THE SUPREME COURT

Appeal No: S:AP:IE:2019:000141

ALI CHARAF DAMACHE

Appellant

-and-

THE MINISTER FOR JUSTICE & EQUALITY,
IRELAND AND THE ATTORNEY GENERAL

Respondents

-and-

THE IRISH HUMAN RIGHTS & EQUALITY COMMISSION

Amicus Curiae

OUTLINE SUBMISSIONS ON BEHALF OF THE AMICUS CURIAE IN RESPECT OF FINAL ORDERS

Introduction

1. By judgment delivered on 14th October 2020 ([2020] IESC 63), the Court held that section 19 of the Irish Nationality and Citizenship Act 1956 was invalid having regard to the provisions of the Constitution. The ratio of the decision is set out at paras 128-129 as follows:

> "128. … The citizen who is facing a proposal to revoke a certificate of naturalisation does not have the same level of procedural safeguards. Following the service of a notice of intention to revoke, the individual is entitled to know the reasons for the proposal and can seek an inquiry as to the reasons for the proposal to revoke. He can make representations, call evidence and challenge the evidence against him. What he does not have is an "impartial and independent decision-maker". The person who starts the process is the Minister. Where there is a Committee of Inquiry, his representatives present the reasons for the proposed revocation and the evidence to support it. Although the Committee reports its findings to the Minister, the Minister has made it clear that the findings of the Committee are not binding on him. The same person who initiated

the process, whose representatives make the case for revocation before the Committee of Inquiry (where it is sought) ultimately makes the decision to revoke.

129. In my view, the process provided for in s. 19 does not provide the procedural safeguards required to meet the high standards of natural justice applicable to a person facing such severe consequences as are at issue in these proceedings by reason of the absence of an impartial and independent decision maker. For this reason, I have come to the conclusion that s.19 is invalid having regard to the provisions of the Constitution."

2. The Minister submits that only a part of section 19(2) and all of section 19(3) should be declared invalid, but that section 19(1), (4), (5) and (6) ought not be declared invalid. The Minister submits that the doctrine of severance is capable of being applied to limit the declaration of invalidity that ought to be granted, by distinguishing between the substantive conditions for revocation and the procedure by which revocation takes place. The implication of the Minister's submission is that the existence of the Minister's power to revoke naturalisation ought to be left undisturbed, but that that power should henceforth exist without *any* statutory procedures at all in respect of which the process of revocation is conducted. It is respectfully submitted on behalf of the *amicus curiae* that the existence of the power to revoke is inextricably linked with the procedure by which such power is exercised, having regard to the requirements of fair procedures and proportionality, and the requirements of EU law.[1]

3. Article 47 of the Charter of Fundamental Rights provides:

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously ***established by law***. Everyone shall have the possibility of being advised, defended and represented…." [Emphasis added]

4. The Minister's submissions in respect of the final orders at para.34 appears to contemplate:

[1] See IHREC substantive submissions in respect of the appeal at paras 20-34.

> "… the introduction of the procedural guarantees required by the judgment, that is, the opportunity of seeking a review or appeal from an independent person or body, which it is envisaged would be provided, in the first instance, by way of administrative procedure which would be binding on the Minister".

5. iThe Commission respectfully submits that this proposal would not adequately address the Court's finding at paras 128-129 as set out above, nor would it comply with the requirements of EU law. Furthermore, such a proposal fails to recognise the Court's finding at para.27 of the judgment that "The loss of citizenship, entailing as it does the loss of protection of the full range of constitutional rights conferred upon a citizen, is a matter of grave significance to the individual concerned" and that the more significant the impact of a particular decision on a person's right, the more robust the procedural safeguards must be. The Minister's proposal would remove the statutory procedural safeguards controlling the power to revoke in their entirety, and for the foregoing reasons it is respectfully submitted that this proposal ought not to be accepted.

Severance

6. The *amicus curiae* respectfully submits that the Minister's proposal in respect of the severability of part of section 19(2) and all of section 19(3) from the remainder of section 19 is not compatible with the jurisprudence in respect of the doctrine of severance.

7. In *Somjee v Minister for Justice* [1981] ILRM 324 Keane J. (as he then was) held:

> "The jurisdiction of this Court in a case where the validity of an Act of the Oireachtas is questioned because of its alleged invalidity having regard to the provisions of the Constitution is limited to declaring the Act in question to be invalid if that indeed be the case. The court has no jurisdiction to substitute for the impugned enactment a form of enactment which it considers desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment."

8. This statement of the law was expressly adopted and approved of by the Supreme Court in *MacMathúna v Ireland* [1995] 1 IR 484. Finlay C.J. stated:

"The function of the High Court with regard to a challenge to the constitutional validity of a statute and the function of the Supreme Court on appeal from a decision of the High Court in such a case is clearly limited.

The limitation can be simply expressed. The court upon such a challenge being brought before it may either conclude that the impugned section or provision of the statute is inconsistent with the Constitution, in which case it is obliged to condemn it; or it may conclude that it is not, in which case it must dismiss the claim. It cannot, however, whether it condemns an impugned section or not, in any way by declaration or otherwise direct the legislature to enact new and different provisions. This principle has been stated on a number of occasions but is extremely clearly and economically set out in the judgment of Keane J. delivered in *Somjee v. The Minister for Justice* …" (p. 495-6)

9. Furthermore, as was stated in *McGrath v. McDermott* [1988] IR 258, 276: "The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable":

10. As stated in Kelly, *the Irish Constitution* (5th edition, 2018) at paragraph 6.2.321:

"As Article 15.4 limits the invalidity of a successfully challenged law to 'the extent only of such repugnancy' … the courts are obliged to keep the operation of declaring either sort of law unconstitutional within a minimum extent. This means that, in some cases, only a portion of a particular section is treated (so to speak) as 'deleted'. However *these partial 'deletions' are only carried out when this can be done cleanly and without violence to the presumed legislative will; the courts will not* patch or mend a provision which a simple excision would render futile, or *turn into something which the legislature had never envisaged.* They will also not sever language where this would result in greater financial liability." (emphasis added).

11. The power of severability was considered in *King v Attorney General* [1981] IR 233, 259-260, wherein Henchy J. stated:

"The limitation which is common to the jurisdiction of the Courts under both constitutional provisions is that the power of severance is but an aspect of the power of

> judicial interpretation in the light of the Constitution; it does not amount to a legislative power which, in effect, would allow the Courts to enact that which the legislature did not enact. It is one thing to strike down a particular statutory provision on constitutional grounds. It is quite a different thing, and one for which there is no constitutional warrant, for the Courts to attempt to breathe statutory and constitutional life into a set of words which acquires a new and separate existence after the severance, but which was never enacted as law. That would be a legislative function which the Constitution expressly reserves to the Oireachtas: see Article 15, section 2."

12. It is clear that it is open to the Superior Courts to sever parts of an unconstitutional statutory provision, but it is submitted that this can only be done in a manner which is consistent with the legislative intention in enacting the provision in question. It is respectfully submitted that the Oireachtas in enacting section 19 of the 1956 Act intended that there should exist not only a power to revoke naturalisation, but that this power could only be exercised in accordance with the procedure for revocation contained in the section. The Minister's proposal in respect of severance would have the effect of conferring upon the Minister a power to revoke with no controlling procedure in respect of revocation at all. It is submitted that this was clearly not the intention of the Oireachtas in enacting section 19, and the Minister's proposed severance is therefore impermissible.

Section 19(4)

13. Section 19(4) provides:

> "(4) Where there is entered in a certificate of naturalisation granted to a person under the Act of 1935 the name of any child of that person, such entry shall for the purposes of this Act be deemed to be a certificate of naturalisation under the Act of 1935."

14. The Minister submits at para.40 of her submissions in respect of final orders that "s.19(4) is a standalone provision which concerns matters entirely separate from the judgment and the Respondents submit that this provision should not be struck down."

15. It is submitted that this submission fails to reflect the purpose of section 19(4) and its connection with the following subsection, which provides:

> "(5) A certificate of naturalisation granted or deemed under subsection (4) to have been granted under the Act of 1935 may be revoked in accordance with the provisions of this section and, upon such revocation, the person concerned shall cease to be an Irish citizen."

16. The effect of the Minister's proposal that the Court should limit the declaration of invalidity to part of section 19(2) and all of section 19(3), is that the Minister would then be left with a power to revoke a certificate of naturalisation pursuant to section 19(1), without any procedure to control the exercise of that discretion. Thus, if the Minister were to exercise that power to revoke in respect of an adult whose child's name was entered on the parent's certificate of naturalisation, the Minister's revocation of the parent's citizenship would operate to also revoke the child's citizenship without any requirement to have regard to the particular circumstances of the child or whether it would be appropriate to fix the child with the consequences of his or her parent's actions. It is submitted that this interpretation could not have been the intention of the Oireachtas.

Conclusions

17. For all the foregoing reasons, it is respectfully submitted that the appropriate order is an order striking down section 19 of the 1956 Act in its entirety. It is then a matter for the Oireachtas to enact legislation providing for the revocation of naturalisation including a procedure which meets the standards set out by the Court in its substantive judgment in this matter.

Siobhán Phelan SC

Patricia Brazil BL

10th December 2020

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