Neutral Citation Number [2005] IEHC 442

JUDICIAL REVIEW

2002 NO. 571 JR

BETWEEN

EOIN DUBSKY

APPLICANT

AND

THE GOVERNMENT OF IRELAND, THE MINISTER FOR FOREIGN AFFAIRS, THE MINISTER FOR TRANSPORT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment delivered by Macken J. on the 13th day of December 2005

1. These judicial review proceedings arise in the wake of the terrorist attacks of 11th September 2001 in the United States and the subsequent U. S. led military action in Afghanistan. On 12th September, 2001, Resolution 1368 (2001) was passed by the Security Council of the United Nations in which it unequivocally condemned the terrorist attacks and expressed "its readiness to take all necessary steps to respond to the terrorist attacks…and to combat all forms of terrorism". The Resolution called on "all states to work together urgently to bring justice to the perpetrators, organisers and sponsors of these terrorist attacks". These sentiments were repeated in Resolution 1373 of the Security Council of the 28th September, 2001.

2. The affidavit of Mr. David Cooney, Political Director of the Department of Foreign Affairs sworn on the 19th September 2002, outlines the respondents' view of the response to the events which surrounded the military action commenced in Afghanistan by a coalition of states led by the United States. According to that affidavit, the United States, having established links between Al Qaeda and the Taliban regime in Afghanistan, the coalition launched a military campaign against the Al Qaeda network and the Taliban in that country. The Al Qaeda camps were destroyed and the Taliban overthrown. The international community thereafter established an Interim Authority in December 2001, which was subsequently replaced by a transitional authority in June 2002.

3. According to the affidavit evidence filed before the court, the response of the Irish Government as to the terrorist attacks in September 2001, and as to Resolution 1368 (2001) was outlined in a speech made by the Taoiseach in which it was articulated that the State would, in so far as it was necessary, facilitate the overflight, landing and refuelling of aircraft engaged in pursuit of Resolution 1368(2001), and this position was duly communicated to Mr. Powell, then Secretary of State for the United States.

4. The applicant in these proceedings is seeking to challenge, by way of judicial review, the first named respondent's decision to permit aircraft involved in the military action in Afghanistan to overfly the State and/or to land and refuel within the State, without the assent of the Dáil. It is the applicant's contention that this assent is required by Article 28 of the Constitution. He also seeks to have struck down the permissions actually granted by the second or third named respondents allowing aircraft to overfly the State or to land or refuel within the State.

Relief

5. The applicant obtained leave to apply for judicial review on the 13th September 2002 by order of this Court (Finnegan P.) The reliefs sought by the applicant were originally more extensive, but, pursuant to order of this Court, are now the following:

> 1. An order of *certiorari* removing for the purpose of being quashed the decision of the First Named Respondent to open the airports and airspace of the State to aircraft involved in or relevant to military action in Afghanistan in purported pursuance of United Nationals Security Council resolution 1368, and/or removing for the purpose of being quashed the decisions of the second named respondent pursuant to the Air Navigation (Foreign Military Aircraft) Order 1952 allowing such aircraft to overfly or land in the State and/or removing for the purpose of being quashed the decision of the third named Respondent pursuant to Article 5 of the Air Navigation (Carriage of Munitions of War, Weapons and Dangerous Goods) Order, 1973, as amended by the Air Navigation (Carriage of Munitions of War, Weapons and Dangerous Goods) Order, 1989, exempting such aircraft from the prohibition on carriage of munitions of war including weapons and dangerous goods.
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> 2. If necessary, a declaration that the said Orders of 1952, 1973, and 1989 are ultra vires, unconstitutional and void and/or the Air Navigation Act, 1946 and in particular s.5 thereof, is unconstitutional and void insofar as it authorises the said orders.
>
> 3. A declaration that the giving of permission allowing the said aircraft to fly and/or land in the State and/or from the giving of any other assistance to states involved in military action in Afghanistan is in breach of Article 28.3.1.of the Constitution.

Grounds for seeking relief:

6. The permitted grounds on which the relief is sought are as follows:

> 1. The State by assisting the military action in Afghanistan is declaring and/or participating in a war without the assent of the Dáil Éireann contrary to Article 28.3.1.
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> 2. The military action in Afghanistan is contrary to the Constitution in particular, Articles 29.1 to 4 thereof.
>
> 3. The impugned decisions are not authorised by the Orders of 1952, 1973, and 1989. If it is found that the decisions were authorised, the said orders are *ultra vires* and unconstitutional and void and/or the Air Navigation Act, 1946 and, in particular, s. 5 thereof, is unconstitutional and void on the grounds of excessive delegation of power, contrary to Article 15 of the Constitution.

7. By a Statement of Opposition filed on 31st October 2002 the respondents pleaded, in essence:

> 1) Affording the facility to foreign military aircraft or to commercial aircraft carrying munitions and/or weapons to pass through Irish airspace, or to have landing or refuelling facilities does not constitute participation in any war;
>
> 2) There is not and has not been, any war between the United States and its allied and Afghanistan as the term "war" is

employed in Article 28.3 of the Constitution. Without prejudice to the foregoing, the United States insofar as it is involved in military action in Afghanistan, is acting with the consent of the Government of that country, and has not declared as against it.

3) In the premises, the assent of Dáil Eireann is not required, whether pursuant to the provisions of Article 18.3 or otherwise, in order for the respondent to allow the facilities complained of.

4) In particular pursuant to the provisions of Article 28.4.1 of the Constitution, the executive power of the State in or in connection with its external relations shall in accordance with that Article be exercised by or on the authority of the Government. The determination to allow the use of the facilities complained of was made in accordance with such provisions, in the exercise of that executive power, pursuant to the mandates of Resolution 1368 (2001) of the Security Council of the United Nations and having regard to the obligations of the State as a matter of international law, consequent upon the United Nations Charter and in particular Articles 25 and 49 thereof.

5) In the premises, the allegation that the military action in Afghanistan is contrary to international law is denied. Further, or in the alternative to this last plea, the applicant has no entitlement to seek judicial review pursuant to the provisions of Article 29.1-4 of the Constitution of Ireland, and the respondents are not in breach of it.

6) This Court does not have jurisdiction or power to adjudicate upon the compatibility of the actions occurring outside the jurisdiction of other Sovereign States or persons outside the State with the provisions of the Constitution, which provisions do not purport to nor in fact govern such actions. The assertion therefore that the military action in Afghanistan is an infringement of the human rights of any person is denied, whether on the basis suggested or otherwise.

7) Further, the provisions of the Air Navigation Act 1946 are not contrary to the Constitution. Section 5 of the said Act does not entail an excessive delegation of powers as alleged, and neither that or any other provision of the said Act entail any unjustified or other discrimination, contrary to the provisions of Article 40 of the Constitution.

8) Without prejudice to the right of the respondents to contend that the Statement of Grounds discloses no basis for impugning the provisions of the said Act, Section 5 thereof read alone and/or in conjunction with the provisions of *inter alia* sections 9 and 11 specifies and defines the principles and policies pursuant to which Regulations made under that Act are to be promulgated

9) The provisions of the Air Navigation (Foreign Military Aircraft) Order 1952, and of the Air Navigation (Carriage of Munitions of War, Weapons and Dangerous Goods) (Amendment) Orders 1973 and 1989 are duly authorised and are intra vires the provisions of the said Act of 1946, and each and every determination of the second named Respondent pursuant to the said Order of 1952 or of 1973 or of 1989 are authorised by and in accordance with the said Orders.

10) The Applicant is disentitled, by reason of laches and acquiescence, to seek the relief claimed and does not enjoy locus standi to do so.

11) Having regard to the provisions of the Constitution, and having regard to the vesting in the Government of the power of the State the power to declare or participate in a war, and to the separation of powers envisaged by the Constitution, disputes implicating the such issues, or the proper meaning and effect of instruments of international organisations and/or the effect of actions of foreign sovereign governments outside the State, are not matters which in the circumstances of this case, are justiciable at the behest of the applicant, but rather are matters of which this Court should decline jurisdiction.

Relevant Constitutional and Legislative Provisions

8. Article 15.2 of the Constitution of Ireland states:

> "1o The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.
>
> 2o Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures."

9. Article 15.6 of the Constitution states: "1o The right to raise and maintain military or armed forces is vested exclusively in the Oireachtas.

> 2o No military or armed force, other than a military or armed force raised and maintained by the Oireachtas, shall b e raised or maintained for any purpose whatsoever."

10. Article 28(3) of the Constitution states:

> "1° War shall not be declared and the State shall not participate in any war save with the assent of Dáil Éireann.
>
> 2° …
>
> 3° Nothing in this Constitution other than Article 15.5.2° shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law. In this sub-section "time of war" includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State and "time of war or armed rebellion" includes such time after the termination of any war, or of any such armed conflict as aforesaid, or of an armed rebellion, as may elapse until each of the Houses of the Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist."

11. Article 28.4.1 o of the Constitution provides:

"The Government shall be responsible to Dáil Eireann."

12. The relevant sections of Article 29 provide:

> 1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.
>
> 2. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination.
>
> 3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.
>
> 4. 1° The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government. 2° For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern.
>
> … ."

13. The control of landing or the overflying of foreign aircraft is governed by a legislative scheme. Included in this scheme, being the most germane to the issues between the parties in these proceedings, are a number of Orders made pursuant to the Air Navigation and Transport Act, 1946 (hereafter "the Act of 1946"), Section 5 of which provides that an Order made by the Minister for Industry and Commerce under the Act of 1946 can be made applicable to any aircraft in or over the State, and authorises the Minister to make Regulations in respect of such matters and things as might be specified in such Order.

14. The relevant provisions of the Act of 1946 provide as follows:

> S. 2 … "the Minister" as the Minister for Industry and Commerce. … .S. 3(1) Subject to the provisions of this section, this Act shall not apply to State aircraft.
>
> S.3(2) The Minister may, by order, direct that such provisions of this Act or any other made thereunder, as may be specified in such order shall, with or without mode indications apply to State aircraft, and whenever any such order is made and is in force, such of the said provisions as may be specified in such order shall, subject to the modifications (if any) as may be specified therein, have the force of law in the State".
>
> S. 5 (1) An order made by the Minister under this Act may be made applicable to any aircraft in or over the State or to Irish aircraft wherever they may be.
>
> (2) The Minister shall not, in any order made by him under this Act, make provisions in relation to the Customs except with the concurrence of the Minister for Finance.
>
> (3) An order made by the Minister under this Act may authorise the Minister to make regulations and give directions for carrying out the purposes of such order in respect of such matters and things as may be specified in such order.
>
> (4) An order made by the Minister under this Act may contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of such order.
>
> (5) (a) The Minister may by order under this subsection revoke or amend any instrument to which this subsection applies.
>
> (b) This subsection applies to—
>
> (i) any order or regulations made under Part I of the Air Navigation Act, 1920, as adapted by or under subsequent enactments, which was continued in force by section 15 of the Principal Act and is in force immediately before the operative date,
>
> (ii) any order made by the Government under Part II or under section 63 of the Principal Act,
>
> (iii) any order made by the Government under section 5 of the Principal Act amending any such order or regulation as is referred to in subparagraph (i) or subparagraph (ii) of this paragraph,
>
> (iv) any order made by the Minister under this Act.
>
> S.6. The Minister may make regulations or give directions in respect of which the Minister is authorised by an order made by the Minister under this Act to make regulations or give directions for carrying out the purposes of such order."Part II of the Act is entitled "Provisions in Relation to the Chicago Convention".

15. The Air Navigation and Transport Act 1950 amended the Act of 1946. In particular S. 5 of this Act defines a "State aircraft" as follows:

> "The expression 'State aircraft', where it occurs in the Principal Act or the Act of 1946 shall … mean aircraft of any country used in military, customs and police services.

16. The first of the Orders made pursuant to the Act of 1946 is the Air Navigation (Foreign Military Aircraft) Order 1952 (hereinafter "the 1952 Order") which contains the following provisions in relation to the overflying and landing of military aircraft in the State:

> 2. The expression "military aircraft" means aircraft used in military service;

The expression "the Minister" means the Minister for External Affairs.

3. No foreign military aircraft shall fly over or land in the State save on the express invitation or with the express permission of the Minister.

5. Every foreign military aircraft flying over or landing in the State on the express invitation or with the express permission of the Minister shall comply with such stipulations as the Minister may make in relation to such aircraft."

17. The Air Navigation (Carriage of Munitions of War, Weapons, and Dangerous Goods) Order 1973 (hereinafter "the 1973 Order") made pursuant to Sections 5, 9, 11 and 16 of the Act of 1946 sets out the position governing certain aircraft carrying munitions of war or dangerous goods. The 1973 Order contains the following provisions:

"the Minister" shall be the Minister for Transport and Power;

5. The Minister may, by direction, exempt any class of aircraft from any of the provisions of Article 6 or 7 of this Order.

6. (1) In this Article "munitions of war" means weapons and ammunition designed for use in warfare and includes parts of or for such weapons and ammunition.

(2) (a) Subject to subparagraph (b) of this paragraph—

(i) it shall be unlawful to carry munitions of war on an aircraft;

(ii) it shall be unlawful for a person to take or cause to be taken on board an aircraft, or to deliver or cause to be delivered, for carriage thereon, goods which he knows or has reason to suspect to be munitions of war.

(b) This Article shall not apply to munitions of war taken or carried on board an aircraft which is registered elsewhere than in the State if, under the laws of the state in which the aircraft is registered the munitions of war may be lawfully taken or carried on board for the purpose of ensuring the safety of the aircraft or the persons on board."

18. Finally, the Air Navigation (Carriage of Munitions of War, Weapons, and Dangerous Goods) Order, 1989 (hereafter "the amended 1973 Order") amended the 1973 Order by substituting for Article 5, the following article:

"5. The Minister may, by direction, exempt a specified aircraft in regard to a particular aircraft operation from all or any of the provisions of Articles 6 or 7 of this Order."

Blanket Exemption

19. Reference will be made in the course of the judgment to what is called a "blanket exemption" Under the 1952 Order – as outlined above - all foreign military aircraft require the express invitation or permission of the Minister for Foreign Affairs to overfly or to land in the State. According to the Respondents, permission has been normally granted for such overflying or landing on the basis of confirmation to the second named respondent that the aircraft is unarmed, carries no ammunition and is not engaged in any intelligence operations and are not involved in military exercises. This position is not wholly accepted by the applicant in the present case, in that he contends, as will be clear from his submissions, that in the absence of documentation as to such stipulations (and as will be seen from the arguments, their alleged waiver), those alleged stipulations and their waiver, do not, in reality, exist.

20. In general, the same procedures and permission are required of aircraft carrying munitions under the 1973 Order. However, there are two exceptions to this practice. Firstly, there is what is known as a "blanket permission" granted to some countries for a specified period, which allows aircraft to overfly and/or land in the State, on condition that advance notification is given to the Department of Foreign Affairs, a practice, according to the respondents, operating in respect of aircraft of many countries. The second exception relates to a practice operating in respect of aircraft of the United States. In 1959 an agreement was entered into between the then Minister for External Relations and the United States Ambassador to Ireland whereby the United States was granted "blanket" permission for overflights of unarmed military aircraft. Under that arrangement, the United States is required to supply regular *post hoc* statistics of overflights broken down on a month by month basis.

21. On this aspect of the matter, according to the affidavits of Mr. Cooney sworn on the 19th September 2002, and on the 16th December 2003, the position post – Resolution 1368 was different as concerns blanket exemptions. Following this Resolution, a waiver of the normal stipulations attaching to overflights and/or landing of foreign aircraft, including military aircraft, was made available in the case of all aircraft operating in pursuance of that Resolution, from wherever they emanated.

22. The foregoing is the legislative scheme, and the practical manner in which the respondents say it was applied, both before the passing of Resolution 1368 and subsequent to that. However, according to the evidence of the respondents, again not fully accepted by the applicant, no actual applications for permission for military aircraft engaged in pursuit of Resolution 1368 to land or overfly Irish territory were received up to the date of swearing of the affidavits, and therefore the waiver of the normal stipulations which was offered by the first named respondent was never called into operation. Instead, overflights and landings continued on the basis of the pre-existing, long-standing procedures.

Brief Background Facts

23. I have briefly introduced the background giving rise to the passing of Resolution 1368 and the background against which the applicant brings these proceedings. It arises in the wake of the September 11 attacks on the World Trade Centre in New York, and the widespread condemnation of terrorist attacks of all types. Several debates took place under the auspices of the United Nations, concerning the question of heightened concern about such attacks, and pursuant to the procedures operated by that international institution several resolutions were proposed and/or adopted. Among these was resolution 1368 (2001), passed on the 12th September, the day following the attacks in New York, and a further resolution, number 1373 (2001) was passed on the 28th September 2001. At that time, Afghanistan was controlled by a group known as the Taliban, which had announced the creation of the Islamic Emirate of Afghanistan, recognised by a small number of governments, and both were in conflict in that country with the United Front Alliance. This latter group was associated to the government of the Islamic Republic of Afghanistan, which in turn was

recognised as the legitimate government of Afghanistan both by Ireland and by the United Nations. Prior to the passing of Resolution 1368, according to the respondents - and not contested - the Security Council had imposed sanctions against the Taliban arising from its refusal to hand over Osama bin Laden, the reputed leader of Al Qaeda, and its refusal to close terrorist training camps operating from territory under its control. Subsequent to resolutions 1368 and 1373, military action was commenced against Al Qaeda and the Taliban Regime in Afghanistan by an international coalition of states, led by the United States of America. The Taliban regime was overthrown, and a new government was established. At the time of swearing of his first affidavit in 2002, Mr. Cooney, on behalf of the second named respondent, indicated that the State was about to sign an agreement with the Transitional Authority of Afghanistan to establish diplomatic relations.

24. After the passing of resolution 1368, the first respondent indicated it would facilitate overflight, landing and refuelling of aircraft engaged in pursuit of resolution 1368, which decision was announced by statement of the Taoiseach, made after consultation with the second named Respondent and following a meeting of the Special European Council, held on the 21st September 2001. The statement disclosed a willingness to "facilitate the overflight, landing and refuelling go aircraft engaged in pursuit of Resolution 1368," making no mention of aircraft of any particular country. It would appear that this offer was formally conveyed by the second named Respondent in a meeting with then United States Secretary of State Powell on the 26th September 2001. Subsequently, the decision was repeated by the Taoiseach and the Minister for Foreign Affairs in addresses by them to the Dáil in late September and early October. Consequent upon the foregoing, it would appear that certain aircraft, armed or unarmed, military or civilian – and in the latter case, carrying arms or troops – were or may have been overflying Irish airspace, and/or were landing at Shannon airport, travelling to or from Afghanistan. These overflights and/or landings are made pursuant to some or other of the above Orders or Regulations, or pursuant to the said blanket exemption, with or without stipulations. Substantial reams of documents have been discovered and disclosed and form part of the proceedings, but I do not intend to refer to these, whether documents secured by the applicant pursuant to the provisions of the Freedom of Information Act, or the discovered documents of the second and/or third respondents, save where this is essential to the judgment.

The Applicant's Submissions

Outline

25. It is the applicant's contention that such aircraft overflying and/or landing in the State are travelling to or from Afghanistan as part of what he contends is a war being carried on there by members of the international coalition led by the United States, and that the decision of the first named respondent to facilitate such overflights and/or landings constitutes, on the part of the said Respondent, participation in that war within the meaning of Article 28.3.1. The assent of the Dáil to such participation has not been secured, contrary, the applicant argues, to the provisions of Article 28.3.1 of the Constitution, and the decision, and the permissions granted consequent upon the same, are therefore properly impugned by him. Further, the permissions actually granted and the waiver of stipulations normally attaching to them are unconstitutional.

26. The applicant's position on the issues arising under Article 28 can be summarised as follows: There was a war in Afghanistan, as that word is understood legally, both in international law and according to the Constitution. Allowing or permitting aircraft whether armed or unarmed military aircraft, or civilian aircraft carrying arms or munitions of war or army personnel, on their way to or from Afghanistan, to overfly Irish airspace or to land and/or refuel in Ireland, constitutes participation in that war. It is unconstitutional for the Government to permit such participation in a war without the assent of Dáil Eireann, which assent has not been secured. The fact that the respondents contend that the permission to overfly and/or land in purported pursuance of United Nations Resolution 1368 is unjustified and does not, in any event, cure the wrongdoing, because that resolution did not authorise the actions taken in Afghanistan. Further, the existence of Resolution 1368, even if it envisaged doing what the coalition of states have been doing in Afghanistan, which is not accepted by the applicant, this cannot render an unconstitutional participation in a war, constitutional.

27. Apart from the foregoing plea as to unconstitutionality, based on the absence of assent of the Dáil pursuant to Article 28 of the Constitution, and which in some respect, invokes also part of Article 29, there is a separate plea of the applicant, also alleging unconstitutionality, on rather more technical grounds. Again in essence, this part of the applicant's case is based on the legality of the several Orders referred to above, which he says are ultra vires, because they exceed the powers of the relevant Minister, having regard to the content of the Act of 1946. In the alternative, he argues that, if they are properly made Orders, then S.5 of the Act of 1946 is unconstitutional due to an excessive delegation of power, having regard to the provisions of Article 15 of the Constitution.

28 I propose in this judgment to deal with what I might be called the primary constitutional submissions first, and then separately with the latter allegations, even though they are somewhat interrelated. Dealing first therefore, with the allegation that the failure of the first named respondent to secure the assent of Dáil Éireann before deciding to allow aircraft to overfly or land and/or refuel at Shannon airport, renders the permission to carry out those activities unconstitutional, it is not disputed, as a matter of fact, that there was no formal resolution of the Dáil passed in respect of, to use a neutral phrase at this point in the judgment, the matters at issue in these proceedings,. While the applicant asserts it is not necessary to determine the issue of the existence of war, he does claim that the court will have to decide what is meant by participation in the events occurring in Afghanistan.

Detailed Submissions

29. For the applicant, the first contention presented by Mr. Rogers, S.C. is that the concept of a war involves solely that of armed conflict, and that what the Constitution clearly does is define a war as "an armed conflict". According to this argument, Article 28.3.3 of the Constitution makes it clear that the definition of a war includes a time when there is taking place an "armed conflict", in which, while the State is not a participant, the Houses of the Oireachtas shall have resolved that arising out of such armed conflict, a national emergency exists. It is submitted that it is clear from this wording that the concept of war involves solely armed conflict, and that what the Constitution clearly identifies as the principal defining quality of a war is an armed conflict.

30. He further submits that the court should reflect on whether there was not an entity governing Afghanistan in 2001 other than the Taliban, and argues that there wasn't. Whereas the respondents claim that because the international community did not recognise the Taliban, it being recognised by a few countries only, then that group did not constitute a government, according to the applicant's argument, that is not a matter which the court can resolve, as it is simply a description of the position "on the ground" so to speak. What is not in doubt however is that the Taliban governed or controlled Afghanistan for a number of years and nobody else did. Mr Rogers accepts that the court could not be required to determine whether or not the Taliban was a lawful Government or a recognised Government in Afghanistan because there are of course different views about that. Whatever the status of the Taliban, the question which arises for determination is whether what happened in October 2001 when what the applicant calls "the war", or when "armed attacks" commenced, was a war. The applicant accepts that this is not a case of war being declared by the first named respondent. Rather what is at issue is whether, a war not having been declared, the respondent is nevertheless participating in a war since 2001. The mere absence of a declaration of war however cannot in logic, he argues, prevent the violent overthrow of a government which had been in situ for several years from being, in law and in fact, a war as that term is used in the Constitution. The respondents' denial that its decision to permit overflights and landings, and the permissions actually granted, do not amount to

participation, flies in the face of the facts on the ground both in Afghanistan and within the State.

31. Secondly, the applicant submits he is entitled to invoke Article 29 and in particular Article 29.2 and 3 of the Constitution not to establish a direct right of action but for the purposes of arguing the status and effect of the underlying principles found there. Mr Rogers submits that the content of that Article is a statement of principle, having regard to a question of a war and whether the State is in fact participating in it. In that regard the applicant relies on principles of international law touching on the duties of neutral powers. These duties can be seen clearly from the Hague Convention 1907, entitled "a Convention Respecting the Rights and Duties of Neutral Powers".

32. Flowing from Article 5 of the Hague Convention, he argues it is clear that a neutral State may not permit belligerents, or the moving of troops or convoys, in or through its territory. Article 7 of the Convention creates a type of exemption which permits the export of munitions or arms from the State, but still does not permit belligerents to be in the State,. It is accepted that Ireland is not a party to the Convention. However Mr. Rogers submits that the Convention is no more than the bringing together or codification of pre-existing, generally accepted principles of international law which emerged in the course of the early 19th century and to which the State subscribes, as is clear from Article 29. In that regard Mr Rogers relied also on an abstract from Schwartzenburger on International Law, 1968 edn. p. 417 under "Fundamentals, The basic rules and duties of abstention and impartiality", and one from Oppenheim on International Law, 1926 edn. p.511 under the heading "The Passage of Troops". In particular he contends that the Oppenheim statement in 1926 that the passage of belligerent troops must be prohibited in order to main neutrality is a significant statement of international law which should be adopted by this court as a criterion or a test on the question of what constitutes "participation" in Article 28(3)(1). Having regard to these well established principles of international law as to neutrality, it cannot be said that a State which permits, in an authorised and administratively approved way, troop movements through that State by a belligerent to a theatre of war, is not participating in such a war.

33. It is not necessary to involve a State's own army to constitute participation within the ambit of Article 28. Facilitation of the movement of a volume of troops and munitions amounts to participation, and such movement of troops and munitions is sufficiently evident in the present case. In the applicant's submission, this is the first occasion on which this particular level of facilitation of troop movements and munitions through the State has occurred without a Dáil resolution. The key feature here is that the Constitution, requiring assent of the Dáil in the event of participation in a war, was infringed by virtue of the fact that no such assent was granted.

34. Thirdly, the applicant prays in aid as a means of interpreting Article 28.3.1 of the Constitution, an Act entitled Spanish Civil War (Non-Intervention) Act 1937, which he contends is apt, having been passed into law at a time contemporaneous with the Constitution. He submits that it defines a war as being that occurring in Spain at the time, and a belligerent as one of the governments or organisations of such nature between whom the war is being waged, and specifically prohibits any person from organising aiding any other persons to depart the State for the purposes of serving in the military forces in Spain at the time. Mr. Rogers argues that this is a particularly apt guide to the court, in terms of content and timing, as to the correct meaning to be ascribed to war in Article 28.3.1 o of the Constitution.

35. Fourthly, the fact that the respondents assert that what is being carried on is pursuant to a Security Council Resolution is not at all relevant. If what is being done is an infringement of Article 28.3.1o, then the fact that such may be done in purported compliance with a Security Council Resolution does not resolve the constitutionality of the acts in question. Either they are within the terms of the Article or outside it. Mr Rogers points out that Resolution 1368 in fact says nothing at all about a war. Further, the fact as the respondents contend that assistance to the United States and its military aircraft has been a long standing practice is also of no consequence, it being entirely irrelevant to the question of determining whether or not Article 28.3.1 has been infringed. Even if there were such an arrangement, the applicant contends that such arrangements did not include, as in the present case, the large scale movement of troops through the State en route to war, and that what is happening now is completely different in terms of its scale in that it involves actual assistance to a military campaign, not being simply a question, for example, of facilitating the overflight of military personnel from the United States to Germany or something akin to that.

36. Next, the applicant submits that the constitutional provision is intended as a check on the Government, and although not mentioned in the constitutional provision itself, Article 28.3.1 is clearly such a check. As to the likely contention of the respondent that the issue raises a question of justiciability, Mr Rogers submits that in the case of Horgan v An Taoiseach and Others 2 I.R. 468 Kearns J. took a view in relation to the role of the courts vis-à-vis Article 28 of the Constitution and in that case declined to intervene for the reason that it would be to second guess the Dáil if he were to do so. He also submits it is also possible to distinguish Horgan since, in that case, there was a resolution of the Dáil, and a resolution in particular and certain terms. Effectively, what the learned High Court judge found in that case was that it would be impermissible for the court to second guess the terms of an actual resolution of Dáil Eireann, one having been already passed. The judgment can be understood as being as simple as that. In the present case there is no resolution at all in circumstances where there is clearly an armed conflict, that is to say a war, clearly stated by the respondents to be so, citing in support thereof part of the first affidavit of Mr. Cooney. While the applicant accepts that the Courts should be slow to overturn a decision of the executive, this is a situation where the Government has intentionally failed to submit the question of participation in a war to the Dáil for approval.

37. The applicant also rejects the averment in the affidavit of Mr. David Cooney that it has historically been the position in Ireland that the Dáil has not determined that Ireland is participating in a war when allowing aircraft to pass through its airspace. It is acknowledged, both by the applicant and by the second named respondent, that the Gulf War in 1991 and the Iraq conflict in 2003 were both the subject of specific motions passed by the Dáil. It is contended on behalf of the applicant that the present situation can be distinguished from previous conflicts, such as the Gulf War 1990 -1991, in any event, because in the present case what is being facilitated are armed combat troops en route to the theatre of war. Permission in such a set of circumstances is contrary to the fundamental notion of neutrality as provided for in the Hague Convention of 1907.

The Permissions are Ultra Vires the Powers of the Minister

38. The applicant's second line of argument is also fairly discrete. It concerns the question as to whether the permissions of the relevant Ministers pursuant to the decision taken by the first named respondent, were ultra vires the relevant statutory instruments invoked to support the permissions. The regulatory scheme provided for under the several regulations is rather complicated, perhaps unnecessarily so. The permissions cover variously military aircraft, as well as civilian aircraft including civilian aircraft used to carry munitions or arms or cargo of a military nature. There are a number of components to this issue, and I will set out the arguments in order.

39. In relation to the Orders made under the Act of 1946, and in particular the 1952 Order, Mr Rogers submits that the first issue to be decided is whether there has been compliance with that Order. According to him, Article 3 of the Order means that there is a requirement for permission to be given on a case by case basis. That is because, when read together with Article 4, the permissions

are to be granted subject to stipulations, if the Minister considers it appropriate. Mr Rogers relies on the use of the word "express" - repeated at least four times in the two provisions in question - and argues that the general construction of these two provisions and the use of the word "express" permission makes it clear that it is a case by case decision which is required on the part of the Minister.

40. Secondly, as to whether or not there can be a permission without stipulations, Mr Rogers accepts that the Minister can dispense with stipulations, but that the real question is whether he can dispense with giving permission altogether. According to the admissions made in correspondence between the Department of Foreign Affairs and the applicant, he contends it is stated by the former that "the normal conditions were waived in respect of aircraft operating in pursuit of the implementation of Security Council Resolution 1368". But the applicant submits that there is no evidence that these stipulations were waived. If there is not a physical permission or consent that can be viewed or considered, the conditions attaching to such waiver referred to by Mr Cooney in his affidavit cannot be relied on because they are not recorded anywhere, and it is not possible to know what conditions actually apply.

41. Having regard to the legal regime required pursuant to the 1952 Order, there must be a record so that it can be said at any point in time whether a permission exists and if so whether stipulations attach to that permission or not. The 1952 Order requires express permission for each and every aircraft and it must have the meaning of being specific and it must have the meaning of being recorded. On the other hand, the giving of an indefinite permission, not available to be seen, inspected or examined and therefore lacking in any coherence of the type expected of a permission under the Article in question, is not permissible at law. In the circumstances it is the applicant's argument that there is no permission in existence which complies with Article 3 of the 1952 Order.

42. The applicant contends that under the second regime, found in the 1973 Order, as amended, civilian aircraft carrying munitions must secure a permission from the Minister for Transport, whereas all military aircraft have, according to the respondents, a full waiver of the requirements necessary under the 1952 Order. Such an approach is not rational. Both instruments purport to be sourced within the Act of 1946 and the regulation of both military aircraft and civilian aircraft carrying munitions. It is difficult, Mr Rogers submits, to see how such a regime could allow of a situation where there is a complete waiver in respect of all stipulations considered necessary in the case of military aircraft, and a very strict and comprehensive regime in respect of civilian aircraft. If the regime under the 1952 Order being contended for by the respondents is in existence, the absence or waiver of the stipulations should not be permitted, because the court is then left with the quandary of not knowing and not being able to ascertain what is in fact regulated.

43. Secondly, dealing specifically with the position arising under the 1973 Order Mr Rogers says that the first thing to note in relation to this is the source of the power which is stated as being section 5 of the Act of 1946. That Order defines "aircraft", and paragraph 4 of the Order deals with the sphere of application of the Order, in providing:

> "Save where the contrary intention appears, apply to all aircraft when in or over the State and to aircraft registered in the State wherever it may be".

44. According to Mr Rogers, on its face, this Order applies to all aircraft whether civilian or military. This is particularly clear from section 3(2) of the Act of 1946. According to this argument, having regard to section 3(1) of the Act, when the Minister made the 1973 Order he could only have been doing so if he was purporting to exercise some power under section 3(2). Although not recited as a source of power in the recital at the commencement of the Order it would appear that the Minister must have had regard to section 3(2) in making this statutory instrument applicable to all aircraft, including military aircraft. This is so notwithstanding that that the respondents contend that this order deals exclusively with civilian aircraft. He argues it is quite plain that there has been non-compliance with the 1973 Order by the failure of the coalition to secure permissions for military aircraft when appropriate, from the Minister for Transport, under that Order

45. Thirdly the applicant contends that there is an issue as to the actual validity of the 1952 Order, leaving aside what is meant precisely by the Order and what consequences flow from that meaning. He submits that the 1952 Order enacted by the Minister for Transport offends the principle of *delegatus non potest delegare*. The general principle is invoked by the applicant, that is to say, that a power must be exercised only by the delegated authority in which it has been vested by the legislature. It cannot be delegated to any other person or body, he argues, citing *O'Neill v Beaumont Hospital* [1990] I.L.R.M. 419. Applying the principles established in that case, Mr Rogers submits that the Order of 1952 was made by the Minister for Industry and Commerce. He provided, by Article 3, that foreign military aircraft could not fly within the State without the express permission of the Minister, the Minister being defined in that Order as "the Minister for External Affairs". The opening passage in the Order does not refer to any specific statutory provision in the 1946 Act, as a source of the power, but simply recites the name of the Act. The question which arises therefore is whether this is a total delegation of the power of the Minister for Transport in respect of the regulation of military aircraft by him, to the Minister for Foreign Affairs, and as to whether, if this is so, that is intra vires the powers of the Minister for Transport. The applicant contends that it is not intra vires, because the 1946 Act itself is explicit in giving the function of regulating the matter to the Minister for Transport alone. The Orders in the Act of 1946 as envisaged are those included in Section 3, 5, 6, 9 and 11. Section 5(1) provides as follows:

> "An order made by the Minister, under this Act may be made applicable to any aircraft, in or over the State, or to Irish aircraft wherever they may be".

46. According to the applicant's argument, that is the power which is given under the Act in respect of the regulation of aircraft, and that power is given only to the Minister for Transport and no one else. This is reinforced by the provisions of Section 5(3) which states:

> "An order made by the Minister under this Act, may authorise the Minister to make regulations and give directions for carrying out the purpose of such Order in respect of such matters and things as may be specified in such Orders".

47. This makes it abundantly clear that the power is granted exclusively to the Minister for Transport who may designate in a Statutory Instrument what things are to be done for the purposes of the Order he is making. The applicant argues that, even considering every other provision in the Act, one finds no power envisaged as being capable of being delegated by the Minister to another Minister. Therefore in the applicants' contention, the 1952 Order is simply not authorised.

48. The next argument made on behalf of the applicant's concerns Section 5 of the Act of 1946, if, contrary to the above contention, it is held by the Court that power in the Act may be delegated to the Minister for Foreign Affairs. On the applicant's argument, the effect of Article 15.2.1 of the Constitution is that laws are to be made exclusively by the Oireachtas. Looking at s.5 of the Act of 1946 all the section does is invest in the Minister a bare power. There is no guidance in the section by reference to criteria, to indicate that in exercising the power he is to have regard to any particular policy or principle. Rather the policy or principle is found in the Regulation or the Orders. The provisions of the Act relating to the Chicago Convention are in Part II of the Act. They apply only

to civilian aircraft. Section 3(1) of the Act states says that the Convention does not apply to State aircraft. That being so, there is a complete absence of any policy or guidance found in the section, which may be contrasted with all of the elements in that regard found in, for example, section 11. The applicant invokes the case of Laurentiu v Minister for Justice, Equality and Law Reform [1995] 4 IR 26 in that regard, and in particular the comments of Geoghegan J. in Cityview Press v An Chomhairle Oiliuna [1980] IR 381 approved of in the judgment and the further judgment in the Supreme Court on appeal.

The Respondents' Submissions

Brief Outline

49. On behalf of the respondents, Mr Connolly S.C, argued a general point first of all. He pointed to a number of Supreme Court pronouncements in regard to the consideration of constitutional issues which are summarised under the phrase "judicial restraint" which tend to indicate that if a court can dispose of legal issues as opposed to embarking on the resolution of constitutional issues, or without having to strike down particular legislative provisions, this is the approach which should be adopted, invoking in that regard *Clarke v Roche* [1986] IR 619, *McDaid v Sheehy* [1991] 1 IR 1, *Brady v Donegal County Council and Others* [1989] ILRM 282. Nevertheless he accepted that there are certain circumstances in which the Supreme Court has dealt with a constitutional issue before first dealing with other legal issues. In the present case he contended that it is preferable that all of the issues be resolved in the same proceedings and his approach therefore is to suggest that he commence with the legal issues and then considered the constitutional ones. Mr. Connolly then dealt with the statutory regime first and Mr. Hogan, S.C., followed on with the Constitutional arguments. However, following the same scheme of argument presented by Mr. Rogers for the applicant, I set out first the arguments of the respondents on the constitutional issues, and then those on the legislative regime.

50. Firstly Mr. Hogan said that, on the question of classifying the activities occurring in Afghanistan as amounting to war for the purposes of Article 28, he accepts that for rhetorical or political or polemical purposes the events may constitute a type of war but this does not constitute a war within the meaning of Article 28 and secondly he says that irrespective of the foregoing there is no question of any participation by the State in any supposed war for the purposes of Article 28.3.1.

51. Secondly, the respondents' draw on the decision of Kearns J. in *Horgan v. Ireland* [2003] 2 I.R. 468 in support of their contention that the issue is one that cannot and should not be determined by this Court. In that case, Kearns J. endorsed and quoted extensively from the findings of the Queen's Bench Division in *C.N.D. v. Prime Minister of the United Kingdom* (Unreported, Queens Bench Division, 17th December, 2002) to that end. The respondents argue that what emerges from the decision in *Horgan* and indeed from other cases, is not that Article 28.3.1 presents a non justiciable controversy, but rather that this is not a matter on which the Court starts with a blank sheet. What constitutes participation in any war is primarily and principally, in the first instance, a matter for the Dáil. The Courts' role in such a matter is highly truncated, and the Court could and should only become involved, if at all, if there is an egregious breach of Article 28.3.1 or the Dáil reached what amounted to a perverse conclusion as to whether the activities amounted to participation.

52. Thirdly the respondents contend that arising out the submissions made on behalf of the applicant concerning the interrelationship between Article 28.3.1 and 28.3.3, the latter constitutes a stand alone clause which cannot be invoked as an aid to the interpretation of Article 28.3.1. This is clear from the special definitions of what constitutes "a time of war" in Article 28.3.3.

53. Finally the respondents submit that the applicant, despite his contention to the contrary, seeks in fact to rely on the provisions of Article 29. They submit this article does not create any enforceable legal right at the suit of a private citizen, and in particular, in light of the decision of Kearns J. in *Horgan*, Articles 29.1 - 29.3 does not create any enforceable legal rights which the citizen can invoke, when these are directed to the relationships existing between Ireland and another state.

Detailed Submissions

54. Dealing with the first issue in this series, Mr. Hogan draws the Court's attention to the fact that the meaning of the word "war" in Article 28.3.1 has not previously been considered by the Court. Unlike the position in Afghanistan, the events which took place in Iraq in relation to the 2003 invasion of that country constituted a war in the classic sense of the word because the regime there was recognised as constituting the lawful government of Iraq, recognised by the international community as such. The respondents contention, as deposed to by Mr. Cooney and not, according to Mr. Hogan, seriously contraverted by the applicant, is that the Taliban regime in Afghanistan was not recognised by the international community as the government of Afghanistan. The Taliban, if it had a status, had some type of de facto control over parts of Afghanistan and to that extent were recognised only by three other states On the other hand the Taliban was not recognised by this State at all. So far as this State is concerned, and having regard to terms of resolution 1368, what occurred was not only in accordance with the wishes of the Security Council but also with the consent of the lawful government of Afghanistan against a de facto regime which operated in parts of Afghanistan. However that situation might be classified, when analysed in the formal legal sense which Article 28.3.1 requires, there is not a war because the action being taken, with the consent of that lawful government, was being taken against persons who had usurped or purported to usurp the functions of the lawful government of Afghanistan

55. While Mr. Hogan accepts that the critical words in Article 28 are "war shall not be declared", which is the conventional 1930s position that war had to be declared solemnly and formally as against another sovereign entity, there could be no question of a declaration of war for the purposes of Article 28.3.1 against an entity which is not a sovereign government, and that the formal interpretation of the phrase "declaration of war" or "participation in war" must be distinguished from colloquial phrases such as "the war on terror" or "the war on drugs" or phrases of that type. If therefore an illegal group or some other faction purported to stage a coup d'etat and the State did not recognise that illegal faction and with the consent of the lawful government the State became involved in such events the State would not be declaring war or participating in a war within the meaning of Article 28.3. Action taken short of that formal declaration of war, or in a situation where there is no declaration of war between sovereign states, does not constitute a war and matters arising, such as permissions to overfly or land, do not constitute participation within Article 28.3.1.

56. On the second issue, the Court is entitled to consider the background to resolution 1368 in assessing whether or not there is a war and also the terms of that resolution. The background of the resolution according to Mr. Hogan envisaged that there is not a war in the conventional orthodox sense, but rather that action is to be taken in pursuance of the resolution against a faction existing in Afghanistan that has been involved in giving aid and comfort to Al Qaeda. That is the background to the resolution. The terms of the resolution are also a very important form of language for the purposes of the Security Council resolution because "all necessary steps" embrace military action. The terms of resolution 1368 can be contrasted with the earlier resolution 1267 in so far as the United Nations was concerned that the Taliban was simply a self-styled entity or self-styled government which happened to have some de facto controls, but which was not the lawful government of Afghanistan. Therefore taking action against the Taliban further to a Security Council resolution, is not simply taking action against Afghanistan as such, nor was there any declaration of war by the United States against Afghanistan as such, but rather it was taking military action against a faction which had purported to usurp certain governmental functions in Afghanistan without being the lawful government of that country. Mr. Hogan submits that it was

against that background that the resolutions could be looked at as an aid to understanding whether there was war in the constitutional sense of the word. It is, he said, fully accepted by the respondents that what constitutes a war for the purposes of Article 28.3.1 is a matter entirely for domestic constitutional law, and also accepted that simply because it may not be described as a war by third parties, the resolution, while not in any sense dispositive on the issue, may be employed by the Court as an aid to understanding whether or not there is a war in the sense understood by Article 28.3.1.

57. Turning then to what constitutes participation, Mr. Hogan says that this is a matter which was fully canvassed by the Courts in the Horgan decision. In that regard Mr. Hogan draws particular attention to those portions of the *Horgan* judgment in which the Court adopted an attitude of restraint to the resolution of an admittedly justiciable issue arising under Article 28.3.1. He argues that while there was no formal Dáil resolution, the Dáil was fully apprised of all of the circumstances of the overflight and landing, and that is a factor to which the Court should have appropriate regard, as in the *Horgan* decision.

58. The respondents also identify the two circumstances in which the Courts can intervene so as to restrain the exercise of its powers. The first of these is the situation allowed for in *Crotty v. an Taoiseach* [1987] 1 I.R. 713, where the citizen can show that there has been actual or threatened interference with his or her rights guaranteed by the Constitution, which they say is not the case here. And secondly, the Court will also, where appropriate, declare an action of the executive inconsistent with the Constitution as explained by Fitzgerald J. in *Boland v. An Taoiseach* [1974] I.R. 338 at 362:

> "…the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution."

59. Mr. Hogan accepts that the Court should add to that, issues highlighted by a number of parallel cases in other jurisdictions, concerning the question of the judicial capacity, suitability and ability to decide such matters. According to jurisprudence in other jurisdictions when considering a question of the nature being considered in the present case, it is recognised that a full assessment of the question of participation can only be made by military experts relying on military intelligence and other matters which are not readily suited for resolution in the legal process. He points out that the resolution of the Dáil in the *Horgan* matter was not a resolution purporting to be passed pursuant to Article 28.3.1. On the other hand the State is not required, according to Mr. Hogan to take an action which is a positive negative, that is to say it is not required to pass a resolution deciding not to go to war or not to participate under Article 28.3.1. Therefore if there had been no resolution in the *Horgan* case, that would have made no difference for the purposes of Article 28.3.1. It recalled the long standing arrangements for overflight and landing of U.S. military and civilian aircraft and supported the decision of the government to maintain those arrangements, but specifically did not purport to be an assent of Dáil Eireann under Article 28.3.1 to any participation in the declared war in Iraq. In the *Horgan* case, the text of the resolution makes it clear in graphic terms that the Dáil was aware exactly of what was going on, specifically endorsed the decision of the government and the Dáil took the view that what was occurring was not participation. These were factors to which Kearns J. had regard. While the applicant argued that in the present case there was no formal resolution of the Dáil, Mr. Hogan submits that really that is neither here nor there. What is important is that the Dáil was made fully aware in the present case, both by the Taoiseach and of the Minister for Foreign Affairs on a series of dates in late September and early October 2001 what was proposed to be done. No action against those proposals was taken by the Dáil and in the respondents submission this was a matter which was, at least in the first instance, entirely within the remit of the Dáil to decide. The hostilities themselves had commenced in Afghanistan in or around October 7th 2001 and the Dáil was fully aware of the provision of the facilities to all aircraft engaged in support of resolution 1368. the conclusion to be drawn from all of this is that the Dáil itself did not consider this to be participation in war. There was therefore in this case, just as in the case of *Horgan* nothing which had occurred such as would warrant even examining the particular decision and the called for resolution yet alone make a determination as to their correctness or otherwise.

60. He also invoked the decision in *Horgan*, insofar as it adopted the rationale underlying the decision in *CND v The Prime Minister of the United Kingdom* which expressed similar terms to that expressed in the American case of *Ange v Bush* 752 F. Supp. 509. In particular Mr. Hogan invokes CND case which had sought a declaration that the Iraq conflict would not be authorised under the terms of international law, and which had effectively invited the English courts to construe the existing Iraq resolutions (of the Security Council) to see whether they did or did not authorise the use of force against Iraq. In that case the English courts said effectively that this is a non justiciable matter because it would be an arrogation of jurisdiction on their part to make a pronouncement about a matter which was a matter more for political debate than of strict legal rights.

61. However because of the nature of a declaration of war or participation in a war, part of the internal checks and balances posited by the Constitution requires that the government itself cannot take this decision unilaterally but must have the prior assent of the Dáil. The Constitution recognises that this is something which is primarily a dispute to be worked out, if dispute there be, between the legislative branch on the one hand and the executive branch on the other. The Constitution recognises at least implicitly that what constitutes participation in war is a matter in which it is as much a question of political as opposed to legal judgment and therefore the decision is committed to the good sense and democratic responsibility of the lower house of the Oireachtas, directly elected by the people. That is why a high level of judicial restraint is always called for in relation to the justiciability of Article 28, a factor reflected in the language used by Kearns J. in the *Horgan* decision.

62. Nor is this a case of some manifest or egregious breach of Article 28.3.1 where the Dáil has not taken its constitutional responsibilities seriously such as might warrant the Court intervening. It is a matter which on the contrary is quintessentially a matter for the government and the elected government representatives in the Dáil to determine and resolve. There is, according to Mr. Hogan, a large margin of appreciation in favour of the Dáil, as is clear from *Horgan*.

63. The decision in *Ange v Bush*, which had been approved of by Kearns J. in the *Horgan* case, in turn relied on *Baker v Carr*, 369 US182, 217 a 1962 decision of the United States Supreme Court in which the issue of judicial restraint was considered. In the present case Mr. Hogan says that the correct analogy with that case is as to whether the issue of the existence of a war or the issue of participation in such a war is primarily a matter for political resolution in the political branch of the State. Since it is clear that the question of what is considered to be participation in a war is a matter on which intelligent and reasonable people might well differ from time to time, this is precisely the type of matter which presupposes the interaction of a political judgment made by the Dáil and the Executive. By a parity of reasoning and to adapt this jurisprudence to an Irish constitutional context the Dáil could quite properly vote no confidence in the government for example if it saw fit or it could for example refuse to approve the estimates, or adopt any range of possible actions which are open to it including, a proposal that opening of airspace or the permission to land made available to aircraft travelling to or from Afghanistan required the passage of a resolution under Article 28.3.1. Therefore the Dáil possesses ample powers under the Constitution to prevent the government overreaching, should the Dáil consider it to have done so. It should not be considered that the legislative branch is helpless without the assistance of the judicial branch.

64. If the Court determined in a particular case that, contrary to what the Dáil had decided, a formal declaration of war should have

been made pursuant to Article 28.3.1. That the State was at war, the political and diplomatic consequences of such a determination by the Court would be virtually unthinkable and unmanageable and would have enormous implications for the manner in which the Executive conducts its foreign relations with other states, invoking the decision of Edelstein J. in the case of *Greenham Women Against Cruise Missiles v Reagan*, 591 F.Supp 1332, in which the Court recognised that a judicial determination of this type would have consequences both for the diplomatic and political realm of the State and the ability of the State to manoeuvre. Mr. Hogan says that the same approaches have been adopted and considered by the Canadian Supreme Court and in judgments of the German Constitutional Court. All of the foregoing, he submits, underscores the principles which are found in the *Horgan* case, namely, that this is a matter which calls for judicial restraint of a very high order. Therefore for the applicant to succeed, he needs to show that there has been some quite egregious breach of Article 28, and nothing of the kind is disclosed in the present case.

65. As to the argument under which Mr. Rogers seeks to invoke the provisions of Article 28.3.3 in aid of the construction of 28.3.1, Mr. Hogan says that Article 28.3.3 deals with an entirely different situation which states simply and clearly that nothing in the Constitution can be invoked to invalidate a law enacted by the Oireachtas which is expressed to be for the purposes of securing public safety or for the preservation of the State in time of war or armed rebellion, or to nullify an act done or purporting to be done during such times. Various resolutions made pursuant to Article 28.3.3 were in fact in force in one shape or another between 1939 and 1995, commencing shortly after the German invasion of Poland in September 1939. These are quite different matters to a declaration or war or participation in war within Article 28.3.1. The definition of what constitutes "time of war or armed rebellion" for the purposes of 28.3.3 is an artificial one, and acknowledged in the text to be so, because it is only applicable when it is resolved by the Houses of the Oireachtas that these events give rise to a national emergency, and that phrase even includes the period after the termination of any war or of any armed rebellion or armed conflict which may elapse until such time as the Houses of the Oireachtas resolve that the national emergency ceases to exist. In this Article what is considered is a time of war as opposed to war itself. The special extended definition of "time of war" is for the purposes of 28.3.3 only.

66. Next, as to the contention that aid can be gleaned from the provisions of the Spanish Civil War (Non-Intervention) Act, 1937, Mr. Hogan rejects this, submitting that the terms of the Act itself make it clear that it was passed so as to execute the obligations on the State imposed by an international organisation, probably the League of Nations, during the course of Saorstat Eireann, and under the Constitution then in force, and cannot therefore be considered to be an appropriate mechanism for the correct interpretation of the provisions of Article 28.3.1. In the Act it defines specifically, and only for the purposes of the Act, the particular civil war being then waged in Spain. In light of these matters, it could not be seen to be in any way determinative of what is meant by a war under Article 37 of the Constitution.

67. As to the applicant's entitlement to invoke Article 29, notwithstanding that Mr. Rogers does so in a narrow and particular context, the respondents argue that the government is not obliged as a matter of law under Article 29 to form any particular view in relation to a war. The only reviewable aspect of a war lies in the issue of compliance with the requirements of Article 28. The furthest that the applicant can go, arising out of the judgment in *Horgan*, is the finding by the Court in that case that the court was prepared to hold there was an identifiable rule of customary law in relation to the status of neutrality, under which a neutral state may not permit the movement of large numbers of troops or munitions of one belligerent state through its territory on route to a theatre of war with another. This statement of Kearns J. in the *Horgan* case is not accepted by the respondents, because it amounts to a judicial determination, almost in *vacuo*, as to what constitutes customary international law. Even if it was correct, this does not assist the applicant in the present case because, for the reasons found otherwise by Kearns J., the applicants cannot invoke Article 29 in this context, and that is so even if one accepted that the Hague Convention imposes such obligations. The parties cannot avail of the provisions of that Convention.

68. Turning now to the statutory scheme which has been attacked by the applicant, at the outset Mr. Connolly first invoked the decision of the Supreme Court in *East Donegal Co-operative Livestock Mart Limited v Attorney General* [1970] IR 317, in which it was stated that the court is entitled in interpreting provisions of an Act who refer to the long title of the Act in question and in that regard he notes that the long title to the Act of 1946 states as follows:

> "An Act to enable effect to be given to the Convention on International Civil Aviation opened for signature at Chicago on 7th December 1944".

69. The predominant scheme of the Act was intended to bring into operation, as part of our domestic law, the contents of the Chicago Convention. The content of that Convention assists the court in outlining the principles and policies which underlie the legislation itself and any statutory instrument made pursuant to this. Section 2 of the Act identifies the Convention and Section 8 provides that it becomes part of domestic law. Insofar as the Chicago Convention itself is concerned the principles and policies of the 1946 Act are to be found in it. Article 3 states that the Convention is applicable only to civil aircraft and shall not be applicable to State aircraft, and that aircraft used in military, customs and police services shall be deemed to be State aircraft. On that basis, military aircraft are a subset of the general classification of State aircraft. Article 3(c) provides:

> "No State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorisation by special agreement or otherwise and in accordance with the terms thereof".

70. It is here Mr. Connolly says that the court can look to discern the principles and policies behind the sections of the 1946 Act which confer authority on the relevant Ministers to put in place the Statutory Instruments complained of. By way of example, Mr Connolly points to Article 6 of the Convention under the heading "schedule air services" which provides that no scheduled international air service may be operated over or in the territory of contracting State except with the special permission or other authorisation of that State, and in accordance with the terms of such permission or authorisation. This provision echoes earlier articles of the Convention and makes it clear there is nothing offensive in having blanket permissions or blanket waivers in place. Indeed, it would not be possible to operate otherwise.

71. In practice, scheduled flights from all of the well known airlines operate under such a scheme. Individual permissions are not given for a particular flight of a particular airline at a particular time to land in the State. There is an arrangement by which all the flights of nominated companies over a particular period, say over a particular year, are permitted to land at times that may well be agreed from time to time with the local airport authority. The same situation arises in relation to cargo restrictions. The Convention provides that no munitions of war or implements of war may be carried in or above the territory of a State in an aircraft engaged in international navigation except by permission of such State, each State determining by regulation what constitutes munitions of war or implements of war for the purposes of the Convention, giving due consideration for the purposes of uniformity, to such recommendations as in the International Civil Aviation organisation may from time to time provide. The provisions of the 1950 Act amending the 1946 Act makes more clear what is intended to be covered is the aircraft of any country used in military, customs, or police services and the provisions of the 1950 Act echo the provisions of Article 3 of the Chicago Convention.

72. While section 3(1) of the Act of 1946 provides that the Act shall not apply to any State aircraft save, under Section (3)(2) the Minister may by Order direct that the provisions of the Act shall equally apply to State aircraft and whenever such an Order is made and is in force such provisions as are specified in such Order shall have force of law in the State. It is therefore only Section 3(2) that can apply to military aircraft. No other section of the Act of 1946 can apply to such aircraft. The Order of 1952 is made by the Minister for Industry and Commerce in exercise of the powers conferred on him by the Act of 1946. As to the applicant's complaint that the invocation of the statutory authority fails to identify a specific statutory provision being invoked, Mr Connolly says that this can be clearly and readily deduced: the Act of 1946 has only one section which applies to military aircraft. By contrast the 1973 Order specifically invokes as a statutory authority Sections 5, 9, 11 and 16 of the 1946 Act. There is a specific exclusion of the intended application of the 1973 Order to State aircraft, or within that, military aircraft.

73. The 1952 Order is entitled "The Air Navigation (Foreign Military Aircraft) Order" making it abundantly clear that it is intended to refer only to military aircraft. It can clearly be deduced as having a power conferred under the one and only section of the 1946 Act which deals with military aircraft, and according to Mr Connolly that is supported because there is a definition, pursuant to the Chicago Convention which states:

> "Military aircraft means aircraft used in military service and aircraft used in military service includes naval, military and Air Force Aircraft, and every aircraft commanded by a person in naval military or air force service detailed for the purpose shall be deemed to be an aircraft used in military service".

74. Finally Mr Connolly draws the court's attention to a 1989 Order under which Article 5 of the earlier 1973 Order is amended (by Article 4 of the latter) which reads:

> "The Minister may, by direction, exempt a specified aircraft in regard to a particular aircraft operation from all or any of the provisions of Articles 6 or 7 of this Order".

75. That pertains only to civil aircraft because again if one looks at the title, since Section 3 is not included Mr Connolly argues it is thereby specifically excluded. It is therefore clear he suggests that the 1952 Statutory Instrument deals exclusively with military aircraft and all civil aircraft are covered by the 1973 Statutory Instrument. The submissions of Mr Rogers on behalf of the applicant in relation to what is contained in the 1973 Order concerning the carriage of munitions and so on are all provided for in the prohibition set out in Article 6 of the 1973 Statutory Instrument pertaining exclusively to civil aircraft.

76. Reverting to the provisions of the Act of 1946, Section 5 permits for the Minister to make general provisions, Section 9 permitting him to make provisions specifically to give effect to the Chicago Convention. Section 11 states:

> "Without prejudice to the generality of the power conferred by Sections 9 and 10 of this Act, the Minister may by Order made under either of the said sections make provision…"

77. These provisions relate to a variety of matters, licensing and conferring of authority etc. and at 11(f), apart from the Chicago Convention, the Minister has powers to make regulations:

> "As to the conditions under which aircraft may pass or passengers or goods may be conveyed by aircraft, into or from the State or from one part of the State to another".

78. Just as there is a general power, Mr Connolly argues the Minister also has powers of various kinds in relation to the operation of the Act, the most draconian of which appears in Section 12(b) which provides that where an aircraft fails to obey a signal, a State aircraft can fire on it and use any other means at its disposal to compel compliance.

79. Considering the 1952 Order and the power vested in the Minister under Section 3(2), it is necessary to have regard to the position of the Minister for Foreign Affairs. The person exercising the power under the Statutory Instrument is the Minister for Transport. He is providing that the appropriate Minister dealing with external affairs in the State should be satisfied as to certain matters. Appropriate deference is given to him in that capacity and no more. Mr Connolly argues that the correct interpretation of the 1952 Order, it having been made by the appropriate Minister, is to accept that the requirements which are set down and which are to satisfy the Minister for External Affairs, are not a delegation of any power to the Minister for External Affairs. On the contrary they are the administrative mechanism by which specific requirements are to be met, in the same way as occurs when a person taxes a motor vehicle pursuant to a specific statutory requirement of the Minister for Finance, and the administrative body a local authority, who will have certain requirements which have to be satisfied, for example, that there is exists a valid driving licence or a current motor insurance policy. Mr Connolly argues that there are similar examples in the legislation under consideration here concerning, for example, the requirements in respect of air accidents. The same could be said for the necessity to meet the licensing or landing requirements of a body such as Aer Rianta. These types of requirements do not fall foul of the Constitution as being impermissible delegated legislation.

80. Mr Connolly points out that even supposing the applicant's argument were correct, that in some way the 1952 Order is unlawful because it constitutes a form of impermissible delegated legislation, it is not the Act of 1946 itself or the delegated legislation which is unconstitutional. The statutory instrument would simply be ultra vires the parent statute. If correct in his argument, it would leave no restriction in place in legislative terms for the control of military aircraft overflying, landing in or leaving the country. While this clearly is not what is intended to result from Mr Dubsky's application, it is something which the court ought to bear in mind when looking at the case in the round, and in exercising its discretion in the matter. The applicant seeks to get around this by saying that the 1973 Order covers all aircraft, including military aircraft covered by the 1952 Order. Mr Connolly argues that it could not have been intended in 1973 that there would be two overlapping or competing statutory instruments, which is the inevitable consequence of the submission made. It would be correct, in fact, to interpret the 1973 Order as specifically excluding from its ambit anything purporting to be an exercise of an authority found under Section 3 of the Act.

81. Turning now to the question of waivers which the applicant also attacks, Mr Connolly addresses the several affidavits sworn by Mr Cooney on behalf of the respondents, citing paragraph 17 of Mr Cooney's first affidavit in which he sets out the decision of the first named respondent and the repetition of the decision in the Dáil by the Taoiseach and by the Minister for Foreign Affairs, which has been set out in detail at the commencement of this judgment. He argues that this detailed description of the response of the first named respondent amounted to a decision, and has to be considered to be a decision in order for it to be amenable to an Order of certiorari in this court. At the time when the decision was taken, it was open to the elected members of the Dáil to challenge that, if needs be, by a motion of no confidence or by any other available means, and this was not done. There was consultation with the Dáil and implicit approval of the Dáil, even if not a formal resolution, as occurred in relation to the earlier Gulf Wars.

Conclusions
82. It is important to bear in mind the precise scope of the applicant's proceedings in this matter. They are judicial review proceedings, with all the limitations attaching to such proceedings. These are not plenary proceedings, in which declarations are sought that there is or was a war in Afghanistan, nor that the first named respondent has been participating in such a war. Here what is sought by the applicant is firstly, an order of certiorari ordering up for quashing the decision of the first named respondent permitting the overflying or landing of military or civil aircraft within the State, without the assent of the Dáil. The proceedings seek, in reality, to ensure that the correct Constitutional processes are met by the first named respondent, in compliance with Article 28.3.1. In such circumstances, the certiorari relief is sought on the fact or the assumption that there is a war, and participation in such war. It is therefore for the applicant to establish sufficient facts and law to persuade the court that it should accept or presume the existence of such a war, and also to establish that the decision of the first named respondent, and the implementation of that decision by the permissions and facilities granted, constitute participation, within the meaning of Article 28.3.1 of the Constitution, in that war.

83. There is another preliminary issue upon which it is proper to make a finding at this stage. This is as to the scope of Article 28.3.1 Although the arguments on this aspect of the case were rather complex, in essence it is the respondents case that in considering the scope of that Article, no assent of any description is required unless there is a declaration of war, or participation in a war. In all other cases, there is no requirement whatsoever for what they term a "positive negative". The essence of this argument is that if the Dáil makes any statement or even passes a formal resolution that the State is **not** participating in a war, that is a matter of political expediency, but is not a constitutional requirement. The applicant, on the other hand, argues that there is a war, and that there is participation, and submits that it is clear from the *Horgan* case that an assent is required pursuant to Article 28.3.1..

84. On the question of the scope of the Article, I find that this is both wide and narrow. It is required to be met, in conformity with the constitutional process therein envisaged, on each and every occasion on which there is an intended declaration of war on the part of the State or when there is an intended participation by the State in a war, whether declared by it or not. In that sense it is very wide. It is narrow in the sense that it requires such an assent only in those two circumstances, and not otherwise, as is clear from its wording. In the event there is no declaration of war, or no participation in a war, there is no requirement for any assent. The Article does not require that the Dáil determine that the State has not declared war. Equally it does not require that the Dáil determine that the State is not participating in a war. In the course of the submissions, there was a suggestion made on the part of the applicant that there had been a deliberate avoidance by the first named respondent to seek the assent of the Dáil to what the applicant contends is participation. Apart from the fact that this was not a ground upon which the relief sought to commence these proceedings was based, or granted, there was, in reality, no evidence to support such a contention. I do not reach my decision in this case based on this argument, which was relatively peripheral, and in this part of the judgment, deal only with the actual scope of the Article. Of course, this is not the end of the matter, because each of the parties proceed on diametrically opposed arguments, namely in the one case that there is a war and there is participation, and on the other that there is neither.

85. While both parties suggest the court may not have to pronounce on what is meant by a war, it is nevertheless the case that to be successful in his proceedings, the applicant must present grounds sufficient to establish that what is or has existed in Afghanistan constitutes, in law, a war or ought to be considered to be so. And that must be established by reference to Article 28, 3.1., subject only to the respondent's contention if successful, that the existence of such a state of affairs, being a matter peculiarly within the ambit of the executive arm of the state, checked in appropriate circumstances, by its legislative arm as provided for in Article 28.3.1, it follows that the courts, in considering the position, should act with great restraint, in conformity with what they contend is the applicable jurisprudence in such matters.

86. It is in the foregoing context that the applicant's case must be viewed. The applicant's first argument as set out above is based on the wording of another sub article of Article 28, namely 28.3.3 the applicant goes so far as to say that the Constitution clearly defines war as "an armed conflict". The respondents have contested this approach on the basis, they submit, the very content of Article 3.3 does not support the applicant's analysis. It is undoubtedly true, and this was evident from the range of arguments put forward both by the applicant and the respondents as to what precisely is meant by war in Article 28.3.1. or indeed what legal definition ought to be applied to the word at all, that, if assistance could be gleaned from the terms of Article 28.3.3 of the Constitution on the meaning to be ascribed to war in Article 28.3.1., this would be the preferable starting point, being within not simply the Constitution, but the very same Article. However, a reading of Article 28.3.3 does not support the contention of the applicant. Indeed, the wording of the Article suggests the contrary. Article 28.3.3 covers different situations, making a distinction between time of war or armed rebellion, and, separately a situation of "armed conflict". The context makes it clear that a distinction was being drawn between the first set of circumstances, and the second, the latter providing for a declaration of emergency in circumstances which are short of or different to a time or war or armed rebellion, that is, a third type of hostility which nevertheless creates a situation of emergency, and therefore ought to fall within a "time of war" for that purpose. That certain something is a state of "armed conflict". It is undoubtedly true that in certain circumstances a war might include or be represented by an armed conflict, but the opposite is not necessarily the case. If what was intended to be included in the second part of Article 28.3.3 of the Constitution was the existence of a war or even of armed rebellion, wheresoever occurring, it would have been quite a simple matter for its framers to have said so – indeed in the simplest possible terms. It is trite law to confirm that different words or phrases appearing in a Constitution are assumed to have different meanings. Here, the contention of the applicant can only succeed if it is assumed that the framers of the Constitution intended that "war" and "armed conflict" should have the same meaning, something which cannot be assumed or concluded from the context in which they are used. Indeed if they were to be considered as the same, or war was to be defined as being constituted by mere armed conflict, then the second part of the phrase Article.28.3.3 upon which the applicant relies is tautologous. I am not satisfied that, on this ground, the applicant has satisfied the court that to constitute a war, within the meaning of Article 28.3.1 it is sufficient to find the existence of an armed conflict because of the use of that phrase in Article 28.3.3.

87. On the same issue, as to the aid which can be gleaned from the provisions of the Spanish Civil War (Non-Intervention) Act 1937, that Act was passed under the Saorstat Eireann Constitution, and moreover, in its long title refers to it as being the implementation of international obligations. It defines the war by specific reference to the events in Spain at the time. Being passed in such limited circumstances, it is not in any way determinative of the meaning of war for the purposes of Article 18.3.1 of the later Constitution, although of course that occurred not long after.

88. On the same issue, namely, as to what constitutes war within the meaning of Article 28.3.1, both parties put forward arguments as to why the events in Afghanistan do or do not constitute a war. What is remarkable is that, notwithstanding all the argument, no party was in a position to refer to any accepted legal definition of what is meant by war in national or international law. It is equally true that, among the several general dictionaries opened, the word is defined as having a variety of meanings, but these cannot be accepted as constituting a clear legal definition of the word either. As to the learned writings which were relied on by the applicant, namely Schwartzenberger and Oppenheim, invoked in a different context, neither of them gives a legal definition of what constitutes war, still less an accepted definition in international law, which might be considered surprising were it not for the fact that what may

constitute war to one state or party to a conflict may not coincide with that of another. So far as earlier editions of these volumes are concerned these may be influenced by the fact that they were written at a time when the concept of war was certainly best and most frequently represented by the existence of hostilities emanating from formal declarations of war, as is clear from these writings themselves. What seems clear from more modern writing or thinkers is that the position has changed or evolved, and that in more recent times, there are wars, armed hostilities, armed conflicts, police actions, and several phrases used to describe hostilities of one kind or another, not all of which are to be treated in the same way, or in the same way as between each of them and war. The applicant has not established therefore that there is any standard recognised legal definition of war.

89. As to facts which might establish the existence or not of war in Afghanistan, it is argued by the applicant that de facto control of Afghanistan was by a group called the Taliban, allegedly associated with Al Qaeda. It was, he alleged, the de facto government of that country. The fact that it was recognised by only a small number of states is irrelevant, and that the United Nations and Ireland recognised a different group as the true government of that country, does not change matters, as, according to the applicant, there is a large debate on these matters which this court could not resolve. The respondents argued that these matters were relevant, as the latter group was the government recognised by this State and also by the United Nations, and that the events occurring in Afghanistan generated by the coalition of states led by the United States, occurred with the consent of that lawful government. Therefore it could not constitute a war as that is understood, either within Article 28 or in international law. I agree with the applicant that it would not be possible for this court to decide whether on the above facts, and the state of events in Afghanistan as described, there could not be a war, if only because there is insufficient material before the court upon which the court could come to any view on this issue, having regard to the judicial restraint incumbent on it, to which further reference will be made below. On the other hand, it is equally impossible to agree with the applicant that this state of affairs assists in establishing that what was occurring in Afghanistan was actually a war, either within the meaning of Article 28.3.1 or in international law On the basis of this argument, it not being for the respondents to disprove that a war exists or existed in Afghanistan, but rather for the applicant to do so, at least to a degree which satisfies the court that it comes within the ambit of Article 28.3.1, the applicant has not, on this ground, established the existence of a war in Afghanistan, such that that Article comes into play, or such that the issue of any participation in such an alleged war requires to be considered.

90. However, given the importance of the issues raised by the applicant, and notwithstanding my finding that the applicant has not established that a war has or is occurring, I should for completeness sake also address the issue of participation in such a war, within Article 28.3.1.of the Constitution.

91. The applicant argues that the court ought to find that there is participation in a war and that therefore the terms of Article 28.3.1 have not been complied with. This argument is primarily based on a premise that involves an indirect invocation of Article 29 of the Constitution. In essence this argument, although indirect, can best be understood as constituted by the following. Ireland subscribes to principles of international law, as is clearly stated in Article 29. Mr. Rogers accepts that, following the Horgan case, supra. Article 29 is not justiciable at the suit of an individual citizen. However, the applicant argues that Article 29 simply reflects pre existing principles of international long established since at least the 19th century. Among these are the principles of neutrality found, inter alia, in the Geneva Convention of 1907. It is his argument that the decision to allow overflights and landings, having regard to the State's declared neutral status, are contrary to those principles of neutrality, and therefore if there are belligerents, as here, travelling to and from the theatre of war, that constitutes participation in a war. The respondents argue that the applicant, while arguing indirectly, is nevertheless invoking Article 29, by essentially a disguised route, and that this is clearly impermissible, having regard to the established jurisprudence on the matter.

92. I do not consider it necessary for the purposes of this judgment to decide whether or not an applicant is entitled in law to invoke principles of international law, recognised in the Constitution, so as to enable him establish that what has occurred is a breach of an Article of the Constitution, even if, as here, it is a different Article to that which affirms the State's acknowledgement of those international law principles. He is not entitled to do so, if this would undermine or evade the correct scope of his entitlement to invoke Article 29 which this Court has clearly established. There are several authorities in support of the position that Article 29 does not confer individual rights but rather refers to relations between the State and other states. This position, first iterated in In *re O'Leighleis* [1960] I.R. 93, was most recently reaffirmed in the case of *Horgan*. The respondents argue that the very terms of Article 29 are vague and broad, and are not suitable to create obligations enforceable in these proceedings. The argument of the applicant is that the State is in breach of what are established international principles of neutrality in times of war. The respondents argue that the position of the State in terms of its neutrality is not provided for under the Constitution. Nor they say is there any reason why the State should not subscribe to a principle of neutrality which might not be on all fours with statements of neutrality found in learned volumes of international law, and they point, for example to the fact that several countries, not being neutral in the sense contended for by the applicant, and while having declared themselves against the actions of the coalition in Afghanistan, have nevertheless provided the same type of facilities to the coalition as have been agreed by the first named respondent.

93. In that regard, I find as follows. While permitting certain activities during a war may jeopardise the neutral status of a state, it does not necessarily follows that such acts constitutes participation in a war, as is contended for. If that were so, it would inevitably follow that any state, not being a neutral state, and permitting any such facilities, must ipso facto be participating in a war, a matter which would have, as its result – in international law terms – and not simply by reference to the Irish Constitution – the automatic participation in the war by several states who have declared themselves utterly against the events which have occurred in Afghanistan. No direct statement is made in either Schwartzerberger or in Oppenheim that the activities mentioned constitute participation in a war.

94. The question of neutrality is predominantly one of policy. It is true that the Constitution is silent on this question, and it is equally true that the issue of neutrality has been long considered and debated by many writers, not only the neutrality of the State, whatever that might be, but neutrality of others states, and in general. And it is equally true that writers or commentators might quite correctly point to the hypocrisy of a state proclaiming neutrality, and yet engaging in activities which do not appear to be on all fours with such proclamation. But it cannot, in my view, follow either in logic or in law that there is a necessary equivalence between the loss of the status of neutrality for alleged failure to comply with norms of neutrality in international law and the establishment of participation in a war. A simple example might be the execution by a state, until then neutral, of a particular type of treaty, which might well result in the loss of its hitherto neutral status, whether declared or otherwise It could of course be that the same act might constitute both, but only coincidentally. The establishment of a state of affairs which constitutes participation in a war, within the meaning of Article 28.3.1 must necessarily be based on factors objectively established, and not simply on the basis that an act which jeopardises neutrality automatically constitutes participation. And that applies, even in the case where a convention such as the Hague Convention, sets out what might jeopardise a state's neutral status such as the movement of troops over its territory. Moreover, the applicant himself relies also on the finding in the *Horgan* case, that the question of participation is one of degree. That also being the applicant's contention, it could not be the case that any breach of the contended for principles of international law on neutrality constitutes, by that fact, participation in war. Further I do not accept that the applicant has established that the provisions of the Hague Convention as contended for, are sufficiently well established as a principle of international law as are

necessarily included in Article 29 of the Constitution. Having regard to the foregoing, I reject the applicant's contention that, on the grounds that the decision made, or the permissions granted, constitute an alleged breach of international principles of neutrality, thereby constitute participation in a war.

95. The respondents further contend that the decision of the first named respondent and the implementation of the same by the permissions and facilities announced were taken in compliance with Resolution 1368. The applicant argues that (a) the resolution did not permit the events which occurred in Afghanistan, and (b) even if it did, it would not render an unconstitutional act constitutional. On the first of these, I am of the view that it is neither permissible nor appropriate for this court to seek to interpret a resolution of the Security Council of the United Nations. This court, in my view, has no competence so to do, and I make no comment on the argument of one or other party on the true meaning of the resolution. I accept, however, the argument of the applicant that if a Security Council resolution directed or implied that the State was obliged to embark on a programme which was obviously unconstitutional, the existence of that resolution could not render the programme constitutional. The arguments on this issue do not bring the matter any further.

96. The respondents make, however, a more formal argument on the question of participation. They say that this is fully disposed of by Kearns, J. in the Horgan case, and particularly in his recognition of the fact that the courts are not the realm in which decisions as to participation or otherwise in a war should be considered. On those grounds, and following the jurisprudence establishing judicial restraint, I adopt the pronouncements of Kearns, J., in that case, as appropriate to apply also to the present case, and in particular the following, based on the decision in the CND case:

> *"The defendants contend, I believe correctly, that this case may be relied upon by the Court as emphasising the strictly circumspect role which the Courts adopt when called upon to exercise jurisdiction in relation to the executive's conduct of international relations generally."*

97. And

> *"Nonetheless this court does accept, for all the reasons stated, that some quite egregious disregard of constitutional duties must take place before it could intervene under Article 28 of the Constitution. This court is not at all persuaded that this has been established."*

98. And further:

> *"The issue of 'participation' is not a black and white issue. It may ultimately be, as stated by the first defendant, a matter of 'substance and degree'. However that is quintessentially a matter for the government and the elected public representatives in Dáil Eireann to determine and resolve. In even an extreme case, the court would still be obliged to extend a considerable margin of appreciation to those organs of the State when exercising their functions and responsibilities under Article 28.*

The following passage from *O'Malley v An Ceann Comhairle* [1997] 1 I.R. 427 at p.431 per O'Flaherty J is also very telling:

> *"How questions should be framed for answer by Ministers of the Government is so much a matter concerning the internal working of Dáil Eireann that it would seem to be inappropriate for the court to intervene except in some very extreme circumstances which it is impossible to envisage at the moment."*

99. Having regard to the absence of any clear line of authority as to the correct or appropriate legal definition of war, or as to what constitutes participation in any such war, or even as to what consequences flow from the failure to comply with invoked principles of international law on issues of neutrality, it is wholly appropriate that courts should adopt the same highly restrained approach to the question of whether and in what circumstances the executive arm of a government should take decisions relating to war or armed conflict or hostilities of whatever nature. It is equally highly appropriate that, in considering the manner in which a Constitution provides, in favour of the elected representatives, the possibility of applying checks to any overreaching by the executive arm of a state, as is the case under our Constitution, the judicial arm should adopt the same prudent and restrained approach to interference.

100. Secondly, the applicant argued that there has been a significant increase in the numbers of flights and troops landing or overflying the State, compared to the position in the past. However, merely because there has been an increase in the numbers, this cannot either automatically constitute participation. Since that is a relative matter, it says no more than that the position has changed. There is little or no evidence before the court as to the relative alleged increase in numbers of flight or troops, as compared to any past period, and in reality the court is being asked to assume that there is a significant increase. That is not to suggest that there has been no increase, because it is evident there has been a steady movement of flights over and through the State. But it establishes no more than that. It does not even establish, on the question of degree, referred to by Kearns, J. in *Horgan*, that there is such a movement of aircraft or troops that the appropriate level or degree, whatever that might be, has been reached. In that context, Mr. Rogers also invoked the provisions of Article 15 of the Constitution prohibiting the maintenance of any army within the State, contending that the facilities which are being afforded pursuant to the decision and the permissions are such as to constitute maintenance within the meaning of that Article. The respondents argue that this is intended to ensure that, within the state, there is only one true and official army, namely the Irish army. I am satisfied that the respondent's argument is correct as to the true meaning of the Article, and that the facilities offered do not constitute maintenance by the respondents of an army within the State, contrary to that Article.

101. The respondent also invoked the provisions of the Constitution in its Irish version, on the basis that they suggest that version requires a direct active involvement in a war to constitute participation within the meaning of the Article. I do not think it necessary to consider this in detail, because the phrase used in the Irish version of Article 28.3.1 which is "na páirt a bheith an" is not conclusive, and does not require further consideration, it not being of sufficient assistance to the court to conclude what precisely is required to constitute participation in a war, although it does suggest at least something quite active or involved. This phrase translates as "nor to take part in" but it seems to me that this is no different in substance than the use of the word "participate", and indeed is a very close translation of that word, even if a different phrase could also have been used.

102. I also reject the applicant's contention that the *Horgan* decision made it clear that a resolution of the Dáil was a necessary precondition, even to establish non participation. I have already found that the correct scope of Article 18.3.1 of the Constitution covers only those situations where there is a declaration of war, or participation in a war is intended but that there is no constitutional requirement for a type of clearance by the Dáil of a decision which does not constitute participation in a war. While there was such a resolution in the *Horgan* case, it is not clear precisely why that was so. The respondents contend it was political expediency. It may also have been the case that, in the event there was a declaration of war by the United States against Iraq, it

was appropriate to bring the matter before the Dáil for a formal resolution. I do not have to decide that. The position in the present case being that I have found it not established that there is a war in the sense of Article 28.3.1. and the applicant not having established participation within the meaning of that Article, on the basis of his arguments even assuming war, no resolution was necessary.

103. The applicant has failed to point to anything that would warrant the interference of the Courts in this exercise of executive power in line with authorities such as *Boland, Kavanagh v. Ireland* [1996] 1 I.R. 321, and most relevantly, *Horgan v. Ireland, supra*. I conclude in the foregoing circumstances that the applicant has not established in the present case that there is, by virtue of the decision sought to be impugned, or by virtue of any of the permissions granted, or by the abolition or waiver of stipulations attaching to any such permissions, participation in war.

104. The second line of argument of the applicant in this case, is made on the basis of it being "if necessary", according to the applicant's Statement to Ground an Application for Judicial Review, and concerns the more technical attack, which arises on the correct interpretation of the Act of 1946 and the Orders made thereunder. The relief sought and the grounds for the same are repeated here, because the arguments ranged far and wide, as if there were several further grounds permitted pursuant to the order of Finnegan, J. The relief was sought and granted in the following terms:

> "If necessary, a declaration that the said Orders of 1952, 1973, and 1989 are ultra vires, unconstitutional, and void and/or the Air Navigation Act, 1946 and in particular s.5 thereof, is unconstitutional and void insofar as it authorises the said orders".
>
> The grounds upon which this was permitted to be brought were the following:
>
> "The impugned decisions are not authorised by the Orders of 1952, 1973, and 1989. If it is found that the decisions were authorised, the said orders are *ultra vires* and unconstitutional and void and/or the Air Navigation Act, 1946 and, in particular, s. 5 thereof, is unconstitutional and void on the grounds of excessive delegation of power, contrary to Article 15 of the Constitution".

105. While the grounds in fact included also a reference to Article 40 of the Constitution, it is clear from the order made in the proceedings that that ground was not permitted, but the order in respect of this particular ground was not modified accordingly. I have simply eliminated it, and no argument was tendered on it. The grounds permitted are therefore quite narrow.

106. Firstly, the applicant argues, are the decisions authorised by any of the above Orders. According to the applicant, they are not. If however the court finds that they are within one or other or more than any of the above orders, then in that event, the applicant asserts they are ultra vires the Act of 1946. It is also claimed that S.5 of the Act of 1946 is itself constitutional.

107. As in the case of the first ground raised by the applicant, I have set out the relevant sections of the Act of 1946 and as amended and the Articles of the Orders at the commencement of this judgment. As to the Orders made pursuant to the Act of 19946, I deal first with the argument made that the Order of 1973 covers both civil aircraft and military aircraft. On this issue, the applicant alleges that the terms of the 1973 Order itself make it clear, on an ordinary reading of it, that it covers all aircraft, and therefore that military aircraft are strictly within its ambit. That being so, all military aircraft, armed or unarmed, are obliged to secure the permission of the Minister for Transport to overfly Irish airspace and/or land and/or refuel within the State. It is clear from the discovery made by Mr. McKay on behalf of the Minister for Transport that no such permissions were either sought or granted in respect of military aircraft, despite the discovery and disclosure of a vast amount of documentation. The respondents' argument on this is equally straightforward. They argue that the provisions of the 1973 Order covers only civil aircraft. I agree with the respondents that the 1973 Order covers only civil aircraft, and not military. This is clear from the source specifically invoked as the authority for the Order. The suggestion by the applicant that, on its face, it covers all aircraft, can only be accepted if the actual sections of the Act of 1946 cited as the appropriate source are ignored, there being no reason to do so. It does not on the other hand, cover military aircraft, as even on the applicant's own argument, only Section 3 of the Act covers such aircraft, and it is not invoked as a source for the 1973 Order.

108. Further it would be illogical and inappropriate to have a dual system in place, one under the 1952 Order and a different one under the 1973 Order, each applicable to military aircraft. The role of the Minister for Foreign Affairs is one which is peculiarly appropriate in the case of military aircraft, and not at all appropriate in the case of civil aircraft. The rationale behind the difference in treatment of military aircraft and civil aircraft arises by virtue of the fact that military aircraft of all states are "state aircraft", and therefore fall to be considered as part of the relationships between states which is on a different and peculiar level, involving as it does matters of diplomacy and international relations, all within the ambit of the Minister for Foreign Affairs.

109. As to the question of an impermissible delegation of power to the Minister for Foreign Affairs by the 1952 Order, the first of these arguments is based essentially on the contention that only Section 5 of the Act of 1946 is invoked by the Minister for Transport and that this constitutes a bare power, and that no Order has been made invoking Section 3(2) of the Act. The respondents reject this contention, and argue rather than the power in the Act is exercised correctly by the Minister for Transport, that the Order is made pursuant to the powers in Section 3 and that the role of the Minister for Foreign Affairs is simply to establish the administrative procedures which are to apply to the overflight or landing of foreign military aircraft, it being his peculiar role to do so. It is, in the case of the Act of 1946 clear that there is only one section which applies to military aircraft. The question which arises therefore, is whether, in making an order, as is permitted under Section 5, the Minister is obliged to make specific reference to the only section in the Act which could constitute the source of the power, in this case, as to military aircraft. I am not satisfied that he cannot do so. This is a question of degree in the sense that if there were any doubt about the application of Section 3(2) in the Act of 1946, it might be said that it could not be ascertained clearly. However, both the applicant and the respondent agree that the only section in the entire of the Act of 1946 which could possibly apply to military aircraft is Section 3 of the Act. That being so, and the applicant not having presented any jurisprudence to the contrary which prohibits this, I am satisfied that the 1952 Order is lawfully and properly made.

110. However, there is a second argument, namely, that there is an entire delegation of power by the Minister for Transport to the Minister for Foreign Affairs, and that this too is impermissible. I have already set out the role of the Minister for Foreign Affairs in state to state relationships in connection with my findings on the alleged application of the 1973 Order to military aircraft. I am satisfied that he is the person who is best placed to set out the procedures such as permissions, stipulations and/or waivers applicable to state aircraft, and within that, military aircraft. The judgment of Henchy J. in *Cassidy v. Minister for Industry* [1978] IR 297 where he stated at p. 310 that an order or other statutory instrument will not be invalid or *ultra vires* its parent statute if it is "within the limitations of that power as they are expressed or necessarily implied in the statutory delegation" is apt, as a consideration of the requirements in the 1952 Order are those necessarily implied in respect of military aircraft. Once a decision has been adopted to apply

provisions of the Act, as here, to military aircraft being state aircraft, it falls within the sphere of the Minister for Foreign Affairs to oversee such administrative requirements as may be applicable or desirable in terms of compliance. There is nothing mysterious or secret about such a situation. It is, on the contrary, the normal way in which relationships between states are regulated. It cannot therefore be accepted that the distinction which is drawn between on the one hand the 1952 Order and the 1973 Order is an unfounded or an illegal one. I reject the applicant's argument therefore that the 1973 Order applies to all aircraft, whether military or civil, or that the provisions of the 1952 Order constitute any impermissible delegation of power, or that Section 5 of the Act of 1946 is unconstitutional for the reasons claims.

111. Two further and related arguments were also made by the applicant, which I also address. The first concerns the question whether, given the use of the word "express" in the 1952 Order, that Order requires a specific permission in respect of each and every overflight or landing, as the applicant argues. It is contended that this must be so, because the stipulations must be specific and must be recorded. Otherwise, it is contended, it would not be possible to ascertain the terms of any permission, or the stipulations attaching to them. Further, on the second and related argument, Mr. Rogers contends that the unrecorded waiver or lifting of stipulations attaching to the blanket exemption described above, in the case of military aircraft pursuant Resolution 1368 is equally impermissible, although he did not refer the court to any specific norm or rule of legislative or administrative law which is thereby infringed

112. While I consider it understandable that the applicant complains about the absence of records of stipulations, I do not consider that the word "express" must be understood only in the sense that it requires stipulations to be placed either on a case by case basis – one argument contended for – or on an aircraft by aircraft basis – the other argument made, under the 1952 Order, and I find no rule of law which prohibits an agreement to grant blanket exemptions of the type arranged some years ago. The existence of the blanket exemption is recorded, although perhaps not in the usual format. From the affidavit of Mr. Cooney in which the stipulations are referred, it is evident there must be some recorded indication of what they consist of. Further, while it is undoubtedly good administrative practice that the stipulations and the waivers, as well as the record of the lifting of any waivers in any particular case be appropriately recorded, it not unlawful or in any way contrary to legal norms existing in this State not to do so. In the circumstances, I do not accept that these matters bring the applicant's argument on the 1952 Order any further.

113. A final argument is made by the applicant, based on the contention that Section 5 of the Act of 1946 is itself unconstitutional on the grounds that it lacks any policies or guidance as to the criteria to be applied. Although this was argued as part of the submissions of the applicant, it was not a ground upon which any relief was sought or permitted in the Order made on the application for leave to issue judicial review proceedings. In the circumstances, I do not intend to make any decision on that argument.

Issue of Delay

114. On an entirely self contained matter, the respondents raise the issue of delay in this case. This is based on the well established principles applicable to the question of delay within Article 84 of the Rules of the Superior Courts, which require that the proceedings be commenced within a specified time period, depending on the relief sought, and in any event promptly. The respondents claim that the applicant neither commenced his proceedings within the time prescribed nor promptly, and that the court should therefore exercise its discretion against the applicant. The applicant contends that (a) the acts in question which he seeks to have quashed are continuing, and (b) in any event he did not have the information necessary for him to commence the proceedings earlier than he did.

115. While it is true that the original order of Finnegan, J. indicated that since the matters complained of were continuing, the question of the applicant not having brought the proceedings within the required time frame did not apply. It is the case, on the applicant's own evidence, that while the decision was announced in late September 2001, and repeated on dates in October 2001, he did not himself seek to have information from the second or third named respondents until late in the month of June 2002. Nowhere is this delay of eight months explained. What is argued is that it was not until July 2002 that the applicant had the material necessary for him to proceed. That being so, Mr. Rogers contends that there was no delay between that date and the date in September when the proceedings were commenced.

116. I do not accept that the applicant has discharged the onus on him to move within the time provided for in the Rules of the Superior Court, nor promptly, as that is understood in the well established jurisprudence, which I do not need to cite in this judgment, and he has given no reason whatsoever for the delay arising in the matter. While I understand the comment by the learned President, on the date of the granting of leave, there are in fact two issues to be considered. The first concerns the decision taken by the first named respondent and repeated by the second named respondent. That was known as early as September or October 2001, and known to the applicant. He was, therefore, at that stage, perfectly able to commence proceedings in respect of the decision. The decision was not a continuing situation. The second issue concerns details of the permissions for overflying and/or landing which, if one takes his argument on this issue at its highest point, he required to have before he commenced proceedings. He was however in a position to invoke – as he did some eight months later – the provisions of the Freedom of Information Act, for the purposes of putting together the very materials which he wished to rely on. It is noteworthy that, in response to his letter sent in late June, 2002 he received a reply from the second named respondent's office in July. There was therefore nothing at all inhibiting him from seeking and obtaining all of the essential material well within the period set forth in the Rules of the Superior Court, and could also have moved promptly as required. Although therefore there was a continuing situation in so far as the permissions were concerned, I am not satisfied that that continuing situation in respect of those justifies a finding that the applicant is thereby exempt from commencing his proceedings as required, in respect of the decision or having regard to the relief or grounds raised on the legislative scheme.

117. In these circumstances, and having regard to the fact that he has furnished no evidence whatsoever as to the reason for the lengthy delay between the date of the decision and late June 2002 when he first made application under the Freedom of Information Act, which might have justified the court in excusing the delay in question, I am satisfied that the applicant did not move either within the time prescribed by the Rules or promptly, as required pursuant to the jurisprudence.

118. Having regard to the foregoing, I reject the applicant's application for each of the reliefs sought.