The Aliens Act, 1935 cases

There is nothing “special” about these cases really insofar as they are simply applications of existing principle. Remember in *Laurentiu v Minister for Justice* the Supreme Court held that no principles and policies existed for the general regulation by Ministerial order of “deportation” etc. Then in *Leontjava & Chang v DPP* one regulation was held to be ultra vires, so that ended things, but the other (Article 15 relating to identification) was intra vires. Thus the principles and policies test was applied, and it survived scrutiny.

### The European Union Aspect

Remember, the problem here is that most EU law comes in by way of ministerial order or statutory instrument. The law would seem to be that this system – as a whole – is not prima facie constitutional or unconstitutional. Rather, any particular example of Ministerial law-making power *may* be saved as “necessitated” by the obligations of membership of the EU (see Article 29.4.10). If it cannot be so saved, then the principles and policies test is applied but the principles and policies are looked for in the relevant EU legislation. We looked at three cases here which all support these principles; *Meagher v Minister for Agriculture*, *Maher v Minister for Agriculture* and *Browne v Minister for Agriculture*.