Mahelet Getye Habte v Minister for Justice and Equality

Mahelet Getye Habte v Minister for Justice and Equality Ireland Attorney General

[2019/108]

Court of Appeal

5 February 2020

unreported

[2020] IECA 22

Mr. Justice Murray

February 05, 2020

JUDGMENT

I THE ISSUES

1. The applicant was born in Ethiopia. She is a naturalised Irish Citizen. The certificate of naturalisation as issued to her on 23rd January 2015 records her date of birth as 24th September 1975. This reflects the date she provided when she applied for naturalisation. For reasons more fully explained below, she believes this date to be wrong. She has requested the first named respondent ('the Minister') to correct the certificate by the insertion of what she says she now believes to be her correct date of birth – 4th October 1982. The Minister has adopted the position that pursuant to the relevant legislation – the Irish Citizenship and Nationality Act 1956 as amended, ('the Act') – he does not have the power to amend the certificate in this way. His consequent refusal to make the amendment sought by the applicant prompted the first set of proceedings giving rise to this appeal, in which the Minister was the sole respondent (2017 126 JR). In those proceedings, the applicant sought an order declaring her date of birth to be 4th October 1982, together with orders requiring the provision to her by the Minister of a true and accurate certificate of naturalisation, and an order of certiorari quashing the decision of the Respondent refusing to amend her certificate of naturalisation. She also sought with other related declaratory relief. In that first action, the essential argument advanced by the applicant was that the Minister did enjoy such a power of amendment, and that he had acted unlawfully in refusing to exercise it.

2. While declining to make a declaration as to the applicant's date of birth, Humphreys J. agreed with the applicant's contention that the Minister had a power – in effect – to amend a certificate of naturalisation. He adopted the view that this could be done by the cancellation of the existing certificate and the immediate re-issue thereof with the correct date of birth. He made certain orders directing how the Minister should consider the exercise of that power. The Minister has appealed that determination.

3. Following the institution of the first action, the Minister proceeded to initiate the process described in section 19 of the Act for the revocation of the applicant's certificate of naturalisation ('the section 19 procedure'). The section 19 procedure is operative inter alia where a certificate of naturalisation has been procured by misrepresentation – whether fraudulent or innocent. It is the position of the Minister that this is the only course of action open to him when it comes to his attention that a certificate of naturalisation has been issued based upon and recording incorrect identifying information, at least where that information originated with the applicant for the certificate.

4. The initiation of that process prompted the second set of proceedings (2017 569 JR). In those proceedings, in which the Minister, Ireland and the Attorney General were the respondents, the applicant contended that the commencement of the section 19 procedure was unlawful on a variety of grounds. It was also contended that section 19(1)(a) of the Act is invalid having regard to the provisions of the Constitution. Humphreys J. rejected these arguments and refused any of the relief claimed in those proceedings. He did so without prejudice to the applicant's right to raise any point in

the event of a challenge being brought to the ultimate decision of the Minister at the conclusion of that process. The applicant has appealed against this decision. The respondents have cross appealed parts of the High Court judgment which identified features of the events giving rise to the revocation process which the trial Judge characterised as favourable to the applicant.

5. While a wide range of reliefs were claimed, and issues raised, in the course of these appeals, it appears to me that the essential questions across both cases (resolved in a single judgment [2019] IEHC 47) were three-fold. First, whether it is appropriate to imply into the Act a power on the part of the Minister to amend a certificate of naturalisation. This issue, as it was addressed in the High Court, presented the question of whether the applicant enjoyed any constitutional, European Convention on Human Rights or other European law-based right which grounded an entitlement to have the personal details on her certificate of naturalisation correctly recorded. Second, whether in the circumstances that presented themselves in this case it was appropriate for the Court to grant relief by way of Judicial Review in respect of the initiation of a process that might lead to revocation of a certificate of naturalisation pursuant to section 19 of the Act. Third, whether the Minister acted unlawfully in initiating that procedure because (a) there was no evidential basis on which he could conclude that it was appropriate so to do, (b) because he failed to afford the applicant fair procedures before so doing, (c) because he initiated the procedure in the mistaken belief that he did not have the power to amend the certificate, or (d) because section 19(1)(a) of the Act is invalid having regard to the provisions of the Constitution.

II BACKGROUND

6. Naturalisation is applied for by completion and submission of a form known as the Form 8. The form is prescribed by the Irish Nationality and Citizenship Regulations SI 569 of 2011. The contents of the Form 8 must be attested to by the applicant in an accompanying statutory declaration. The form is headed with a warning that the information to be supplied must be true and correct. It advises that the provision of false or misleading information on the form may constitute an offence, and that the certificate may be revoked if procured by fraud, misrepresentation (innocent or fraudulent) or concealment of material facts or circumstances. The information notes to the form advise applicants that a Certificate of Naturalisation cannot be amended once issued. The detailed guidance on filling out the Form 8 directs applicants to include their date of birth 'as recorded on your Birth Certificate' . The guidance document also makes it clear that if the application for a certificate of naturalisation is successful, the certificate will record inter alia the applicant's date of birth as stated on the application.

7. The applicant applied for naturalisation as an Irish citizen by application dated and witnessed on 23rd May 2015. It was received by the Minister on 5th June. The applicant inserted on the application form her date of birth as '24/09/75'. Contrary to the direction on the Form 8 itself, this is not the date appearing on the applicant's birth certificate. That certificate contains two dates. Opposite the Amharic words for 'date of birth' on that document, the date '24/01/75' appears. Opposite the English words 'date of birth' the date given is '04/10/82'. These two dates reflect differences between the Ethiopian Coptic calendar (Ge'ez) and the Western Gregorian calendar. The Ethiopian calendar is approximately seven years behind the Gregorian calendar. It has twelve months of thirty days each, plus five or six additional days (depending on whether a year is a leap year). These additional days are added as a thirteenth month each year to match the calendar to the solar cycle. The first calendar month is 'Maskaram' . It commences at approximately the 11th (or in a leap year the 12th) of September according to the Gregorian calendar. There is, however, no month known as September in that calendar. It should also be observed that while the applicant avers in one of her affidavits (without supporting evidence) that 'Maskaram' translates to September in the English language, these months do not run concurrently. The applicant enclosed with her Form 8 a letter dated 31st May 2014 setting out the differences between the Ethiopian and Gregorian calendars. At the end of that letter she provided a telephone number at which she could be contacted in the event of any questions.

8. While neither date on the applicant's birth certificate appeared on the naturalisation application, the date that was given by her on that document corresponded with the date of birth appearing on her Ethiopian passport. That passport issued to her on 20th May 2011. It records her date of birth as '24 Sep 75' . The applicant explains this date on the basis that '24/01/75' according to the Ethiopian Coptic calendar is reflected as 24 September 1975. She says this because (she avers) September is considered the first month of the year in the Ge'ez calendar. The applicant claims that she understood that she should state her date of birth on the Form 8 as it appeared on her supporting home country identification documentation and that she thus included the date of birth as it appeared on her

passport.

9. On 23rd January 2015, the applicant was granted Irish citizenship on the basis of residence in the State for five years out of the previous nine years. Her certificate of naturalisation reflected her date of birth as submitted on her Form 8, 24 September 1975. Thereafter, she applied for an Irish passport. This issued to her on 12th March 2015. This recorded the same date of birth as appeared on her certificate of naturalisation.

10. The applicant did not raise any issue as to the date of birth recorded on her certificate of naturalisation when she received that document. She thereafter travelled abroad on the basis of her Irish passport. In her Statement of Grounds (the contents of which were verified on oath by her) she pleads that while she noted the date of birth recorded on her certificate of naturalisation and Irish passport were incorrect 'in relation to the Gregorian calendar' she assumed that, having explained the calendar discrepancy to the respondent, 'the Irish system must require that the date of her Ethiopian passport be used' . She further pleads that 'it would not be a difficulty to change the date on her passport in the future should she need to do so' . She says that she did not make any attempts to remedy her certificate of naturalisation between 23rd January 2015 and August 2016 in circumstances where she became pregnant in October 2015 and her daughter was born in June 2016.

11. She then pleads that when, in August 2016, she decided to obtain a driving licence and car insurance, she became concerned that she needed to have the correct date of birth on her identity documents. She corresponded with the Passport Office seeking an amendment of her passport and was told by the Passport Office that she first needed to have her certificate of naturalisation amended. This prompted correspondence extending from 31st August 2016 to 22nd November 2016 between the applicant and thereafter her solicitors, and the relevant agency of the Department of Justice, the Irish National Immigration Service (respectively 'the Department' and 'INIS'). The end point of that correspondence was that the INIS refused the application she made for an amended certificate of naturalisation. The basis for this position was recorded in a letter of 6th September 2016. It said, 'once a certificate of naturalisation has issued it is not our policy to issue an amended certificate at a later date' . That letter was followed by an e-mail from the applicant to the INIS in the course of which she said the amendment sought to her naturalisation certificate was required 'due to a marital status change' , to which the response was 'your query has been already addressed by this office in a letter … dated 6/9/2016' . Subsequent correspondence from INIS to the applicant reiterated the position adopted in this letter.

12. Leave to seek Judicial Review of the decision refusing to amend the applicant's certificate of naturalisation was granted on 13th February 2017.

13. By letter dated 22nd June 2017, the applicant was notified of a proposal to revoke her certificate of naturalisation. The letter stated as follows:

> The Minister intends to revoke your certificate of naturalisation, being satisfied that the circumstances through which your certificate of naturalisation was obtained do not satisfy the conditions stated in Section 19(1)(a) of the Irish Nationality and Citizenship Act 1956, as amended, three months after the date of this notice.

14. The 'Grounds' recited in the letter were as follows:

> In your naturalisation application you submitted a translated copy of your birth certificate which records your date of birth as 24/01/1975. This document also stipulates that your date of birth by the Gregorian calendar is 04/10/1982. With your citizenship application you also submitted your Ethiopian passport (issued in May 2011) which records your date of birth as "24 Sept 1975". On 23 January 2015 you were granted a certificate of naturalisation, your date of birth, as stated by you on your application form and evidenced by your Ethiopian Passport, is reflected on your Certificate of Naturalisation as (24/09/1975). This date of birth was also provided by you in your immigration registration details and is reflected on your GNIB card. It is also reflected on your application for an Irish passport, and this date of 24/09/1975 is reflected on the Irish passport which issued to you on 12th March 2015.

On 31 August 2016 you contacted the INIS by email stating that the date of birth on your certificate of naturalisation referred to the Ethiopian calendar date of 24 September 1975 and needed to be amended to reflect the Gregorian calendar date of 4 October 1982. You were informed by Citizenship Section that it is their policy not to amend a certificate of naturalisation once it has issued.

From the information you have now provided, it appears that you have submitted false or misleading information on your application for a certificate of naturalisation in respect of your date of birth.

(Emphasis added.)

15. The letter advised the applicant of her right to apply to the Minister for an inquiry under section 19(2) of the Act. The applicant was advised that in the event that she so applied, the Minister would not revoke her certificate of naturalisation without first considering the report of the Committee of Inquiry. The applicant in her response did not seek an inquiry, the deadline for making an application for which was extended by the respondent in the course of the action. That period remains extended until the determination of these proceedings.

16. Following an attempt to amend the then extant Judicial Review proceedings to include a challenge to that decision, the applicant was on 17th July 2017 granted by way of separate proceedings leave to seek Judicial Review of the proposal to revoke her certificate.

17. In the course of her correspondence with the Minister the applicant produced an undated letter from the embassy of the Federal Democratic Republic of Ethiopia, which confirmed the applicant as the 'holder of Ethiopian passport Ep. 1493975 date of birth 24/011975 (sic) E.C is the same with date of birth 04/10/1982G.C. as per indicated on applicant's birth certificate. ' At the trial, she produced in evidence an identity card issued by the Ethiopian authorities on 30th October 2015, valid for five years. This card states that the applicant's date of birth by reference to the Gregorian calendar is 24th September 1975.

18. Two further aspects of the general background should be noted. The Minister explains in his submissions that each certificate of naturalisation is created with a specific identification number. This contains five pieces of identifying information – name, address, place of birth, date of birth and country of previous nationality. The Minister accepts in his submissions that he has in the past (in what his submissions describe as 'a tiny number of cases') cancelled naturalisation certificates containing errors and issued a new certificate with a new certificate number. He says that where this has occurred 'in nearly all cases' the certificate has been cancelled before being issued to the applicant. This is described in those submissions as a 'policy' arising where there is a clerical error or slip which was the fault of the Minister. Where such an error is detected and a fresh certificate is thereby created, the old cancelled certificate is kept in a safe. In oral submissions, counsel for the Minister said that the power to do this arose from section 15 of the Act (which contains no such express power). The Minister says that this 'policy' is of no application to the applicant's position, as she provided the information which is now said to have been erroneous.

19. The Minister also explains that in the period between October 2003 and June 2008 – and prior to the grant to the applicant of her certificate of naturalisation – the applicant obtained five visas. Between those visas, they recorded three separate dates of birth – '1975', '24/09/75', '24Sept.1975', '10Sept.1975' and '10/09/1975'. The date on her GNIB card (issued on 27 June 2011 and expiring on 18 May 2016) was '20/09/1975'.

20. The applicant has been living and working in Ireland since 2003. She married her husband in Ethiopia in 2014. Their first child was born on 23rd June 2016, and their second on 17th October 2018. The applicant's husband now resides with her in this jurisdiction. The applicant contends that if her Irish citizenship is revoked she will be rendered stateless.

III THE RELEVANT PROVISIONS AND THE GROUNDS OF REVIEW

21. Under section 14 of the Act, Irish citizenship may be conferred on a non-national by means of a certificate of naturalisation granted by the Minister. Under section 18, every person to whom a certificate of naturalisation is granted shall, from the date of that issue and for as long as the

certificate remains unrevoked, be an Irish citizen.

22. The power to issue such a certificate is conditioned by section 15 of the Act. The section states that the Minister may, on application, grant such a certificate 'in his absolute discretion' if he is satisfied in respect of six matters. These include the applicant being of full age, of good character, that he or she has had a period of one year's continuous residence in the State immediately before the date of the application and during the eight years immediately preceding that period has had a total residence in the State amounting to four years, and that he or she intends in good faith to continue to reside in the State after naturalisation. He or she must also make a declaration either before a District Justice in open Court or in such manner as the Minister allows, of fidelity to the nation and loyalty to the state.

23. Section 17(1) provides that an application for a certificate of naturalisation shall be in the prescribed form and must be accompanied by such evidence to vouch the application as the Minister requires. Section 17(2) makes it an offence where a person for the purposes of or in relation to an application for a certificate of naturalisation:

> "… gives or makes to the Minister any statement or information which is to his knowledge false or misleading in any material respect …"

24. Section 19(1) provides for the revocation of a certificate of naturalisation. It confers this power on the Minister where he is satisfied of one of five matters. For the purposes of these proceedings, the relevant provision is section 19(1)(a). This is operative where:

> "… the issue of the certificate was procured by fraud, misrepresentation whether innocent or fraudulent, or concealment of material facts or circumstances."

25. Section 19(2) describes the commencement of the process of revocation:

> "Before revocation of a certificate of naturalisation the Minister shall give such notice as may be prescribed to the person to whom the certificate was granted of his intention to revoke the certificate, stating the grounds therefor and the right of that person to apply to the Minister for an inquiry as to the reasons for revocation."

26. Section 19(3) addresses the obligation of the Minister where a request for an inquiry is made in accordance with subsection (2), and provides the only description of the powers and function of the inquiry:

> "On application being made in the prescribed manner for an inquiry under subsection (2) the Minister shall refer the case to a Committee of Inquiry appointed by the Minister consisting of a chairman having judicial experience and such other persons as the Minister may think fit, and the Committee shall report their findings to the Minister."

27. Section 29A renders it an offence for a person to knowingly or recklessly make a declaration under the Act, or a statement for the purposes of any application under the Act, that is false or misleading in any material respect.

28. In the first Judicial Review proceedings, the principal relief sought by the applicant comprised an order declaring the correct date of birth of the applicant to be 4th October 1982, together with an order of certiorari quashing the refusal of the respondent to amend the applicant's certificate of naturalisation to insert that date of birth. An order of mandamus requiring him to do so, was also sought. The essential grounds on which this relief was claimed were that the Minister had failed to comply with the provisions of the 1956 Act and Regulations made thereunder; that he acted unlawfully in applying a fixed policy against amending certificates of naturalisation once they had issued; that by refusing to amend the certificate on the basis of a blanket policy and having regard to the nature of the error, he acted irrationally; and that he denied the applicant fair procedures by failing to consider her application to amend the certificate on an individualised basis.

29. In the second proceedings the principal relief sought was an order of certiorari quashing 'the decision to form an intention to revoke' the applicant's certificate of naturalisation as communicated in the letter to her of 22nd June 2017. That relief was claimed because it was said that there were not sufficient facts on the basis of which the Minister could have concluded that the certificate was procured by misrepresentation, that in commencing the revocation procedure the Minister had acted irrationally, and that the Minister had exercised his powers for an improper purpose and in bad faith. Declaratory relief was also sought to the effect that section 19 of the Act was invalid having regard to the provisions of the Constitution and European law.

IV THE HIGH COURT JUDGMENT

30. The analysis undertaken by Humphreys J. and the reasoning that led to his conclusion that the applicant ought to be granted certain relief in respect of the first proceedings, and refused any relief in respect of the second, can be summarised as follows.

31. First, Humphreys J. determined that the applicant enjoyed a right 'to have her identity correctly recognised by the State' which was 'so fundamental that it must be recognised as an unenumerated [right]' (at para. 43). The trial Judge rooted this conclusion, in part, in the widespread recognition of the right in international instruments (Article 24(2) of the International Covenant on Civil and Political Rights, and Article 7 of the Convention on the Rights of the Child) and the view that this right both necessarily inhered in Article 8 of the European Convention on Human Rights and was a corollary to the right to protection of data provided for in Article 8 of the Charter on Fundamental Rights of the European Union (in which connection the Judge further referred to section 74(3) of the Data Protection Act 2018 and section 9 of the Freedom of Information Act 2014). He said (at para. 44):

> "…there is an implied constitutional onus on the State arising from the inherent dignity of the individual referred to in the Preamble and the personal rights of the citizen in Article 40.3 of the Constitution to accurately record and represent central aspects of personal identity."

32. Further, he identified a number of rights expressly provided for in the Constitution which depended on the age of the individual (the rights to vote, and to stand in a general or presidential election) and that other provisions which presumed a clear record of age (Article 36.1), all of which involve 'a necessarily implicit constitutional requirement that such age is correctly recorded (at para. 45). He upheld the argument advanced by the applicant that 'the right to have a correct official record of one's identity is an aspect of the personal rights of the citizen' under the Constitution, Article 40.3, and pursuant to Article 8 of the European Convention on Human Rights as applied by the European Convention on Human Rights Act 2003 (at para. 47).

33. In that regard, Humphreys J. placed some reliance on the decision of Kearns P. in Caldaras v. An tÁrd Chláraitheoir [2013] 3 IR 310 [2013], IEHC 275 in which, in the context of an issue as to whether the Registrar General for Births, Marriages and Deaths enjoyed the power under the Civil Registration Act 2004 to amend a birth certificate so as to correctly record the name of the applicant on her daughter's birth certificate, Kearns P. referred to parent and child enjoying 'the right to have the correct identity of the parent recorded on a child's birth certificate' . While acknowledging that the primary responsibility of the State relevant to this entitlement is for the recording of information in respect of persons born within the jurisdiction, and while the primary onus to have recorded the applicant's date of birth correctly accordingly fell on the Ethiopian authorities, Humphreys J. said that this did not absolve the State from recording that date of birth correctly 'in its own records' (at para. 47).

34. In the light of these considerations, the trial Judge proceeded to address the first relief claimed in the first action for a declaratory order as to the applicant's date of birth. This relief was refused because the Court felt that the inquiry process enabled under section 19(3) of the Act was 'the more appropriate mechanism' and that any declaratory relief granted by the Court of this kind would 'cut across' that process. He continued (at para. 56):

> "… the applicant ought not be left in limbo, so if by the conclusion of the process the Minister has not clarified what he considers the applicant's correct date of birth to be, the

basis for my having declined to make a declaration at the request of the respondents would have been negative, so the applicant would have to be free to reapply to the court again."

35. From there, the Court addressed the argument that there was an implied power to amend a certificate of naturalisation. Humphreys J. made it clear in this context that when he referred to a power to 'amend' a certificate of naturalisation, he was referring to the power to cancel and simultaneously re-issue such a certificate. As I have already noted, this is the procedure adopted by the Minister where a certificate contains a clerical error for which the Minister was responsible. In deciding that the Minister did enjoy this power, Humphreys J. observed the combined effect of section 22(3) of the Interpretation Act 2005 (which stipulates that a power to make a statutory instrument shall be read as including the power to amend such an instrument) and the definition of statutory instrument provided for in section 2(1) of that Act (which includes a 'certificate … issued by or under an Act ..'). While he held that the power to revoke a certificate save in accordance with section 19 was implicitly excluded, the power to amend in the sense defined by him was not. The conclusion that there existed such a power was, the Court held, reinforced by the double construction rule, and the fact that an interpretation that did not enable such a power would result in a disproportionate interference with constitutional rights and with rights secured by the European Convention on Human Rights (at para. 59).

36. The Minister's position as contended for before the Court was that if he had a power to amend the certificate, he had considered the applicant's application and addressed it in accordance with his policy not to grant such amendments where they were necessitated by the fact that the holder of the certificate had himself or herself provided incorrect information. Humphreys J. held that the Minister was not entitled to have a policy that did not respect the applicant's rights, and in particular to have a policy which resulted in the Minister not affording due and reasonable consideration to the applicant's representations before forming a view as to whether or not he would amend. He determined that, subject to the revocation procedure having been lawfully commenced, the appropriate course of action was for the Minister to consider the question of amendment in the context of any outcome of the deliberations by the committee of inquiry. That being so, he decided that the appropriate order for the Court to make was one requiring the Minister to consider the amendment application, albeit that this could be done in the context of the inquiry process. He based this on the following conclusion (at para. 60):

> "The refusal of the application to amend here was unduly influenced by both the view of the law that incorrectly reads the Minister's jurisdiction as too narrow, and also by a view of the Minister's entitlement to a general policy that does not stand up as being one that adequately respects the rights of the applicants."

37. In consequence, the order made in the first proceedings was that the Minister consider, if appropriate in the light of any report of the committee of inquiry, whether the applicant's certificate of naturalisation should be amended in the sense of being cancelled and reissued with the amended date of birth.

38. In respect of the second set of proceedings, Humphreys J. noted what he viewed as the general approach whereby judicial review would not normally lie in respect of a 'mere proposal nor of the decision to initiate a procedure (at paras 61 and 62). Observing that the existence of an alternative procedure is not an absolute bar to relief and that the process initiated by the Minister provided a remedy in relation to any infirmities in the proposed case against the applicant, he felt that the circumstances in which the continuation of the proposal would be prohibited would be exceptional, arising in circumstances such as where the proposal was clearly ultra vires or made for an improper purpose (at para. 63).

39. Humphreys J. determined that there was no basis for granting relief on either of these grounds. Insofar as the applicant had pleaded a case based on the process having been initiated for the improper purpose of preventing continuance of the first set of proceedings and by way of collateral defence of the judicial review proceedings, this was determined by the Court on the basis of the evidence of the respondent's witnesses (who were cross-examined at the hearing). Having seen and heard those witnesses, the trial Judge rejected the suggestion that the proposal to revoke was

motivated by an improper purpose. These factual findings of the High Court Judge are not disputed by the applicant in this appeal.

40. Humphreys J. expressed the view that the whole purpose of the second set of proceedings was 'to spike the guns of an inquiry that is yet to take place' . He explained that the contention that the decision to proceed with the inquiry was ultra vires as advanced in the High Court was essentially based on four propositions (a) the applicant had not mispresented her date of birth having regard to the fact she had explained the impact of the Gregorian calendar; (b) the error in her birth certificate was not causative of the issue of the certificate and, accordingly, it was not 'procured' by any such misrepresentation; (c) the Minister in any event could only exercise his discretion so as not to revoke because of the impact revocation would have on the applicant; and (d) insofar as he had a discretion to revoke, it was appropriate that it be exercised in favour of the applicant. Humphreys J. rejected each of these contentions on the basis (at para. 71) that it was not possible to say a priori and in the abstract before any facts have been found in the inquiry whether or not any or more of these contentions was bound to succeed such that the inquiry should be prohibited at this stage. Similarly, he felt that the issue of whether the committee could recommend that in lieu of revocation the certificate should be cancelled and reissued did not arise at that stage. He further concluded that the contention advanced by the applicant that section 19 was unconstitutional because the provision operated so that error in the submission of information on the Form 8 leads to revocation, was ill-founded. Error, he said, did not lead inexorably to revocation (at para. 68).

41. The order made in the first proceedings was that 'the Minister do consider if appropriate in the light of any report of the committee of inquiry whether the applicant's certificate of naturalisation should be amended in the sense of being cancelled and reissued with the correct date of birth' . In the second proceedings, the reliefs sought by the applicant were refused, without prejudice to the applicant's right to raise any point in the event of a challenge to the ultimate decision of the Minister. The Court nonetheless emphasised a number of respects in which the applicant had, in the view of the Court , 'succeeded in highlighting a number of matters favourable to her that she can presumably anticipate will be given due weight and consideration' (at para. 71). These included the fact that it was the applicant who drew the attention of the Minister to the error in her certificate, and the fact that nothing in the applicant's immigration history was suggestive of abuse of the immigration system. Following a second judgment directed to the question of costs ([2019] IEHC 93), the Court ordered that the costs of the first proceedings be awarded in favour of the applicant. No order for costs was made in the second judicial review.

V THE POWER TO AMEND

(1) The Extent of the Revocation Power:

42. The Act contains neither an express power of amendment properly so called, nor does it provide for a power to correct an error on the face of a certificate by its cancellation and the immediate issue of a new certificate in a corrected form. The issue is thus whether either such power can be implied. Part of the Minister's response to the proposition that it can, depends on section 19 of the Act. That provision, he says, provides the procedure to be followed where the holder of a certificate asserts that it contains incorrect information. He says that the express power to revoke for innocent misrepresentation within section 19 is inconsistent with the proposition that there should be implied into the legislation a process of amendment of the kind contended for by the applicant.

43. It follows that the first issue that arises in considering whether there is such an implied power depends on the nature and extent of the jurisdiction conferred by section 19(1)(a). Central to this question, having regard to the arguments advanced in the second proceedings, is whether the Minister has the power to revoke a certificate simply because a misrepresentation by the applicant for naturalisation as to their identifying information is established (as the Minister contends) or whether that power is properly limited to cases in which the Minister is satisfied that there was a causal connection between the grant of the certificate, and the false information provided (as the applicant contends).

44. There is – at least to some extent – an inverse relationship between the breadth of the power to revoke, and the strength of the case for an implied power of amendment. The broader the revocation power the less likely it is that there is a gap in the legislation that requires the implication of a power. If the legislation enables revocation for any innocent misstatement by an applicant for citizenship of

their identifying information irrespective of whether the error contributed to the issuing of the certificate, this strengthens the argument that the legislature intended all such errors to be addressed within the revocation process. If, however, the revocation power is narrower, this means that the Act provides no express mechanism for correcting all errors made by an applicant for such a certificate, rendering the case for an implied power to that effect stronger. It follows that the question of whether there is such an implied power cannot be resolved without determining the scope of the revocation jurisdiction.

45. The first relevant power to revoke a certificate of naturalisation appeared in section 7 of the British Nationality and Status of Aliens Act 1914. That provision was amended by the British Nationality and Status of Aliens Act 1918. The section as so amended was similar in a number of respects to the procedure now provided for in this jurisdiction in the 1956 Act. The facility to revoke (which following amendment in 1918 was expressed as an obligation rather than a power) arose where the Secretary of State was satisfied that inter alia a certificate had been 'obtained' by 'false representation or fraud, or by concealment of material circumstances' . The amendments effected by the 1918 Act enabled the holder of the certificate to be notified prior to the exercise of that function, and to require the case to be referred to an inquiry under the auspices of a person who holds or held "high judicial office" .

46. Although the Irish Nationality and Citizenship Act 1935 reserved whether these Acts ever applied in Saorstat Eireann (section 33), that legislation broadly reflected the grounds for revocation contained in the English legislation. Section 10(2) of that Actinter alia mandated the Minister to revoke a certificate of naturalisation when satisfied of one of a number of matters. One of these arose where there had been misrepresentation. However, the legislation differed from the Acts of 1914 and 1918 by expressly providing that an innocent misrepresentation could ground revocation, referring to 'misrepresentation whether innocent or fraudulent' rather than 'false representation' , and by vesting in the Minister (in section 10(1)) an absolute discretion to revoke a certificate of naturalisation for unspecified cause. The process of inquiry which had in practice proven an important part of the earlier English legislation was not included in the 1935 Act. It was, as noted above, revived in the 1956 Act, although that Act defined the scope of the inquiry ('as to the reasons for the revocation') and made provision for reporting its findings in a manner not provided for in the older legislation. The 1956 Act maintained the specific grounds as provided for in section 10(2) of the 1935 Act, while removing the 'former arbitrary discretion of the Minister to revoke naturalisation for unspecified cause' (see Parry "Nationality and Citizenship Laws of the Commonwealth and Ireland" (Michigan, 1957) p. 967).

47. The experience in the United Kingdom (explained in an article helpfully submitted by the applicant – Weil and Handler Revocation of Citizenship and Rule of Law: How Judicial Review Defeated Britain's First Denaturalisation Regime (2018) 36 Law and History Review 295) underlines a key issue of interpretation. While originally adopting the view that the legislation mandated the withdrawal of citizenship when the subject had provided false information even if this was done honestly, the Inquiry Committee provided for under that legislation had, by the early 1930s, decided that before citizenship could be revoked in cases of dishonesty, the Home Office had to establish that it would have refused naturalisation but for the dishonesty (see pp. 327-328). When the British Nationality and Citizenship Act 1948 maintained the power of revocation for fraud, the post war experience in that jurisdiction maintained the high standard for the operation of the fraud provision:

> "[N]o action to deprive a person of his citizenship under the [fraud] subsection would be contemplated unless the facts suppressed or misrepresented would undoubtedly have led to refusal of naturalisation, and unless it is reasonable to suppose that the applicant was aware that disclosure of the true position would have prejudiced his case"
>
> (Home Office Deprivation of Citizenship of the United Kingdom and Colonies: A digest of Home Office Practices S. 4(a)(i) (1961) quoted in Weil and Handler at p. 349).

48. It should be emphasised that this summary identifies two issues, one of which (the requirement that the applicant for naturalisation knows that disclosure is false) is now expressly addressed in the Irish legislation, but the second of which (the need for a causal connection between the falsity of the statement and the grant of the certificate) was not.

49. It is arguable, as the Minister contends, that where an applicant for naturalisation furnishes key identifying information as required by the Minister, the naturalisation certificate is 'procured' by that information, in the sense that the information given is material (because it is identifying information)

and on the basis that had the information not been given the Minister would not have issued the certificate. However, I do not believe it can be said that this means that the issue of a certificate on foot of information provided by an applicant which is incorrect has for that reason alone been 'procured … by misrepresentation' in the sense in which the phrase is used in section 19(1).

50. The Minister's contention depends upon the construct that if information required is material (in the sense that had the information not been given, the certificate would not have been granted), and if that material information is incorrect in any respect, the certificate has been 'procured … by misrepresentation.' This is not the obvious import of the conjunction of these words, which implies not that the certificate has been issued in response to information subsequently shown to be false, but that the falsity of that information has influenced the decision whether or not to grant the certificate.

51. That construction reflects the approach adopted in the interpretation of section 21(1)(h) of the Refugee Act 1996, pursuant to which a declaration of refugee status may be revoked where that declaration 'has been given on the basis of information … which was false or misleading in a material particular' . In Gashi v. The Minister for Justice Equality and Law Reform [2010] IEHC 436, the test to be applied in operating this provision was described in terms of 'whether the application for protection would have been determined differently had the information not been misrepresented.' . In NzN v. The Minister for Justice and Equality [2014] IEHC 31, this was described as requiring that the false information provided be 'instrumental in her recognition as a refugee' (at para. 34). Of course, these decisions are concerned with a different legal regime, and with the conferral of a different status. What they do reflect is a sensible interpretation of similar language operating in a not entirely dissimilar (but obviously different) context enabling the revocation of a declaration of status issued by the Executive on the basis of information furnished by the applicant. Indeed, it is to be noted that this reflects the role of causation in other areas of the law of misrepresentation, with the case law positing a general 'but for' analysis of the relationship between misstatement and consequence (see Carey v. Independent Newspapers Ltd. [2004] 3 IR 52, 70). Had it been intended to displace the ordinary meaning of the words 'procured by … misrepresentation' and the common understanding of the role of causation in determining the effect of a misrepresentation so as to allow the Minister to revoke a certificate simply because some or all of the information provided by an applicant was incorrect, it would have been easy to so provide in those terms. In that event, the section would confer upon the Minister the power to revoke as an automatic consequence of the provision of erroneous identifying information. That is not what the section says.

52. Some other features of the provision support this view. Reading section 19(2) in its entirety, it is not without significance that the provision not merely demands that the Minister be satisfied that the issue of the document was procured by the misrepresentation, but does so in a context where it is made clear that the independent basis for revocation arising where there is a concealment of facts or circumstances is limited to the non-disclosure of that which is 'material' . The express requirement of materiality in this part of the subsection implies that the concealment be in some way operative (see Sleiman v. Secretary of State [2017] UKUT 367 at para. 60). I do believe it likely that such a requirement of materiality is imposed in respect of concealment, without a similar quality being required of a positive misrepresentation.

53. It is also relevant that the 1956 Act clearly limited the broader untrammelled power previously vested in the Minister under section 10(1) of the 1935 legislation. From 1956, the Minister could no longer revoke a certificate for any reason. He was confined to the specific grounds identified in the legislation. Having so confined him, there is no reason to believe that the Oireachtas intended that the words defining that power should be afforded a construction broader than their plain terms suggest. To divorce the misrepresentation from the reasons the certificate was issued is to render revocation a penalty for misstatement. To do so in a context where the consequence for the citizen of revocation is of considerable moment, would require clear expression (see Delaney v. Coughlan [2012] IESC 40 at para. 37).

54. Although obviously not in any sense determinative of the proper construction in its own terms of the Irish legislation, it is of both note and assistance that this approach reflects that adopted in the United Kingdom. Section 40 of the British Nationality Act 1981 enables the revocation of citizenship status resulting from registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was 'obtained by means of … false representation' .

55. In Sleiman v. Secretary of State [2017] UKUT 367, the appellant misrepresented his date of birth when (unsuccessfully) claiming asylum. Had the information he provided been correct, the date of birth he tendered would have rendered him a minor at that time. In fact, he was two years older. The

same date of birth was subsequently relied upon in granting British Citizenship. His correct date of birth having become evident when he produced his Lebanese passport while seeking emergency travel documents, a decision was made to deprive him of citizenship on the basis that it had been obtained fraudulently (the decision, in fact, not making it clear whether it was fraud, false representation or concealment of a material fact that prompted the conclusion). The reasoning of the respondent (accepted at first instance but not on appeal) was that the misstatement of age justified revocation of citizenship because the applicant was only in a position to make an application for naturalisation by reason of that misstatement. Had he disclosed his true age at the time of the asylum application, the reasoning went, he would not have been treated as a minor and would likely have been returned to Lebanon when his asylum application was refused.

56. In allowing the appeal, the Upper Tribunal concluded that 'there must be some causative link between the action(s) or omission of the appellant and the obtaining of citizenship' (at para. 57). Referring to the decision of the Court of Appeal in Hysaj and ors v. Secretary of State [2015] EWCA Civ. 1195 (a case concerned not with the statutory ground for revocation, but with the circumstances in which fraud will vitiate a grant of citizenship ab initio and irrespective of the statutory power of revocation), the Court referenced 'a direct link' and 'causative relevance of the original fraudulent impersonation' (at para. 57). Referring to language used in the Respondent's internal instructions governing the application of the English provision, Kopieczek J. said (at paras. 60 and61):

> "The phrase 'direct bearing' suggests that in cases where the fraud etc. only has an indirect bearing on the grant of citizenship, deprivation action would not be appropriate. This, it seems to me, is consistent with the phrase 'by means of' in s.40(3) …
>
> On the basis of the above…the impugned behaviour must be directly material to the decision to grant citizenship …"

57. The same approach is evident in R(KV) v. Secretary of State [2018] EWCA Civ. 2483 at para. 19, where the Court referred in a similar context to the establishment not merely of deception, but 'that without it, the certificate of naturalisation would not have been granted' .

58. There are important points of distinction between the regimes in this jurisdiction and in the United Kingdom. The Court in Sleiman was clearly affected in its conclusion by the respondent's own guidelines, and the decision in Hysai was subsequently reversed on appeal on consent (see [2017] UKSC 82). However, the former merely explain the operation of the provision in line with the text of the section, as was held by the Court, and the vacating by the UK Supreme Court of the decision in Hysai does not affect the construction of the statute (see in particular [2017] UKSC 82 at para. 17). More importantly, the United Kingdom legislation uses the term 'by means of' (which the Irish legislation does not) and the Irish legislation expressly refers to innocent misrepresentation (which the other legislation does not). However, I do not see these distinctions as affecting the conclusion. There is no relevant difference between the concept of obtaining 'by means of' and that implied by 'procured by …' and the interpolation of the adjective 'innocent' goes to the character of the misrepresentation, not its effect. I find the reasoning of the Upper Tribunal in its own terms, persuasive in construing section 19(1) of the Act. The differences in the legislative schemes and context do not make it any the less so.

59. However, it must be emphasised that it is quite possible that an innocent misstatement as to the date of birth of an applicant for citizenship would in an appropriate case, meet the requirement that the application for naturalisation would have been determined differently had the information not been misrepresented.

60. This could be so not merely where the discrepancy between the represented and actual date of birth of an applicant was material to the factors brought to bear on a consideration of whether citizenship should be granted, but also where the discrepancies, although seemingly minor, could have led the Minister to a train of inquiry in relation to an applicant which might have resulted in a refusal of citizenship. For this reason, the applicant's assertion that this is not a case in which the preconditions for the exercise of section 19 exist, because 'as a matter of logic' the alleged misrepresentation did not procure the grant of the certificate, is mistaken.

61. Dates of birth, as observed by the respondent in the course of submissions, are a crucial piece of identifying information, utilised inter alia in conducting background checks on an applicant. Misstatement by an applicant for a certificate of naturalisation of their date of birth – and a failure to

take timely steps to correct such a misstatement when it becomes apparent to the applicant – is a potentially very significant matter. The inability of an applicant for a certificate of naturalisation to proffer a consistent account of their date of birth may, depending upon the reasons for not doing so, have been a relevant factor in the decision to grant naturalisation in the first place. The realisation that the birth certificate and passport of an applicant for naturalisation disclosed different dates of birth and that the applicant had chosen to proffer only the latter as her date of birth on the Form 8, may – again depending on the facts as ultimately determined – have affected how the Minister addressed that application for naturalisation. These are all clearly matters which the Minister is entitled to have investigated and are all clearly matters which, in an appropriate case and having regard to the construction of the provision as I have outlined it above, could potentially give rise to revocation of the certificate.

(2) Section 22(3) of the Interpretation Act 2005.

62. Humphreys J. based his finding that the Minister could without express statutory authority to that end revoke and issue a new certificate, on the provisions of section 22(3) of the Interpretation Act 2005. Insofar as he relied upon this provision, I disagree with his conclusion.

63. Section 22(3) provides:

> "A power conferred by an enactment to make a statutory instrument shall be read as including a power, exercisable in the like manner and subject to the like consent and conditions (if any), to repeal or amend a statutory instrument made under that power and (where required) to make another statutory instrument in place of the one so repealed."

64. 'Repeal' for the purposes of the 2005 Act as a whole, includes 'revoke, rescind, abrogate or cancel' (section 2(1)). However, the term 'repeal' is consistently referenced in the Act in accordance with its general usage, as connoting the revocation of a measure having the effect of law (see sections 26 and 27). There is nothing in section 22 to displace the inference that the term should be construed in accordance with that usual meaning.

65. This is important, because section 22 (the effect which may of course be displaced where the contrary appears in the legislation — see section 4(1) of the 2005 Act) has a surprising breadth of application. This is a consequence of the wide definition of statutory instrument in the Interpretation Act itself (section 2):

> "'statutory instrument' means an order, regulation, rule, bye-law, warrant, licence, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act, and references to 'made' or to 'made under' include references to made, issued, granted or otherwise created by or under such instrument."

66. There can be no serious dispute but that a certificate of naturalisation issued under the Act falls within this definition. However, having so determined the trial Judge did not in fact find that the Minister had the power to 'amend' a certificate of naturalisation once so issued. What he found instead was that there was an implied power to cancel the original certificate, and to simultaneously replace it with a fresh and differently numbered certificate. This is not the same as 'amendment' as that term is ordinarily understood. An 'amendment' occurs when an instrument as originally issued remains in force but is, after its issue, changed in some respect. It is the same instrument after the amendment as before the amendment, albeit with an alteration effected to it. The cancellation of an old certificate and issue of a new certificate by way of replacement, in contrast, involves the production of a new and different document.

67. The distinction is reflected in section 22(3) itself which acknowledges that a statutory instrument may be amended, or it may be repealed and replaced. I do not believe that that power as envisaged in section 22(3) – to repeal and replace the instrument with another – is applicable to a document of the kind in issue here. Although noting that 'repeal' includes 'revoke' and while the certificate is a 'statutory instrument' for the purposes of this legislation, the expansion of neither definition changes the usual function of 'repeal' as a term generally addressed to legislative instruments. The definition of

‘repeal’ in section 2(1) elaborates on how a repeal can be achieved, but does not purport to expand the scope of what it is can be repealed. Indeed, section 12(3) of the Interpretation Act 1923 (which implied a the same power but only in relation to rules, regulations or by laws) used very similar language (‘rescind, revoke … ’). The expansion of the scope of section 22(3) following the unorthodox definition of statutory instrument in the Act (see for example the definition in section 1(1) of the Statutory Instruments Act 1947) should not be extended any further than its language requires.

68. The proper effect of section 22(3), therefore, is that (subject to the legislative context not being inconsistent with such implication) a power to make any statutory instrument as defined in section 2(1) implies a power to amend that instrument. Where, the instrument is legislative, it may be repealed (and to that extent, revoked, rescinded, abrogated or cancelled). However, section 22(3) does not imply a power to cancel and reissue a certificate of the kind in issue here. To determine whether there is such a power, resort must be had to the general law governing implied powers.

69. As I have noted, insofar as the issue of ‘amendment’ as that term is used in section 22 is concerned, when the provision speaks of ‘amendment’ in this context, it is concerned with the alteration of an instrument by a mechanism which does not cancel the original instrument but allows it to be changed by subsequent act. By making it clear that this can be done as a matter of implication, section 22(3) travels in tandem with section 22(1), which creates a presumption that the first exercise of a power does not prevent its subsequent exercise. However, section 22(3) only implies a power to amend in this sense where such an amendment is consistent with the statutory scheme as a whole. This follows from section 4(1) of the 2005 Act, which subordinates the provisions of that legislation to any contrary intention appearing in an enactment to which it is sought to apply those provisions. That assumes that an amendment of the kind suggested can only actually be effected consistent with that statutory scheme.

70. The applicant in this case (who did not cross appeal or seek to vary the decision of the High Court insofar as it refused to imply a power of amendment in this conventional sense) has not established that amendment thus understood could ever be operated in connection with a certificate of naturalisation. The certificate once issued operates to grant citizenship to the person described in it. That person is the person with the name, date of birth and other identifying information contained in the certificate. It is that person upon whom nationality has been conferred. To change one of these pieces of identifying information, is, obviously, to confer citizenship on a person with different identifying information. It is impossible to see how, without legislative regulation, this could be done on the basis of an amended version of the same certificate while the earlier iteration of that certificate as issued (conferring citizenship on a person defined by reference to different identifying features) remains in some form of undefined but suspended animation. None of this would be consistent with need for absolute clarity and certainty around the person's citizenship. Thus, the Minister – in my view correctly – adopts the position that where he addresses a clerical error of his own, he does so by cancellation of the old certificate, and issue of a new one rather than by amendment. He does this in order (as recorded in the Minister's affidavit evidence) to ‘protect the integrity of’ the certificate.

71. These features of an instrument conferring citizenship mean that the amendment of the certificate in the sense ordinarily understood cannot by virtue of section 23(2) be interpolated into the Act. The only viable mechanism for addressing the concerns of the applicant here is that determined by the trial Judge – cancellation of the old certificate combined with the simultaneous reissue of a new certificate containing the correct identifying information.

(3) Implied Power to Cancel and Issue A New Certificate:

72. The question of whether the Minister has a power to cancel a certificate of naturalisation as issued by him, and to replace it with a new one, accordingly falls to be resolved by reference to the general principles governing the implication of powers, rather than pursuant to section 22(3). The proposition that there is such a power does not suffer from the same difficulties as the proposition that the extant certificate be simply amended. Were cancellation and reissue enabled by an implied power, the old certificate would cease to have effect, and a fresh certificate would now represent the basis for the applicant's naturalisation.

73. The Interpretation Act 2005 is not irrelevant to that exercise. Section 23(1), to which I have already referred, provides:

> A power conferred by an enactment may be exercised from time to time as occasion

requires.

74. Reference to the predecessors of that provision (sections 12(1) of the Interpretation Act 1923 and section 15 of the Interpretation Act 1937) would have changed the outcome of the one decision I have been able to identify addressing an asserted implied power to revoke and reissue statutory certificates. In Minister for Agriculture v. Gallagher [1941] IR 278, the High Court found that the plaintiff acted ultra vires when, having issued certificates which determined sums due by the defendant under the Slaughter of Cattle and Sheep Act 1934, he revoked those certificates and purported to issue new instruments certifying different sums due. The power to issue the certificate having been exercised (the Court held), it was spent and accordingly a new certificate could not be issued recording different information ([1941] IR at 283). Had it been understood that the power was not spent, the conclusion of the Court that the legislation would have to express that power, would have been different. As I have observed, the decision, was seemingly made in ignorance of the effect of the Interpretation Act 1937 (see Hogan, Morgan and Daly, " Administrative Law in Ireland " 5th Ed. (2019 at para. 12-66 fn. 149). What is important for present purposes is that the section identifies as a starting point the proposition that the power to issue a certificate of naturalisation in respect of the applicant was not exhausted by its first exercise.

75. The test for the implication of powers is neither complex, nor in dispute. A statutory body will be found to enjoy such powers as are incidental to or consequential on the powers and duties expressly provided for by the Oireachtas. While this remains the core test applicable to the question (McCarron v. Kearney [2010] IESC 28 [2010] 3 IR 302 at para. 39) it falls to be applied having regard to whether the power thus implied is be justified by the statutory context as a whole, and to its not being inconsistent with any express provisions within the relevant statutory scheme. The implication of a power is thus but one component of the overall process of interpretation of a statute conferring public law functions and must be gauged according to standard principles of construction. The implication of powers should accordingly function so as to avoid absurdity, advance the effectiveness of the legislation and implement the intention of the Oireachtas as deduced from the language in the relevant provisions viewed in the light of the statutory scheme as a whole. At the same time, the Court in determining whether to imply a power must caution itself against legislating which, if the test is applied as formulated, it will not be doing.

76. Ultimately, in determining whether such a power should be discerned from the Act, the Court is concerned to determine whether it can be said that the Oireachtas so clearly intended the statutory body to enjoy the power that it was reasonable to conclude it did not feel it necessary to express it. It is for this reason that it is sometimes said that if the power it is suggested should be implied is of a kind one would, in the ordinary course, expect to see expressed, it is not appropriate to impose that power by implication (see Magee v. Murray and anor. [2008] IEHC 371 at para. 29). However, this should not be overstated: the fact that a power is of a kind that appears expressed in other legislation is not a basis for refusing to imply one if it is otherwise appropriate to do so.

77. In this case, the fact that the Minister is compelled to accept that he has the power to cancel a certificate of naturalisation containing a misstatement caused by the Minister's own error, and to reissue in that circumstance a new corrected document, renders it impossible to deny such a power where the error arises due to a mistake on the part of the applicant for the certificate. The Minister either has the power to cancel a certificate of naturalisation and issue a new one to the same holder with different information on it, or he does not. A power qualified by reference to the cause of the error is precisely the type of measure one would expect to see expressed in the legislation, the limitations on the power being clearly prescribed and defined.

78. The basis for that distinction relied upon by the Minister – the fact that section 19 enables revocation in a case of innocent misrepresentation – does not justify it. As I have explained earlier in this judgment, section 19(1)(a) properly construed entails a test of causation. It functions only where the application for naturalisation would have been determined differently had the information not been misrepresented. Therefore, it operates only in respect of a sub-category of misstatements by an applicant. If the Minister is correct in his contention that there is no power to cancel and reissue a certificate where there has been an error which was not causative of the grant of naturalisation, it means that the citizen holding the certificate is compelled to operate with a certificate which he or she knows to be in error. This is not merely injurious to the citizen, but creates a situation in which the naturalisation process itself is compromised with citizens presenting to the world at large a naturalisation certificate which they – and potentially the State – know to contain false information. It

makes no more sense that the Oireachtas would so provide, than it would for the Oireachtas to preclude revocation and issue of a new certificate containing a mistake originating with the Minister himself. Such a power in both forms is required to render the legislation effective: in itself, this points strongly to the implication (see An Blascoid Mor v. Commissioners of Public Works [1996] IEHC 45 at para. 26).

79. This very point emerges with some force from the memorandum concerning the issue of a notice of intention to revoke the applicant's certificate of naturalisation prepared by the Minister's officials and dated 6th June 2017. There, they observed as follows:

> "It is essential for the effective operation of the State's immigration system, which is fundamental to the State's national and international interests, that persons who have misrepresented their identity to the State cannot continue to avail of that identity, and that the State is not legitimising that identity when travelling to other countries using an identity supported by an Irish passport."

80. Given that it is not possible to revoke a certificate of naturalisation other than where the Minister is satisfied that the misrepresentation procured the grant of the certificate in the sense in which I have explained that requirement, in the absence of a power to cancel and reissue such a certificate in cases where it contains a misstatement but section 19(1)(a) is not engaged, the significant concerns so identified by the Department cannot be addressed at all.

81. I am conscious that it might be said that the correct resolution of this dilemma lies not in implying a power to revoke with a view to re-issue of a new certificate, but in expanding the scope of the phrase 'procured by' so as to give it the meaning contended for by the Minister.

82. In that way, the legislation would address the mischief without the necessity for implication of a power which could have been, but was not, stipulated by the Oireachtas. To that one might add the not insignificant consideration that it could be contended that a power to amend of the kind contended for by the applicant would in the normal course be accompanied by some procedure to enable the amendment process to operate in a structured way and, in particular, for the determination of facts in the course of that process.

83. That proposition suffers from two overwhelming difficulties. The first is that the text of the section does not, on a literal interpretation, bear that meaning. The implication of the constitutional entitlements of the applicant as explained by Power J. in her separate judgment render it inappropriate to expand the provision beyond that literal meaning. The second is that if this interpretation is correct, the consequence is that the price of an innocent error by an applicant for naturalisation is deprivation of her citizenship (potentially rendering at least some naturalised citizens stateless) without any legally enforceable expectation that a new certificate will be issued. On these bases alone, the correct resolution of the question lies in giving section 19(1)(a) its actual meaning and implying a power to cancel and simultaneously reissuing a certificate, rather than expanding the scope of the provision, which is what I believe the Minister's contention requires.

84. However, subtending both of these factors is a more fundamental infirmity attending the argument. For this contention to be well placed it could only be made so by importing a purpose into the revocation power which its own terms — and history — defy.

85. In addressing the injustice to the naturalised citizen and the potential compromise of the naturalisation process that would arise where a certificate contains information innocently provided by an applicant which subsequently proves to be false, the Minister must say one of two things. He must either (a) say that in this circumstance the only remedy is for the certificate to be revoked, with the holder of the certificate forever losing citizenship because of that innocent error, or (b) he must adopt the position that the power to revoke under section 19 can be exercised with a view to conferring citizenship again where the facts disclose that the error was innocent and in all the circumstances there is no reason to deny it. Option (a) would be a self evidently unjust outcome – even for a privilege granted in the absolute discretion of the State.

86. But if the true position were (b), this could only be the case if it could be said that section 19 was intended by the Oireachtas to provide the mechanism for addressing the obvious injustice that would arise where an applicant for naturalisation through no fault of their own provides incorrect identifying information by effectively enabling cancellation with a view to eventual reissue. In this regard it is hard

not to notice that in the memorandum dated June 6th 2017 to which I have referred, the officials specifically counselled that '[i]f the Minister revokes this certificate of naturalisation it would be open to [the applicant] to apply for a certificate of naturalisation again using her now stated date of birth' .

87. It appears to me that this would be to propose using section 19(1)(a) for a purpose not envisaged by the provision at all. The intention behind the section – and in this regard its history is of importance – is to enable revocation, not to provide a mechanism for compensating for the absence of a power of amendment, by revocation with a view to an application being made by the holder for a new certificate. Nothing in the legislation supports the proposition that it was intended that section 19 fulfil this purpose. Yet this is the purpose that must be attributed to the provision if it is to be decided that section 19(1)(a) provides the vehicle for resolving the dilemma presented by this case. In my view, the only tenable conclusion is that the power to cancel and simultaneously reissue is different and independent of that provided for in section 19. Therefore, section 19(1)(a) is not relevant to the question of whether this fundamentally different power should be implied.

88. The Minister advances a number of further arguments in support of his claim that a power of this nature cannot be implied. First, he says that once the details on the certificate correspond with details on the Form 8, the certificate cannot be changed. Second, he observes that if a person submits information on that form and then says that this was wrong, this requires 'very serious investigation and the naturalised person's identity must be thrown into doubt' . Third, it is contended that the consequence of the decision of Humphreys J. is that 'in effect, the statutory provision was amended by the Court' . Fourth, it is said that had the Oireachtas intended such a power of amendment, this would have been expressly provided for.

89. I do not believe any of these arguments withstand analysis. The first proposition is reductive. No sustainable reason has been advanced why an error of the Minister enables the cancellation of an issued certificate, but an innocent error by an applicant for a certificate of naturalisation does not. This is not, I should state to conclude that the applicant's error was 'innocent'. This is a matter to be determined in accordance with the relevant statutory processes. It is, however, to say that it is difficult to believe that the Oireachtas intended that a person who did find themselves with a certificate of naturalisation recording information that subsequently proved to be false, is required to simply accept that fact. As I have already observed, such a state of affairs would be in the interests of neither the naturalised citizen, nor the State's own interests in ensuring the integrity of its naturalisation processes and the corresponding accuracy of the information contained in the official certification generated in the course of that process.

90. The second point will almost certainly be correct in many cases in which a discrepancy between the Form 8 and the actual facts is identified. However, as I explain later in this judgment, where this is so the Minister is entirely free to commence the section 19 procedure. Where the Minister determines that the commencement of the that procedure is not appropriate, he is free to conduct such investigations as he believes are necessary to determine whether an amendment should be granted. The Courts have had little difficulty in implying the appropriate statutory procedures where required to give effect to an implied power (as evidenced by the decision in Dellway and ors. v. National Asset Management Agency [2011] 4 IR 1). The important point is that where, having exhausted whichever process he believes appropriate, the Minister decides that the case for an amendment has been made out, but the case for revocation has not, he may proceed to amend in the manner described above. To construe the legislation in this way is no more an amendment of an Act of the Oireachtas than is the decision of the Minister to operate a power to revoke and reissue certificates containing error. The final proposition advanced by the Minister is a feature of every case in which an implied power is contended for and disputed: the statement begs rather than answers that question.

91. I have reached this conclusion independently of the question of whether the applicant enjoyed a right to require a correct record of her personal identity, whether pursuant to the Constitution, the Convention or the Charter, so that the double construction rule would require this implication. However, I do not believe that the Minister is correct in the submission he makes to the effect that it was not necessary to determine this issue. In interpreting the statute, the High Court judge was correct to address this aspect of the applicant's argument (which was contained in her legal submissions to that Court). In particular, I cannot accept the Minister's argument that because there is at this point a lack of clarity as to what the applicant's date of birth actually is, the issue of whether there is a right to have one's date of birth formally recognised by the State is irrelevant. That issue is relevant to whether the legislation should be construed as to incorporate a gateway through which an amendment can be effected where an error is established. As to the substantive question thus arising,

I agree with the separate judgment on this question delivered by Power J. and, in particular, with her treatment of the decision in Caldaras v. An tArd Chlaraitheoir [2013] IEHC 275 [2013] 3 IR 310.

(4) Final Observations on power to Cancel and Issue New Certificate:

92. The power to cancel and reissue as determined by Humphreys J. was limited to 'mistakes of such a character as would not result in a positive decision to revoke in a given case'. While certainly limited to mistakes I do not believe that the power is otherwise qualified. The Minister has a power of revocation, operative in the circumstances defined in section 19. He also has a power to cancel and reissue a certificate of naturalisation to correct an error in the certificate. The fact that the section 19 procedure is expressed in the legislation while the power to cancel and reissue is not, does not entail any inconsistency. As I have explained above, the powers are fundamentally different. Where the Minister revokes under section 19, he is under no obligation to reissue a new certificate. Indeed, it must be likely that in many circumstances in which he has revoked a certificate for misrepresentation, he would not countenance issuing a new one. Where the Minister exercises the implied power, the object is not the revocation, but the issue of a new certificate with the correct information. There is, therefore, no reason in principle why both powers cannot co-exist without the implied power being conditioned by the applicability of section 19(1)(a). They are directed to different ends.

93. In this regard it is important to underline that the Minister, upon being presented with a request to amend the certificate by cancellation and the issue of a new certificate, is perfectly entitled to refuse to amend in this way because he believes it appropriate to embark upon the section 19 procedure. At the conclusion of that procedure, the Minister is not mandated to revoke, even if the criterion in section 19(1)(a) are established. In that circumstance, he remains free to revoke, or to refuse to revoke and/or (where the issue arises) to amend in the sense to which I have referred. Where, following that procedure, the case is found not to come within section 19(1)(a), the Minister can so amend if he deems it appropriate to do so. While it must be highly unlikely that where presented with a significant misstatement in a certificate arising from information provided by the applicant for naturalisation the Minister would without an investigation of some kind accede to an application to cancel and simultaneously reissue a certificate, there is no limitation on his power of amendment so understood of the kind suggested by the learned trial Judge.

94. As explained further below, the applicant's situation presents one in which the Minister was fully entitled even when armed with a power to cancel and re-issue the certificate, to embark upon the section 19 procedure. To that extent, the point of conclusion reached by the trial Judge and this judgment may in practice be the same. However, the legal route to that conclusion is different.

95. It follows from the foregoing that the immediate consequence for the applicant of the power of amendment so understood depends on whether the initiation of the section 19 process was unlawful. I will return to that consequence, in the light of my conclusions in respect of that issue.

VI REVIEW OF A PROPOSAL

(1) The Issue

96. I agree with the observation of the learned trial Judge (at para. 61) that it is not, in general, appropriate to grant Judicial Review directed to a mere proposal or, as he later put it (at para. 62), 'the decision to initiate a procedure is not liable to judicial review in the same way as the outcome of the procedure' . Usually, as Humphreys J. observed (at para. 62) judicial review is directed to an act that must affect some legally enforceable right of an applicant. He expressed the view that a decision to initiate a process is only exceptionally in that category.

97. Cutting across that inquiry in the case of multi-stage decision making process, is the related question of whether an applicant for judicial review has available to him or her an alternative remedy: even if there is a 'decision' made that is in theory amenable to judicial review, the Court may refuse to accede to an application for that relief where there exists an alternative remedy. Where a process is initiated by a decision amenable to judicial review, with an entitlement thereafter for an affected person to make representations in advance of the final determination of that process, there is available to that person another remedy which, in an appropriate case, may be held to debar him or her from obtaining relief by way of Judicial Review. It may also be said that the proceedings are premature. However, it is important to keep all of these issues distinct. Prematurity and the availability

of an alternative remedy, while they may often overlap, are not always the same thing. A case may be premature because there is at the time of the institution of the proceedings no properly developed factual context in which the Court can adjudicate on the issues presented by the case, without there necessarily being any adequate alternative remedy available (see Lewis, "Judicial Remedies in Public Law", 5th Ed. (London, 2015) at paras 12.05 to 12.016. Both of these issues usually present questions for the discretion vested in the Court in determining whether to grant a remedy by way of judicial review. The question of whether there is a 'decision', in contrast, goes to whether judicial review is available at all.

98. In this case, I do not think it can be said that the formation by the Minister of an intention for the purposes of section 19(2) of the Act is other than a decision capable of giving rise to judicial review. The trial Judge clearly adopted the same position, insofar as he held that it could be reviewed on the basis of improper purposes, or where it was clearly ultra vires. The action is taken under statute and brings the applicant into an arena where she must either engage with an inquiry, undertake the process of making representations directly to the Minister, or risk revocation of her naturalisation (and see Lewis "Judicial Remedies in Public Law" 5th Ed. 2015 at para. 4-020). Similar characteristics have been held to render interlocutory orders in the course of various inquiry processes to be reviewed (see in particular Borges v. Fitness to Practice Committee of the Medical Council [2004] 1 IR 103, at p. 110). The critical questions that do present themselves relate to whether some or all of the grounds on which the applicant seeks such review arise at this point in time, whether the Court's discretion is properly applied now to enable review to take place given that there is a statutory process available to her in the course of which she can make her case prior to a final decision and (in the event that the answer to the preceding two questions is in the affirmative) whether she has made out any basis for relief.

(2) The Section 19 Procedure:

99. Each of these questions, however, depend on the process envisaged by section 19 itself. In my view, none can be properly resolved without defining the scope of that process. In that regard, six features of the statutory scheme merit emphasis.

100. First, and as I have noted earlier, unlike section 10(2) of the 1935 Act, section 19(1) confers a discretionary power on the Minister, its predecessor being framed in mandatory terms. In contrast to the scheme in place under the 1935 Act, the Minister's power of revocation under the 1956 legislation is bounded. Further, by expressly extending the scope of misrepresentation to include both fraudulent and the innocent misrepresentations, the draftsman has left no room for debate around the irrelevance to the statutory criteria of the intent of the applicant for naturalisation, although this may be relevant to the exercise by the Minister of his discretion in a particular case.

101. Second, the section as a whole clearly envisages that the ultimate decision made by the Minister in respect of a person who disputes a proposed revocation, arises only after the holding of an inquiry and therefore, necessarily, when the Minister has considered the 'findings' of that inquiry. Obviously, therefore, the Minister is in no sense bound by his initial intention. Even if no inquiry is requested, it must follow that the Minister can review that intention in the light of any further information he receives in advance of making a final decision on the issue. As the Minister says in his submissions to this Court (at para. 29), the applicant is free to make such representations as she sees fit prior to the making of a final decision even though section 19 entitles her to request an Inquiry before an independent Committee. As the Minister also says (at para. 37), he cannot make a final decision without both hearing what the applicant has to say and, if she requests an Inquiry, considering the findings of the independent Committee. I should state in this regard of the statement in the Minister's submissions to this Court (at para. 41) that '[i]nsofar as the Applicant contends that … the Notice of Intention … will take effect if she does not seek a Committee of Inquiry … this is accepted' , that if this is not made in error, it is inconsistent with the propositions to which I have just referred in paragraphs 29 and 37 of those submissions and is incorrect. While the Oireachtas has put in place a procedure for an inquiry where an applicant wishes to avail of such a process, there is nothing to indicate that the general power to receive and obligation to consider representations made by a person in advance of a final decision affecting their rights, has been displaced.

102. For these reasons, the contention advanced by the applicant throughout her submissions that there was a substantive decision, or indeed that the proposal communicated in the Minister's letter 'will take automatic effect' is misconceived. Thus, it is not (as the applicant has suggested) the fact that the Minister has extended the time for requesting an inquiry that disentitles the applicant to relief,

it is the fact that the Minister has not made any final decision to revoke the applicant's naturalisation certificate – with or without an inquiry. This is why, it should be said, the applicant is wrong to rely on the decision in Stefan v. The Minister for Justice [2001] 4 IR 203. In Stefan there was a decision to deport, which could be appealed and if not appealed could be acted upon. Here, there is a decision to initiate a process which, without a further decision by the Minister, cannot be acted upon in any way.

103. Third, the scope of the inquiry is framed broadly ('as to the reasons for the revocation') and must be construed so as to enable the holder of the certificate to agitate fully all issues of fact and law relevant to those reasons. I see no reason to give the jurisdiction of the committee as so described a narrow construction. Contrary to the suggestion advanced by the applicant in her submissions, the reasons for revocation cannot be disentangled from the merits of revocation. Questions around whether revocation would be a disproportionate interference with the rights of the holder of the certificate, the issue of whether the admitted misstatement in the applicant's Form 8 'procured' the certificate of naturalisation, and indeed any issue properly relevant to the question of whether revocation should or should not take place, are within the committee's remit. For this reason, the applicant's reliance on the comments in Rowland v. An Post [2017] 1 IR 355 at pp. 360-361 is misplaced: there is no process here that has 'gone irremediably wrong' and therefore no basis for intervention by the Courts at this point on the grounds that it has. The applicant has a full entitlement to make, and the Minister a consequent obligation to take account of, all and any submissions relevant to the question of whether her certificate of naturalisation should be revoked which the applicant chooses to advance prior to his making a final decision.

104. In the course of his submissions, the Minister says that the trial Judge erred insofar as his judgment was predicated on an assumption that the Minister, in considering the accuracy of information on a naturalisation certificate, has a wider jurisdiction to investigate 'difficult issues of identity' . The Minister says that in exercising his powers under section 19, he is confined to the issues the subject of that provision and does not enjoy any broader jurisdiction. If it is sought to thus suggest that the Minister does not have the power to reach conclusions in accordance with the evidence before him as to the applicant's date of birth, this is mistaken. Necessarily, in deciding whether there has been a misrepresentation such as to justify the exercise of the power of revocation arising from the manner in which the applicant described her date of birth, the Minister must address the question, based on the information before him, of what the evidence discloses her date of birth as having actually been. It appears to me that the proposition that the Minister could decide that there had been a misrepresentation without (as the trial Judge put it) 'forming some view as to what the correct factual position is' lacks reality. As the trial Judge said 'a finding that correct position was not accurately represented appears to presuppose some understanding of what the correct position in fact is' (at para. 56). While the Minister submits that this is illogical, because once the applicant asserts that the information in the Form 8 is erroneous there has by definition been a misrepresentation, I do not accept that the Minister is entitled to revoke the certificate without addressing any evidence adduced by the holder of a certificate as to what their age actually is. The actual age of the applicant is relevant to materiality, it is potentially relevant to whether the certificate has been 'procured' by misrepresentation and it is, one would have thought, potentially relevant to the exercise by the Minister of his discretion. It must be unlikely that the Minister would exercise his discretion to revoke a certificate without at least forming an opinion as to whether that representation was made fraudulently or innocently, and the applicant's actual date of birth (if it is possible for the Minister to determine same) may be relevant to that decision. This is not to say that the Minister must determine irrespective of the quality of the evidence before him what the date of birth of the applicant is. He could well decide that the evidence he has is insufficiently reliable to allow him to do this. What he must do is address the issue based on the materials he has and if those materials enable a decision as to the date of birth of the applicant, he can and should decide the question.

105. Section 19 properly construed allows the Minister to do this if such a determination is necessary to the discharge of his functions under that provision: in Moke v. Refugee Applications Commissioner [2005] IEHC 317 [2006] 1 IR 476, it was determined that implicit in the legislative provisions governing the processing of claims for asylum, was the power of the respondent Commissioner to determine an applicant's age. This, it was held, followed from the function of advising the Health Service Executive of the arrival of an unaccompanied minor. Similar considerations apply here. Insofar as the Minister's function is dependent on there being a misrepresentation, he necessarily has the power in the course of the section 19 procedure to determine the age of a certificate holder, where this is germane to his decision. The same logic dictates that he has this power where he considers an application to amend a certificate of naturalisation.

106. Fourth, one would expect the 'findings' of the Inquiry to address the contentions thus raised by the holder of the certificate insofar as these are viewed by the Committee as relevant to the entitlement of the Minister to revoke the certificate. To the extent that the inquiry is directed to the 'reasons for the revocation' (and depending of course on the precise case advanced to it) the Committee can express its opinion whether in the light of its view of the issues of fact and of law agitated before it, those reasons are sustained by the evidence, or sustainable by reference to any applicable legal principles. The Minister is not required to adopt or accept those conclusions, but he pleads in his Statement of Opposition, as clearly must be the case, that findings of fact made by the Committee will be considered by the Minister prior to making any final decision to revoke a certificate of naturalisation. The same applies to any conclusions of law reached by the Committee (which it will be noted must include as its chair a person with judicial experience). While it was suggested in the course of oral argument that the term 'findings' implied a limitation on the jurisdiction of the Committee to reach only determinations of fact, this is not correct. The inquiry is into the reasons for the revocation, and where those reasons present legal issues the Committee has the power to address them and present their conclusions as part of their findings.

107. Fifth, while section 19(2) speaks of the Minister forming an 'intention' to revoke and advising the holder of the certificate to that end, that 'intention' must be understood in the light of the inquiry procedure and section as a whole. It follows from its context that the Minister's 'intention' is both preliminary to a final decision, and contingent upon the outcome of any inquiry, any further representations the holder of the certificate may make to him or any information he otherwise obtains prior to the making of a final decision. This follows from the very fact that there is facility for an 'inquiry' (a term implying investigation as much as adjudication), the requirement that the inquiry take place under the aegis of a chairman with judicial experience, the fact that the Minister may, following the inquiry, determine not to proceed with revocation, the fact that the Minister may similarly decide not to revoke even if the holder of the certificate does not seek an inquiry and indeed the fact that even if the grounds in section 19(1)(a) are made out, the Minister does not have to revoke. It is correctly described – as it was by Ms. Stack SC for the Minister throughout these proceedings – as the formulation of a 'proposal' . The statement in the notice of intention that the Minister was 'satisfied' that the circumstances in which the certificate was obtained 'satisfy' the conditions of section 19(1)(a) (a formulation which while prescribed in the Irish Nationality and Citizenship Regulations SI 569/2011 and employed as the basis for a decision to revoke in section 19(1), does not appear in section 569/19(2) of the Act) has to be viewed in that light.

108. It follows that the applicant falls into error when she seeks to present the formation by the Minister of an intention in accordance with section 19(2) as being a decision which in itself results in revocation. This contention ignores the preliminary and contingent nature of the intention required to trigger the provision, as it does the fact that what the legislation has expressly mandated at this initial stage is the formation of an 'intention' not the making of a 'decision' .

109. In my view it is likely that any misstatement by an applicant for a certificate of naturalisation of the key identifying information required by the Minister in the application process would merit (but of course would not require) the formation by the Minister of that preliminary and contingent intention, the commencement of the section 19 procedure, the initiation of an inquiry if requested by the holder of the certificate, and an ultimate decision by the Minister whether or not to revoke based on the outcome of such an inquiry or of information otherwise obtained by him following the formation of his intention. That is sufficient to justify the Minister triggering commencement of the process. For reasons I explain later, it is not necessary in this case to determine whether (as the applicant contends) the Minister is under an obligation when initiating the section 19 procedure to decide that there is a prima facie case that the certificate has been 'procured' by the misrepresentation in the sense of being satisfied that there is evidence that the application for naturalisation would have been determined differently had the information not been misrepresented. However, insofar as there is an obligation to form any opinion at this point in respect of the procurement issue, the fact that the holder of the certificate has been responsible for a misrepresentation of a material fact central to their own identity following which misrepresentation the certificate issued, satisfies any such prima facie standard and, in this case, the particular peculiarities attending the documentation of the variety of dates submitted as the applicant's date of birth, leave no doubt but that there was a basis for forming the view that the notice of intention should issue. The Minister's obligation to finally decide the potentially involved issue of whether the facts establish that the certificate was procured by misrepresentation in the sense I have defined it, does not arise until after an inquiry and/or any representations by the holder of the certificate having regard to the evidence.

110. Finally, and following on from this, the burden on an applicant seeking to quash the formation of such an opinion and the halting of the section 19 procedure is substantial. Where it is accepted that the information provided by the holder of a certificate was false, the Minister must be fully entitled to begin the process that will enable such an inquiry (should the holder of the certificate request it). He is entitled to inform himself fully of the reasons for and context of the misrepresentation, and of its effect, and based on the outcome of that process to determine whether to revoke. The issue of when the Court should intervene so as to arrest that procedure must be viewed in the light of the overriding consideration that this is the arena determined by the Oireachtas as the proper location for the resolution of the issues touching on revocation.

(3) The Discretion of the Court:

111. The starting point in the application of the discretion of the Court to refuse relief by way of Judicial Review at the instance of an applicant who has available to him or her an alternative remedy, is that such relief should be refused unless that remedy is not in fact adequate or there is a particular exigency in the interests of justice which requires otherwise (Byrne v. Minister for Defence [2019] IECA 338 at para. 62). Thus, the requirement to exhaust such remedies represents the default position, where there is such a remedy. Those cases in which review is permitted in that circumstance being ‘ exceptional to the general rule ’ (EMI Records (Ireland) Ltd. v. Data Protection Commissioner [2013] 2 IR 669 at paras. 36, 41 and 42).

112. It follows that the onus is on the party seeking relief by way of Judicial Review to establish either that the alternative remedy is not adequate, or that there is a particular exigency which renders it unjust that it should have to be exhausted. This requirement may be met where the ground of challenge includes a case based on fair procedures: in that circumstance an appeal or review of a procedurally unfair process may not reinstate the applicant to the position he would have been in had the process been conducted regularly in the first instance (Stefan v. Minister for Justice [2001] 4 IR 203). Review might also be enabled notwithstanding the existence of an alternative remedy where the issue is jurisdictional (Leng v. Minister for Justice [2015] IEHC 681 at para. 36) or where the case presents a net issue of law so that judicial review is particularly appropriate, or where there is a legitimate basis for perceiving an unfairness in forcing the applicant to proceed within the statutory scheme (Tomlinson v. Criminal Injuries Compensation Tribunal [2005] 1 ILRM 394, at pp. 399 to 400). At the same time, it is clear that where an issue is heavily dependent on a factual assessment, the presumption in favour of requiring the applicant to exhaust the statutory process, is particularly strong (see Nova Colour Graphic Supplies Ltd. v. Employment Appeals Tribunal [1987] IR 426).

113. While I will address each of the grounds of review maintained by the applicant before this Court in the next section of this judgment, no basis has been disclosed in this case for displacing the default position in relation to any of these objections. In this case, the applicant must allow the statutory procedure to be concluded before proceeding to seek judicial review of any decision of the Minister relating to revocation. She has identified no net issue of law, and no single issue of jurisdiction, which would bring the case within any of the established circumstances in which judicial review is enabled notwithstanding the availability of a procedure designed to enable the determination of the relevant facts following a quasi-judicial process.

114. The arguments the applicant seeks to advance in relation to fair procedures do not arise at this stage of the process at all. While she says that there is an unfairness because the Minister is the person who both issues the letter recording his intention to revoke, and then decides following any inquiry procedure whether to proceed with revocation, this argument misunderstands the preliminary and contingent nature of the Minister's initial determination. It also ignores his obligation to take account of the inquiry findings or of any representations presented to him by the applicant.

115. Nor is the fact that the applicant has not called for an inquiry relevant: she remains entitled to do so. Even if that were not the case, what the applicant does not enjoy is the option, at least on the facts of this case, of both refusing to engage in the inquiry process and proceeding to litigate her complaints by way of judicial review before the Minister has actually made any decision to revoke (see AB v. The Minister for Justice [2016] IECA 48). The applicant has therefore identified no ‘injustice’ consequent upon her being required to exhaust that process. In fact, all considerations of fairness, economy and efficiency point in the opposite direction.

(4) The Grounds of Review:

116. All of this comes into focus when the individual grounds sought to be agitated by the applicant are analysed. The written submissions filed by the applicant in this Court present four distinct grounds of challenge.

117. First, it is said that because the exercise of the power under section 19(1)(a) is dependent on the existence of a preliminary factual scenario – that the certificate was 'procured by' misrepresentation – there must be 'sufficient evidence on which the Minister can conclude that their jurisdictional requirements have been satisfied' . It follows from the analysis earlier in this judgment that some of the predicates of this submission are well founded: revocation can only occur where the application for naturalisation would have been determined differently had the information not been misrepresented. Further, while the Minister's notice of intention to revoke as delivered to the applicant refers to his being of the view that the conditions in section 19(1)(a) were satisfied, it makes no reference to his believing at the time of issuing that notice, that the misrepresentation did procure, in the sense I have defined that term, the certificate. Indeed, it is unlikely that the Minister addressed his mind to this issue, given his position that the section does not import such a requirement of causation.

118. However, for two reasons, I do not believe that it is appropriate to grant relief on this basis. For a start, even if this is characterised as a jurisdictional issue, the applicant will have a full opportunity to make the point that the certificate was not procured by misrepresentation either in the inquiry process, or if she persists in her refusal to engage in that process, in any representations she chooses to make to the Minister. The Minister cannot revoke the certificate without satisfying himself that the misrepresentation has procured the grant of the certificate in the sense in which I have explained this requirement. That issue is in all cases one of fact, but in this case it is an issue of fact which arises in a peculiarly involved – and uncertain – context. Therefore, in applying the Court's discretion, and having regard to the considerations I have outlined in the preceding section of this judgment it is not appropriate for the Court to intervene at this point. The correct point at which such a review should occur is after the relevant facts have been found and a decision to revoke is made under section 19(1)(a).

119. Further, I have explained earlier in this judgment why, in my view, it is sufficient to commence the process that the holder of the certificate of naturalisation has adopted the position that she has mis-stated a key piece of identifying information and that following that misstatement the certificate was issued. This all the more so given the consideration that as of now there are significant unanswered questions surrounding the admitted misrepresentation which has grounded the Minister's notice of intention. Because that misrepresentation was of key identifying information provided by the applicant, the reason the applicant misstated her date of birth and the context in which she did so are plainly relevant to the question of what the Minister would have done had he known all of the facts relating to these issues when the certificate was originally applied for.

120. In particular:

> (i) While it is the applicant's case that she inserted in her Form 8 her date of birth according to the Ethiopian calendar rather than the Irish calendar, this presents a sequence of as yet unresolved issues. The date inserted by her, 24th September 1975, is unknown in the Ethiopian calendar, in which it is either 24th Maskaram or 24/01/1975. Because the months under the two calendars are not aligned, 24th Maskaram is not 24th September, but 4th October. In consequence there remains (at the very least) an issue as to how precisely the Western date of 24 September 1975 (which is not the applicant's date of birth under either calendar) came to be on the applicant's Ethiopian passport and her Ethiopian identity card. In itself the fact that the applicant is the holder of an Ethiopian birth certificate and an Ethiopian passport which record different birth dates presents a consideration which satisfies any burden on the Minister to establish a prima facie basis on which it could be concluded that the certificate was procured by the misrepresentation. Those facts alone, had the discrepancies been identified at the time of the grant of naturalisation, could have affected the decision of the Minister and, at the very least, would have justified further inquiries of the applicant.
>
> (ii) It is not disputed that the applicant failed to comply with the clear direction on the detailed guidance on filling out the Form 8 that she provide her date of birth in accordance with that on her birth certificate. The Minister is fully entitled to interrogate her explanation for this – that she believed it was appropriate to use the date on her passport. The position as pleaded and averred to by her that, notwithstanding the direction contained on the Form 8, 'the Irish

system' required that the date of her Ethiopian passport be used, raises its own questions. In this regard it is relevant that while the applicant furnished a letter together with her application for naturalisation explaining the differences between the two calendars, and while she provided a copy of her birth certificate with that application, she did not relate her explanation to the date of birth she was actually inserting.

(iii) The Minister is entitled to examine and take account of the explanations provided by the applicant for both travelling on an Irish passport recording what she contends to be an incorrect date of birth as contained in her certificate of naturalisation, and failing at the same time to take any steps to have her certificate corrected. She was issued with the certificate in January 2015 and took her first steps to have it corrected in August 2016. Her explanation is that she became pregnant in October 2015 and gave birth in June 2016. It is not immediately obvious how this explains her failure to address the issue for the calendar year 2015. Similar considerations arise from the various dates provided for the purposes of the applicant's various visas and her GNIB card.

121. The next argument advanced by the applicant is that that there was an absence of fair procedures because she was not informed of the intention to make a proposal to revoke her citizenship nor given an opportunity to make representations in advance of the issuing of such a proposal. This does not ground a basis for Judicial Review of the Minister's decision. The issue of when fair procedures operate in multi-stage decision making processes has been addressed in some detail in Crayden Fishing Co. Ltd. v. Sea Fisheries Protection Authority [2017] IESC 74, [2017] 3 IR 785. This decision confirms that the default position is that a person conducting a preliminary investigation, which itself does not lead directly in law to a binding and adverse decision, is not normally under an obligation to comply with the requirement of a fair hearing ([2017] 3 IR at 805, para. 32). The Minister in forming an intention to revoke a certificate of naturalisation within a context in which the holder of that certificate has an untrammelled right to cause an independent inquiry to take place at which it must be assumed all of her rights of fair procedure will be respected, is in precisely that position.

122. The third ground advanced by the applicant was based on the claim that the Minister in issuing his proposal based his decision on an incorrect understanding of his power to amend certificates of naturalisation. As with the first ground advanced by the applicant, the predicate of this contention is correct. The Minister adopted the view that he had no power to amend a certificate of naturalisation, he initiated the inquiry in a context where he believed that this was the appropriate course of action to adopt where an error on the certificate arising from information furnished by the holder of the certificate was identified, and he was mistaken in both respects.

123. For reasons similar to those identified above in the context of the first ground of challenge, I would decline to grant any relief arising from these considerations. Again, the existence of the statutory process engages the exercise of the Court's discretion not to enable Judicial Review. Further and aside from this, once it is understood that the Minister was fully entitled on the facts disclosed in this case to proceed to initiate the section 19 procedure, the fact that he did so while labouring under the mistaken belief that he could not amend the certificate is irrelevant. The existence of the power to amend does not preclude the Minister from proceeding to revocation, and the fact that the Minister considers revocation does not prevent him from thereafter amending in the manner I have explained. The applicant will have a full opportunity to emphasise the implications of the fact that the Minister does have a power to amend either in the inquiry process, or if she persists in her refusal to engage in that process, in any representations she chooses to make to the Minister. And if all of this is wrong, I would refuse relief on this ground for the simple reason that I do not believe it would serve any useful purpose. If the Minister decides in the light of the decision of the Court that he does enjoy a power to cancel the certificate and to simultaneously issue a new certificate that he does not want to pursue revocation under section 19, he is free to determine that process. If he wishes to press ahead with the procedure under section 19, on the basis of the other conclusions I have reached here he is free to recommence it even if the present process were arrested. I do not believe that it can be said that had the Minister understood the correct legal position he would have reached any different decision (see Smith v. Minister for Justice [2013] IESC 4). For the same reason, I see little point to quashing the decision of the Minister not to amend in this case. If the Minister determines not to revoke under section 19(1)(a), he must address the applicant's request that he cancel the existing

certificate and issue a new one. I would not propose interfering with the Order of Humphreys J. to that effect.

124. The applicant finally claims that the Minister failed to individually consider the applicant's circumstances and the proportionality of the decision, thereby breaching EU law. These are, quintessentially, issues to be resolved within and following the inquiry when the facts have been determined and, insofar as they are not addressed within that process and insofar as the applicant says they ought to have been considered, it is following any decision to revoke that those grounds of challenge should be agitated.

(5) The Challenge to the Validity of Section 19.

125. The applicant makes the case that she is entitled at this point to challenge the validity of section 19 of the Act on the basis that the process of revocation is not conducted with the benefit of judicial oversight. She points to a sequence of decisions in which challenges to the validity of constitutional provisions have been enabled before the conclusion of criminal proceedings where plaintiffs or applicants have been prosecuted on the basis of the provisions so impugned. Thus, in both Curtis v. Attorney General [1985] IR 458 and Osmanovic v. Attorney General [2006] 3 IR 504 proceedings challenging the validity of legislation were entertained based on and following the institution of criminal prosecutions (but before trial) on the basis that the Plaintiff and applicant respectively were 'in imminent danger of a determination affecting…rights' ([2006] 3 IR 504 at p. 511), and see also SM v. Ireland (No.2) [2007] IEHC 280 [2007] 4 IR 369 and McNamee v. DPP [2017] IECA 230 at paras. 10, 11.

126. However, there is at the same time authority suggesting that even a plaintiff with locus standi to challenge the constitutional validity of legislation may be precluded from doing so if he is involved in a process which may, ultimately, render irrelevant the issues of which he complains. These reflect the belief that the power of judicial review of legislation should be reserved to those cases in which it is 'imperatively required' (BG v. Judge Murphy [2011] 3 IR 748 [2011] IEHC 445 at para. 15). Thus, in Kennedy v. DPP [2007] IEHC 3, a challenge to the validity of the evidential presumption contained in s.4 of the Prevention of Corruption (Amendment) Act 2001 was determined to be premature: the presumption might not be relied on in the trial (see also North East Pylon Pressure Company Limited v. An Bord Pleanala [2016] IEHC 300). More recently again, the comments of the Court (Charlton J.) in Sweeney v. Ireland [2019] IESC 39 at paras. 2 to 5, reflect some of the concerns attending pre-emptive legal challenges expressed by Humphreys J. in both this case, and in North East Pylon Pressure Company Limited. In Sweeney, the Court was faced with a challenge to the constitutional validity of a statutory provision pursuant to which the plaintiff had been charged (section 9(1)(b) of the Offences Against the State (Amendment) Act 1998) but not yet tried. Although compelled to determine the matter because the High Court had proceeded to strike down the provision, the Court expressed the gravest of reservations about the launching of a constitutional challenge before the relevant facts had been established. Osmanovic is not referred to in the judgment.

127. The line of authority reflected in Osmanovic may be capable of distinction on the basis that the jeopardy of a criminal trial presents a particularly pressing prejudice and indeed within the cases there may be a valid differentiation between challenges to the provision on foot of which the plaintiff or applicant is prosecuted, and challenges to evidential provisions around the prosecution, and there may be potential distinctions between proceedings in which an established factual matrix is necessary before a challenge can be properly adjudicated upon, and those in which it is not (see the comments of Charlton J. in Sweeney at para. 5). However, leaving to one side the question of whether decisions such as Kennedy are, as the authors of " Kelly: The Irish Constitution " (Hogan et al. 5th Ed. (Dublin, 2018)) at para. 6.2.196 believe, properly characterised as 'discordant' there is a certain incongruity highlighted by allowing a pre-emptive constitutional challenge of the kind presented in this case to proceed. If the holder of a certificate of naturalisation challenged a revocation decision after the fact and in the course of that challenge succeeded in his or her claim on non-constitutional grounds, the Court would on conventional principle, decline to hear the constitutional claim (Murphy v. Roche [1987] IR 106). It seems strange that the Court would at the same time entertain that challenge before the same process which might at its conclusion preclude the Court from considering the constitutional issues, has progressed beyond its initial stages.

128. Whether or not the appellant is entitled to advance this case (described by Mr. Harty SC for the applicant in oral submissions as 'peripheral') at this point in time, the underlying argument is, in my view, weak and it can and should be disposed of now. The only argument recorded in the applicant's

submissions in this Court directed to the validity of section 19, is based on a statement in Kelly: The Irish Constitution Hogan at para. 3.3.09. There, addressing the power in section 19(1)(b) of the Act to revoke citizenship where a naturalised citizen has by overt act shown himself to have failed in his duty of fidelity to the nation and loyalty to the State, the authors state:

> "The constitutionality of this provision seems highly questionable, partly because of the drastic nature of revocation of citizenship and the consequent question whether anyone other than a judge in a court could order it, and partly because the criterion here set up is so vague that it invites an unpredictable, subjective application of a kind hostile to the concept of 'due process' or 'due course of law.'"

129. Noting that the second of these propositions does not arise in this case, the suggestion that the single fact that a decision is 'drastic' requires that it be made by a judge is misconceived as a matter of law. Were the position otherwise, it would present an expansion of the judicial function beyond all recognition. There is, of course, a category of process which falls within the ambit of the administration of justice which (unless it can be brought within the terms of Article 37 of the Constitution) can only be conducted before a Court. The grant or revocation of citizenship does not on any version of fact or law fall within that description. Apart from everything else, a significant feature of the test for whether a decision falls within the administration of justice as articulated by the Court in McDonald v. Bord na gCon No. 2 [1965] IR 217 requires attention to whether a process is, as a matter of history, productive of an order characteristic of courts in the State (see Keady v. Garda Commissioner [1992] 2 IR 197 at p. 205 (McCarthy J.) at pp. 210 to 211 (O'Flaherty J.)). More recent case law reinforces the central importance of this question (O'Connell v, The Turf Club [2015] IESC 57, [2017] 2 IR 43 at para 94). As explained earlier, since at least the early twentieth century revocation of citizenship has been an Executive function. Apart from the option of a reference to the High Court provided for under the 1918 Act (a choice vested in the Executive, not the holder of the certificate of naturalisation), from a judicial presence on the committee of inquiry provided for under that legislation (whose decisions do not bind the Minister), or from the overhanging jurisdiction of the Courts by way of judicial review of any revocation decision, the Courts have historically had no role in the decision to revoke citizenship. That is consistent with the general role of the Executive in relation to the entry, residence and exit of foreign nationals (Bode v. Minister for Justice [2008] 3 IR 663). There is nothing in the text or interpretation of the Constitution to suggest that any aspect of this function, ' drastic ' in its effect or not, had been transferred to the judicial branch.

130. While some of the decisions in dealing with the supervision of professional misconduct – in particular Re The Solicitors Act 1954 [1960] IR 239 – attach significance to the importance and impact of a decision for an affected person in determining whether the decision comprised the administration of justice, none purport to suggest that the issue is resolved by simply placing the decision on a scale of impact, shorn of any analysis of the type of order in issue, its relationship to the normal business of the Courts, the extent to which it can be enforced in the same way as a judgment of a Court or of the connection between the subject matter of the process in question and the constitutional function of other arms of the State. It would be remarkable if it did, rendering the critical definition of judicial power under the Constitution centrally dependent upon a value laden inquiry into the significance of the effect entailed by a decision, and creating a controversy around the constitutional consignment of every determination of the State having a substantial impact upon the citizen.

VII OTHER RELIEFS CLAIMED AND ARGUMENTS RAISED

131. The logic of the foregoing analysis is that the other reliefs claimed in both proceedings should be refused. The fact that there is, as I have determined, an express statutory process which will enable the Minister to decide whether to revoke the applicant's certificate of naturalisation, and an implied power to adjudicate upon her application to have her certificate of naturalisation cancelled and a new certificate reissued render it inappropriate for the Court to grant the applicant any declaratory relief as to her date of birth. For reasons I have explained above, the Minister is likely to have to address the issue of the applicant's correct date of birth within those processes. I do not see any basis on which the Court should pre-empt those procedures by making declaratory relief as to what the date of birth of the applicant is. This, I should say, is aside from the fact that based on the evidence before this Court at this point in time, I do not see any basis on which that issue could be satisfactorily addressed on appeal. The applicant, it is to be noted, was not cross examined in the course of the trial. In

consequence of the foregoing, the claim for damages and injunctive relief will also be refused.

132. Insofar as the Minister in the first action complains of the trial Judge's identification of features of the chronology he thought might be viewed as favourable to the applicant, I cannot see how the expression by the trial Judge of the views he recorded in this part of his ruling give rise to any basis for an appeal. It is quite clear from his judgment that the trial Judge was assiduous in avoiding any pre-emption of the statutory processes and his observations (which he was fully entitled to make) neither precluded nor purported to preclude the committee (should the applicant seek an inquiry) from adopting whatever view of the facts it sees as appropriate based on the evidence and submissions made to it.

133. At various points in the papers and hearing, a series of other arguments were raised. Many of these were not seriously pursued. Thus, it was suggested that the applicant had a claim in the second action based on the proposition that the initiation of the section 19 procedure was unlawful because it interfered with the then pending first action. This is not a valid basis for complaint. The fact of an extant legal action does not, in itself, freeze public administration to the extent of precluding any action by the State which might impact on those proceedings, whether by rendering them moot or otherwise (see Gorman v. Minister for the Environment (No.1) [2001] 2 IR 414). Such an action is only prohibited by constitutional principle where the substantial effect of the legislative or executive measure in question was such that the pending justiciable controversy was purportedly determined by either of those bodies, or where the court was purportedly required by such action to dismiss a claim or appeal without hearing (Buckley and ors. v. Attorney General [1950] IR 67).

134. Finally, it will be noted that one of the grounds on which the trial Judge relied, was the existence of an entitlement to have personal information corrected pursuant to the General Data Protection Regulation, and the Data Protection Act 2015. The applicant having neither pleaded nor made any submission based on these provisions before the High Court, I do not believe the question of the extent of application of these measures was before the Court, and they form no part of the reasoning in this judgment.

VIII CONCLUSIONS

135. The conclusions I have reached in respect of the issues presented by both sets of proceedings, are as follows.

136. First, the Minister does enjoy an implied power to cancel an existing, and simultaneously issue a new and corrected, certificate of naturalisation where such a certificate contains a material error of fact, irrespective of the source of that error, and irrespective of whether on the facts of a particular case that certificate is amenable to revocation under section 19 of the Act.

137. Second, where an application is made to the Minister to thus cancel a certificate of naturalisation and issue a new certificate and the Minister believes that on the facts as they appear to him there are grounds for revocation of that certificate, the Minister is fully entitled to proceed to commence the section 19 procedure rather than to first determine the application to cancel the existing certificate and issue a new one.

138. Third, upon service by the Minister of the notice of intention which initiates that process, the holder of the certificate of naturalisation is free to call for an inquiry, to make representations directly to the Minister or to do nothing. In the first event, the holder of the certificate can make any case to the committee of inquiry relevant to the grounds of revocation he or she believes appropriate, and the Minister must take account of the findings of that committee prior to making any final decision. In neither of the other two events does a revocation follow automatically from the service of the notice of intention to revoke. If submissions are made to him, the Minister must consider them and if they are not the Minister is not obliged to implement the intention he has expressed.

139. Fourth, where there is to be a revocation based upon section 19(1)(a), before revoking the Minister must be satisfied not merely that there has been a misrepresentation, but that the application for naturalisation would have been determined differently had the information not been misrepresented.

140. Fifth, at the conclusion of the section 19 process, the Minister may revoke the certificate or he may decline to revoke it under section 19(1)(a). Where he declines to revoke and he has received a

request from the holder of the certificate to cancel it and issue a new corrected certificate, the Minister must (if he has not already adjudicated upon the matter) determine whether to accede to the application to cancel and reissue the certificate. In so deciding, the Minister may have regard to all the relevant circumstances, including the evidence adduced in the course of the section 19 procedure and, if appropriate, any finding of the committee of inquiry touching on any matter relevant to that request for cancellation and reissue.

141. Sixth, it follows from the foregoing, that the applicant's essential contention in the first proceedings – that the Minister is empowered to cancel a certificate of naturalisation and issue a new certificate so as to correct an error on that certificate – is well placed. The applicant is entitled to a declaration to that effect.

142. Seventh, for the reasons stated earlier in this judgment, it is not appropriate to grant to the applicant an order declaring her date of birth or quashing the refusal of the respondent to amend the certificate of naturalisation, or the other declaratory relief sought in the first proceedings.

143. Eighth, the circumstances surrounding the admitted error on the face of the applicant's certificate of naturalisation were such as to entitle the Minister to form the view that there was a case for revocation of the certificate, and he was entitled to initiate that process accordingly. Neither the claim that there was no prima facie case that the certificate had been procured by misrepresentation, the fact that he believed at time of the initiation of the process that revocation was the appropriate mechanism for addressing an error arising from information provided by the holder of the certificate nor the fact that he did not solicit the applicant's views prior to initiating the process, disclose any grounds of legal complaint. If they did, this would be a case in which the discretion of the Court should be exercised against the grant of relief by way of judicial review, having regard to the availability of an adequate – and more appropriate – statutory process for the determination of each of these factually dependent issues.

144. Ninth, section 19(1)(a) of the Act is not invalid having regard to the provisions of the Constitution.

145. It follows that the applicant has not made out a basis for any of the relief sought in the second proceedings.

146. Therefore, the Court will make an order dismissing both appeals, but will make in addition to the Order made by Humphreys J. in the first set of proceedings, an Order as follows:

> "A Declaration that pursuant to the provisions of the Irish Nationality and Citizenship Act 1956 as amended, the respondent is empowered to cancel a certificate of naturalisation and issue a new such certificate where satisfied that the former contains a material error of fact."

147. Finally, I was greatly assisted in navigating the very wide range of issues arising in this case by the helpful submissions of counsel, Mr. Harty SC and Ms. Maher (for the applicant) and Ms. Stack SC and Mr. Caffrey (for the respondents).

Mahelet Getye Habte v Minister for Justice and Equality

Mahelet Getye Habte v Minister for Justice and Equality Ireland Attorney General

[2019/108] (WLIE 1)

Court of Appeal

5 February 2020

unreported [2020]

IECA 22/1

Ms. Justice Power

February 05, 2020

JUDGMENT

Introduction

1. I adopt the account of the facts and the careful reasoning on the applicable law as set out in the judgment of Murray J. and I agree with the conclusions reached therein. I also agree with the order he makes and with his reasons for so doing.

2. This judgment deals only with one aspect of the appeal brought by the Minister for Justice and Equality ('the Minister') in the first set of proceedings in respect of the High Court judgment of 11 February 2019. It is identified as the first of three legal issues to be determined and it is set out at para 31 (a) of the Minister's submissions in his appeal in case number CA 2019/108. It concerns the necessity and/or correctness of the trial judge's declaration that there exists an unenumerated Constitutional right to have one's identity recognised by the State, together with an implied right for there to be a correct record of a person's age. The trial judge, in fact, referred to 'central aspects of personal identity' , including, a person's age (paras. 43 to 50 of the judgment). Whilst the applicant ('Ms Habte') before the High Court is the respondent in this appeal, I shall, for ease of reference and to maintain consistency with the judgment of Murray J., hereinafter refer to the respondent as the applicant.

High Court Judgment

3. The High Court (Humphreys J.) recalled that the right to registration of birth, and implicitly to an accurate registration thereof, is recognised by Article 24(2) of the International Covenant on Civil and Political Rights and Article 7 of the Convention on the Rights of the Child. It found that the fulfilment of that right is closely related to the enjoyment of several socio-economic and other rights. It also found that the right to registration of birth, including the right to have the details of one's personal identity correctly recorded, arises under Article 8 of the European Convention of Human Rights. The trial judge found that these rights were in issue, at least to some extent, in this case. That the applicant must have a right to have her identity correctly recognised by the State is so fundamental that 'it must be recognised as an unenumerated constitutional right' (at para. 43 of the judgment.)

4. In the trial judge's view, the right to registration of one's birth and to an accurate registration thereof also arises, to some extent, as a corollary of data protection principles, including, those set out in the Charter of Fundamental Rights of the EU. Article 8 of the Charter provides that everyone 'has the right of access to data which has been collected concerning him or her and the right to have it rectified' . Similar rights are included in s. 74 (3) of the Data Protection Act, 2018 and in s. 9 of the Freedom of Information Act, 2014. The High Court considered that the fact that rights are provided for by statute or European Law does not logically mean that corresponding rights cannot also arise, at least in certain circumstances, under the Constitution. Humphreys J. concluded that there is 'an implied constitutional onus on the State arising from the inherent dignity of the individual referred to in the

Preamble and the personal rights of the citizen in Article 40.3 of the Constitution to 'accurately record and represent central aspects of personal identity' (at para. 44 of the judgment).

5. In coming to this view, the High Court observed that the exercise of a number of explicit constitutional rights depend upon an individual's age. To exercise the right to vote, for example, one must be 18 or the right to stand in a general election, 21 or in a presidential election, 35. On this basis, Humphreys, J was satisfied that there must, therefore, exist an implied right to a correct record of one's age if such constitutional rights are to be exercised. Whilst acknowledging that identity is not an easily defined concept, he noted that all the applicant was seeking was that her correct date of birth (and, therefore, the age on which much treatment of her by organs of the State could potentially depend) be accurately recorded. Although the primary onus to have recorded the applicant's date of birth correctly fell upon the Ethiopian authorities, that fact, in itself, did not absolve this State from its duty to record her date of birth correctly within its own records. Consequently, the High Court agreed with the applicant that the right to have an accurate official record of one's identity is an aspect of the personal rights of citizens under Article 40.3 of the Constitution and Article 8 of the European Convention on Human Rights ('ECHR'), as applied by the Human Rights Act, 2003 (para. 47 of the judgment).

6. In support of the High Court's finding in this regard, Humphreys J. acknowledged that he had derived considerable assistance from the approach taken by Kearns P. in Caladaras v. An tArd Chláraitheoir [2013] 3 I.R. 310 at pp. 319 to 320. In that case, the applicant had provided what she believed to be her real or official name when registering her daughter's birth. However, it subsequently transpired that the name she provided was incorrect and was, rather, the name of another woman whose birth certificate she had mistakenly believed to have been her own. On an application to the Office of the Registrar for Births, Deaths and Marriages to have her daughter's birth certificate corrected, the Registrar General refused to amend the certificate indicating that the register was a 'historical record of correct facts at the time the record was created'. In support of his position, he had referred to the judgment of the High Court in Foy v. An tArd Chláraitheoir, (Unreported, 9 July 2002) in which McKechnie J. had described a birth certificate as a 'snap shot' of matters on a particular day rather than a 'continuum record of one's travels through life' . Since the certificate was, in the Registrar's view, a correct representation of the applicant's details at the relevant time, no amendment could be permitted.

7. In Caladaras, Kearns P. was satisfied that the circumstances in Foy were 'altogether different' . The applicant in Caladaras was not seeking a retrospective amendment of a birth certificate such as would reflect a change of sex following gender reassignment surgery. An amendment of that nature did not involve an error of fact and was not permitted by the Civil Registration Act 2004. Rather, the applicant in Caldaras was seeking only an amendment to reflect the factually correct details at the time of her daughter's birth. Kearns P. held that the applicant was entitled to have the Register amended, accordingly.

The Appeal

8. The Minister has argued that the learned High Court judge was incorrect in law in finding it necessary to declare that there exists an unenumerated constitutional right to have one's identity correctly recognised by the State, together with an implied right for there to be a correct record of a person's age. He claimed that this is so particularly in circumstances where the applicant was not born in the State and where the Minister has no obligation to register her birth. Grounds 1 to 7 of the appellant's Notice of Appeal relate to this alleged error in law.

9. Citing the Supreme Court decision in Fleming v. Ireland [2013] 2 I.R. 417, the Minister accepted the 'general proposition' that there is an unenumerated constitutional right to have one's identity accurately recorded. Such rights are necessary to ensure the dignity and freedom of the individual and they inhere in the individual personality which constitutes a vital human component of the social, political and moral order posited by the Constitution. The Minister accepted that this would entail a right to have such State documents as are required to live one's life with dignity, including, a birth certificate and a passport. However, he claimed that, in this case, the applicant had not relied on the provisions of the Constitution in her Statement of Grounds in the High Court nor had she filed any submissions in relation to the notion of an unenumerated constitutional right to recognition of one's correct identity. Even though this substantial question had not been encompassed by the pleadings in the case, the trial judge, nevertheless, in the Minister's view, went on to find that the applicant 'must

have a right to have her identity correctly recognised by the State' .

10. The Minister advanced a number of arguments in support of his appeal. Firstly, he placed reliance upon the fact that the applicant was not born in the State and that, consequently, the Minister never had any obligation to register the details of her birth. He also argued that the difficulties surrounding the applicant's date of birth placed him in an exceptionally difficult position, in terms of ascertaining, with certainty, the date upon which she was, in fact, born. Furthermore, the Minister claimed that the approach of Humphreys J. had involved a breach of the separation of powers because it had, in effect, provided for a new ministerial function and power over and above the supervision of the reliability of a certificate of naturalisation. Even if a legislative scheme were necessary for the vindication of one's personal identity rights, the role of the court, the Minister argued, does not extend to creating such a scheme. He relied upon A.P. v. Minister for Justice [2019] IESC 47, by analogy, in support of his claim in this regard.

11. From the perspective of European law, the Minister relied on Butt v. Norway App. No. 47017/09 (ECHR, 4 December 2012) in support of his contention that applicants have a duty to provide correct details of personal identity. Whilst acknowledging that Butt related to immigration, generally, he argued that the duty would apply a fortiori in the context of the naturalisation process. Such a process can be a means whereby non-nationals acquire not only Irish citizenship, but proof of identity, internationally. Given the difficulties pertaining to ascertaining the correct date of the applicant's birth, the Minister claimed that any unenumerated right to have one's date of birth recognised, formally, by the State could not be relevant to or engaged by these proceedings. Even if he were incorrect in this regard, he submitted that the alteration of the record of one's date of birth involves the alteration of a key personal identifier and that there must exist a countervailing public interest in ensuring that a person cannot simply change his or her identity.

12. The Minister claimed that the European Convention on Human Rights did not advance the applicant's case, significantly. Article 8 requires only that a deprivation of citizenship should not be 'arbitrary' and that adequate procedural safeguards against arbitrariness exist (Ramadan v. Malta, App. No. 763613/12 (ECHR, 21 June 2016.) He submitted that the s. 19 process as provided for in the Irish Nationality and Citizenship Act 1956 ('the 1956 Act') demonstrates that the Minister's actions have a legal basis and that decisions taken in respect of citizenship are not ad hoc administrative acts. He claimed that there were 'ample procedural safeguards' within the s.19 process, including, a right to request an Inquiry by a Committee and a right to judicially review his decision.

13. The case of Rottman v. Freistaat Bayern (Case C-135/08) was relied upon by the Minister to demonstrate that the notion of an 'arbitrary' deprivation of citizenship under international law does not extend to a deprivation for misrepresentation. In such a case, it was argued, deprivation of citizenship could be justified even if it were to render a person stateless. The Minister argued that Article 7 of the Charter is largely coextensive with Article 8 of the Convention, and, in the absence of any evidence as to the effect on the applicant's private or family life, those Articles were not engaged in the decision to notify her of the intention to revoke her citizenship. This was all the more so in circumstances where the Minister had not, as yet, even decided to revoke the applicant's citizenship and may never do so as more information may come to light in the revocation process. Finally, the Minister claimed that Article 8 of the Charter does not arise in the circumstances of this case as there is no assertion let alone evidence, that the personal data of the applicant would not be protected by the Minister during the revocation process.

14. Against those arguments, the applicant submitted, firstly, that in the High Court proceedings she had, indeed, relied on the right to have her correct identity officially recorded and she referred the court, specifically, to her submissions in this regard. In Caldaras, the High Court had recognised that the right to have a correct official record of one's identity was an aspect of the unenumerated personal rights both within the Constitution and under Article 8 of the European Convention on Human Rights. Insofar as the Minister had sought to argue that he had no obligation to register details of her birth because she was not born in Ireland, this, she claimed, ignored the fact that the successful applicant in Caldaras had been born in Romania. The Minister's argument also failed to acknowledge the nature of the applicant's rights as an Irish citizen. The right to have her identity correctly recorded was one which accrued to her regardless of where she was born because by the time her application to amend the certificate had been made, she was, in fact, a citizen of Ireland. There was no justification for the Minister's attempt to limit the application of this unenumerated constitutional right solely to persons who were born in Ireland.

15. The applicant disputed the assertion that the trial judge had extended the Minister's powers and

duties. She claimed that the judge's finding was simply a corollary of the data protection principles, including, those contained in Article 8 of the Charter of Fundamental Rights of the EU, the Data Protection Act 2018 and the Freedom of Information Act 2014 under which all citizens have the right to rectification of their personal data. Further, the trial judge had not breached the separation of powers principles but had correctly sought to vindicate her constitutional rights and his approach was entirely consistent with Supreme Court jurisprudence (A.P. v. Minister for Justice [2019] IESC 47, paras. 5.12 to 5.13). She submitted that, in this case, there had been no gap in the law per se. What she was facing was an overly literal interpretation of s.19 of the 1956 Act matched with an asserted policy that once a certificate of naturalisation issues, the Minister would not correct it unless the error in question was a clerical one committed within the Department. The applicant contended that the trial judge had been entirely correct in finding that the Minister's stated view that he could refuse to consider an amendment on the basis of such a policy without any regard to her rights was contrary to the requirement that he act lawfully and in accordance with the Constitution.

The Legal Issue

16. It would appear that the specific right to recognition of one's date of birth and to a correct recording thereof has not, per se, been litigated before the Irish or the European courts. To that extent, this appeal raises a somewhat novel point. That said, however, the legal principles to be derived from case law in which the courts have considered the existence or scope of the right to have other aspects of personal identity reflected in official records, provide helpful guidance in approaching this appeal.

17. In this case, Humphreys J. found that the right to have one's identity correctly recognised by the State is ‘so fundamental that it must be recognised as an unenumerated constitutional right’ . Whilst the elevation of this right to constitutional status is a novel feature of this case, the interaction between constitutional rights and the registration of identity details, generally, has been examined before by the Irish courts in a number of cases, including, Foy v. An tArd Chláraitheoir [2002] IEHC 116, [2007] IEHC 470 and in Caldaras v. An tArd Chláraitheoir [2013] IEHC 275, [2013] 3 I.R. 310, and, most recently, in O.R. v. an tArd Chláraitheoir [2014] IESC 60, [2014] 3 I.R. 533.

18. Certain observations in the judgments of the Supreme Court in O.R. v. an tArd Chláraitheoir provide a good starting point for considering the Minister's specific complaint under consideration in this judgment (see para. 2 above). In O.R., a married couple who had availed of a surrogacy arrangement challenged the refusal by an tArd Chláraitheoir to register the genetic mother—as distinct from the gestational mother—of twins as the ‘mother’ on the children's birth certificates. The Supreme Court overturned an order of the High Court which had declared that the genetic mother was entitled to be registered as the ‘mother’ . It held that the term ‘mother’ under the Civil Registration Act 2004 did not extend to genetic mothers in surrogacy arrangements and that thus there existed a lacuna in the law which was more appropriately filled by the legislature rather than by the courts, due to the complex and sensitive nature of surrogacy arrangements. Notwithstanding the reversal of the High Court order, McKechnie J. was satisfied that the relationship of the genetic mother and the children and their relationship with the genetic mother in the context of the reproductive process involved in their conception, was justly deserving of recognition at constitutional level (at para. 393). The High Court had found that chromosomal DNA material has a deterministic influence on the uniqueness of the embryo, which carries into the inheritable characteristics upon which our individual sense of self and identity is based. Such an input into creation, in the view of McKechnie J., was so integral that it must command constitutional protection. He was satisfied that rights ‘at the highest level of our legal order’ were involved in the circumstances as outlined. This required that the natural and human association between mother and child and child and mother must be recognised in law, in a way that reflects the fundamental reality of the situation.

19. Clarke J. (as he then was) filed a dissenting judgment holding that the ‘least bad’ solution to the case was for an tArd Chláraitheoir to put in place such administrative measures as would be necessary to record both the genetic mother and the gestational mother. He found that the applicants had a constitutional entitlement to have the State recognise their familial status, although the State may be entitled to properly regulate the recognition of such status. His comments on the register of births, however, are worth recalling in the context of the instant appeal. He said:

> ‘While not decisive, it is also worth noting that persons, understandably, place a high

value on the way in which their status is officially recognised. We do not maintain, in this jurisdiction, any general register of persons which records matters such as their age, gender and indeed, parentage. The closest we have is the register of births, marriages and deaths. In those circumstances it is hardly surprising that persons are concerned that the way in which their birth is registered accurately reflects the legal situation, for it is, in normal circumstances, the only official record of their status.' (at para. 506)

20. The European Court of Human Rights has also considered the legal protection to be afforded to features of personal identity, such as, name, gender and ethnicity, in a number of cases. Its jurisprudence confirms that the question of the official record of one's personal data is a matter that falls within the scope of Article 8 of the ECHR (see Goodwin v. UK App. No. 28957/95 (ECHR, 11 July 2002.) The key finding in Goodwin—a case concerning gender identity—was applied, subsequently, in Grant v. UK App. No. 32570/03 (ECHR, 23 August 2006) which held that a refusal to recognise the gender status of the applicant and to accord her the appropriate pension rights amounted to a violation of her Article 8 rights from the date of the Goodwin judgment onwards.

21. In Ciubotaru v. Moldova, App. No. 271138/04 (ECHR, 27 April 2010) it was ethnicity as a feature of personal identity that arose for the court's consideration. The applicant sought to change the registration of his ethnic origin in official records. The State's failure to examine his claim to belong to a certain ethnic group in the light of objectively verifiable evidence amounted, in the court's view, to a violation of his right to respect for his private life. In Cemalettin Canli v. Turkey, App. No. 22427/04 (ECHR, 18 November 2008) the Court confirmed that Article 8 of the Convention is applicable to personal data pertaining to private life even where such data is in the public domain. It found that 'public information' can fall within the scope of 'private life' where it is systematically collected and stored in files held by the authorities. It held that the retention and transmission of an inaccurate police report constituted an interference with the applicant's right to respect for his private life within the meaning of that provision.

Discussion

22. As noted, Humphreys J. acknowledged that he had derived 'considerable assistance' from the case of Caladaras in coming to his conclusions in this case. In Caladaras, Kearns P. had distinguished the circumstances of correcting an error of fact on a birth certificate from a retrospective amendment of a certificate to reflect a change of sex following gender reassignment surgery. This Court considers that such a distinction can be sustained. In Caladaras, the High Court was satisfied that constitutional and Convention rights were engaged in the process of an application to amend a birth certificate so as to reflect correct personal identity details, confirming that both a parent and a child have the right to have the correct identity of the parent recorded on a child's birth certificate. Kearns, P. stated:

> "In terms of the Irish Constitution, the 'double construction rule' requires that statutory provisions be given an interpretation which allows for the personal rights of individuals to be respected. Furthermore, s. 2 of the European Convention on Human Rights Act, 2003 provides that in interpreting and applying any statutory provision or rule of law a court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

Kearns P. held that allowing such an amendment does not involve an interpretation of the provisions of the Civil Registration Act 2004 in a manner that is fundamentally at variance with a key or core feature of the statutory provision or rule of law in question. He found that there was no requirement or test under the 2004 Act, such as would require that only mistakes made by the Registrar General or his or her staff could be corrected. I agree with Humphreys J.'s endorsement of the approach taken by Kearns P. and consider that Caldaras provides a useful lens through which (to borrow a phrase from McKechnie J. in O.R.) 'the fundamental reality of the situation' in issue in this appeal may be viewed.

23. The fundamental reality of the situation here is that the applicant claims that her date of birth, as it appears on the certificate of naturalisation, is incorrect when calculated according to the Gregorian

calendar. Whilst the legal issue on personal identity rights in this case is less complex and diverse than those arising in the area of assisted reproduction, the reality, nevertheless, remains that the applicant's date of birth is an integral aspect of her personal identity. Although the Supreme Court in O.R. refrained from making an order as to the registration entitlements of the applicants due to the difficulties in making a democratically sound determination on the definition of 'mother' in surrogacy arrangements, the judgments of the Court, nevertheless, affirm the importance of maintaining an accurate register of births and recognise this as a prerequisite for the vindication of numerous constitutional rights. The Supreme Court's observations in this regard apply, by analogy, to other official records of an individual's personal data.

24. It is difficult to conclude that the Minister's arguments for setting aside the trial judge's findings concerning the personal identity rights of the applicant are persuasive. The Minister claims that he had no obligation to register the details of her birth because of the fact that she was not born in the State. Whilst the Supreme Court has not, as yet, determined the extent to which constitutional rights vest in persons who are non-citizens, one can assert, at least as a general principle, that the most basic of fundamental human rights are not dependent upon the place of one's birth. They are not the gift of any State. They inhere in the individual on the basis of his or her humanity. Whereas the chance location of one's place of birth may influence the extent to which fundamental human rights are respected, it cannot and does not determine their existence. The applicant, in this case, however, is an Irish citizen and the fundamental rights in issue in this appeal are related to matters concerning her personal identity. Any citizen whose personal identity details are registered by the State has a right to have such registration recorded, accurately, and in a manner that is factually correct. The State held personal identification details on the applicant and she is entitled to a correct recording of those details. At the time of the applicant's request to amend her certificate of naturalisation, the legal reality that obtained cannot be overlooked. The applicant, as the holder of such a certificate (albeit one which recorded, in her view, a factual error in her birth date when calculated according to the Gregorian calendar) was and remains an Irish citizen. Accordingly, she is entitled to the protection of the Constitution on the same basis as every other Irish citizen.

25. Furthermore, the contention that the approach of the learned High Court judge involved a breach of the separation of powers principle—by providing for a new ministerial function and power over and above the supervision of the reliability of certificate of naturalisation—is not convincing. No new administrative power or function has been created in this case. The trial judge made an order that 'the Minister do consider if appropriate in the light of any report of the committee of inquiry whether the applicant's certificate of naturalisation should be amended in the sense of being cancelled and reissued with the correct date of birth' . I do not consider that in making this order he was engaged in devising a legislative scheme and imposing it on the Minister. It would, indeed, have been a breach of the separation of powers principle for a court to have done so (see Clarke C.J., A.P. v The Minister for Justice and Equality [2019] IESC 47, para. 5.21]. It is clear from the judgment of the High Court that Humphreys J. took the view that it was for the Minister to make the final decision on the outcome of the s. 19 process in this case. I consider that it was entirely within the remit of the trial judge to find that the right to have one's identity correctly recognised by the State is 'so fundamental that it must be recognised as an unenumerated constitutional right' . In finding that the applicant was entitled to have her date of birth correctly recorded in official documents, the High Court's declaration constituted no more than a vindication of her constitutionally protected rights, including, those rights, the exercise of which necessarily depends upon the correct recording of a citizen's age.

26. Having considered the case law relied upon by the Minister in support of his appeal, I am not persuaded that it supports his position, greatly. If anything, the Supreme Court's judgment in Fleming v. Ireland [2013] 2 I.R. 417 reinforces the applicant's starting point. Nor does the Strasbourg Court's judgment in Butt v. Norway advance the Minister's case, in any way. In Butt, the applicants had resided in Norway from an early age except for a short period in their lives when they and their mother had returned to Pakistan. They were granted a settlement permit at a time when the Norwegian authorities were ignorant of the three-year period spent in Pakistan and it was based on false information provided by their mother that she and the applicants had continued to reside in Norway. Notwithstanding the provision of such false information, the Strasbourg Court nevertheless found that the respondent State had exceeded its margin of appreciation when seeking to strike a fair balance between its public interest in ensuring effective immigration control and the applicants' interests in remaining in Norway to pursue their private and family life. It concluded that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention.

27. Whilst it is not for this court to determine that the applicant's error was innocent (see para. 85 of

the judgment of Murray J.) I do not consider that it has been established, at this stage of the proceedings, that there has been a deliberate concealment of a material fact or a breach of the duty of full disclosure such as occurred in Butt. It must be recalled that the applicant had enclosed with her application for naturalisation, a letter of 31 May 2014 setting out the differences between the Ethiopian and Gregorian calendars and that she had furnished a telephone number at which she could be contacted in the event of any questions. It must also be recalled that it was she who drew the Minister's attention to what, she claims, is an inaccuracy in the certificate of naturalisation.

28. Insofar as reliance was placed by the Minister on Rottman v. Freistaat Bayern (Case C-135/08), I accept that this case may be authority for the proposition that an 'arbitrary' deprivation of citizenship under international law does not extend to deprivation for misrepresentation. In that case, the CJEU held that it is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception , on condition that the decision to withdraw observes the principle of proportionality (emphasis added). Again, it has not been established, at this stage of the proceedings, that the applicant's naturalisation has been based on deception or material misrepresentation. That is a matter for the Minister to decide. However, as Murray J. notes (at para. 49 of his judgment) it cannot be said that the issue of a certificate on foot of information provided by an applicant which is incorrect has for that reason alone been 'procured … by misrepresentation' in the sense in which the phrase is used in section 19(1) of the Act of 1956.

Decision

29. I am satisfied that the recognition by the State of a person's date of birth is engaged both as an unenumerated constitutional right and under the 'private life' limb of Article 8 of the ECHR. Whilst it would appear that there is no specific case on point in either in Irish or European law, the trial judge's declaration is not inconsistent with principles arising in cases which deal with other aspects of personal identity. Such principles, to my mind, may be applied, by analogy, with equal force to the facts of this case.

30. Just as in Stjerna v. Finland, App. No. 18131/91 (ECHR, 25 November 1994) the Strasbourg court held that a name constitutes a means of personal identification and a link to a family, so it can be accepted that a person's date of birth also constitutes an important means of personal identification. One need only observe, how in the medical sphere and health care systems, for example, a person's date of birth is routinely used as an important cross-check to confirm his or her identity.

31. I am led to conclude that a person's date of birth is a significant aspect of his or her personal identity and constitutes an important link to his or her family. The right to have one's date of birth recognised by the State and recorded accurately must fall within that category of rights which are at what McKechnie J describes as 'the highest level of our legal order' (O.R. at para. 393). Consequently, I am satisfied that the trial judge did not err in law in finding that personal identity rights are engaged in the process in issue in this case. He was entitled to come to the view that the applicant's right to have her identity correctly recognised by the State is so fundamental that it must be recognised as an unenumerated constitutional right. He was further entitled to conclude that there exists an implied constitutional onus on the State, arising from the inherent dignity of the individual referred to in the Preamble and the personal rights of the citizen in Article 40.3 of the Constitution, to 'accurately record and represent central aspects of personal identity' .

32. In these circumstances and for the reasons set out above, I dismiss the Minister's appeal on this point.