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

I. Introduction

1. This case involves the issue of the lawfulness of the power to revoke a certificate of naturalisation pursuant to section 19 of the Irish Nationality and Citizenship Act 1956 (as amended) (the '1956 Act') with reference to the Constitution, European Convention on Human Rights (the 'ECHR') and EU law.

II. Factual background

2. The appellant, a naturalised Irish citizen was informed on 18 October 2018 by the Minister for Justice and Equality (the 'Minister') of his intention to revoke the appellant's citizenship on the ground, as stated under the 1956 Act, that the appellant had shown himself to have failed in his duty of loyalty and fidelity to the State. The appellant sought to oppose this revocation and was informed that as *per* the standard procedure, a Committee of Inquiry (three members, including two legal practitioners) would be appointed by the Minister to consider the case and issue a non-binding recommendation, following which the Minister will make his final decision. Although judicial review is available, there is no right of appeal from the Committee's recommendation or the respondent's decision. The process has not proceeded beyond the appellant being informed of the Minister's intention to

revoke citizenship and his opposition to same.

3. The appellant filed judicial review proceedings seeking *inter alia*, an order quashing the notice of the intention to revoke his citizenship, an order prohibiting revocation and a declaration that section 19 of the 1956 Act is unconstitutional and incompatible with the State's obligations under Articles 6, 8 and 13 of the ECHR and EU law.

4. In *Damache v Minister for Justice and Equality, Ireland and the Attorney General* [2019] IEHC 444 the High Court refused the relief sought, but stayed the revocation to allow for an appeal and determination by the Supreme Court.

5. By determination dated 5 November 2019 the Supreme Court granted the appellant's application for leave to appeal directly from the High Court.

III. The Issues in the Case

6. The Commission respectfully submits that two core issues arise in the within appeal:

    a. Whether the revocation of citizenship is a judicial or executive act; and to what extent this impacts on procedural safeguards?

    b. Whether judicial review provides for a sufficient procedural safeguard in respect of a decision to revoke a certificate of naturalization?

A. Whether the revocation of citizenship is a judicial or executive act and to what extent this impacts on procedural safeguards

7. Both the appellant and respondent ascribe significance to the question of whether revocation of citizenship is an executive act or a judicial act. This is said to be relevant for a number of identified reasons. Firstly, if the power is a judicial one, involving the administration of justice, section 19 of the 1956 Act clearly vests it in the Minister. The appellant submits that this may, in itself, render the section unconstitutional having regard to Article 34.1 of the Constitution, unless it is saved by the provisions of Article 37.1 of the Constitution. Secondly, it is suggested that

the nature of the power as judicial or executive dictates (or is a factor in dictating) the level of procedural safeguards that must attend on the use of the power. However, it is the Commission's position that the extent to which procedural safeguards are necessary is not dictated by the characterisation of the power as judicial or executive, but rather by the extent of its impact on the rights of the person the subject of it.

Administration of Justice and the Constitutional Position

8. What emerges clearly from a consideration of the considerable case law on the concept of the "administration of justice" for the purposes of Article 43.1 of the Constitution is that it is difficult to articulate a unified and comprehensive basis on which to assess this issue.

9. The *obiter* comments of Kenny J in the High Court in *McDonald v Bord na gCon (No 2)*[1] ("*McDonald*"), subsequently approved by the Supreme Court on appeal (notwithstanding their reversal of his decision), constituted an attempt at defining the characteristics of the "administration of justice". They have been oft-cited subsequently, and should be considered foundational when considering this issue. As Kenny J put it in that case:

> "*It seems to me that the administration of justice has these characteristic features:*
>
> *1, A dispute or controversy as to the existence of legal rights or a violation of the law;*
>
> *2, The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;*
>
> *3, The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;*

[1] [1965] IR 217.

4, The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;

5, The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country."[2]

10. The above indicia of the exercise of judicial power are not exhaustive.[3] For instance, the source of the power has also been held to be determinative in some cases. In *Geoghegan v. Institute of Chartered Accountants in Ireland*[4] ("*Geoghegan*"), Murphy J in the High Court (not upset on appeal) noted that:

> "*It is, therefore, of the essence of In re Solicitors Act, 1954 [1960] I.R. 239 that the Supreme Court was considering not merely activities which had in their appearances and consequences (however severe) the hallmarks of the administration of justice but also the source of the power to engage in such activities. The Court was not considering judicial power in the abstract but the judicial power of the State, being one of the powers of Government exercisable only by or on the authority of the organs of State established by the Constitution (see Article 6 of the Constitution of Ireland, 1937). It is for that reason that the starting point of the enquiry was the legislation setting up the tribunal followed by an analysis of the powers granted to it with a view to ascertaining whether this involves "a diminution or devolution of the judicial power of the State" or, what is the converse, the conferring of some part of that power on persons who are not regularly appointed as judges under the Constitution.*"[5]

11. Finally, it is worth noting that the extent to which the decision impacts on rights has fallen out of favour as an indicator of engagement in the "administration of

[2] *McDonald*, at pp.230-231.
[3] *Keady v. Garda Commissioner* [1992] 2 IR 197.
[4] [1995] 3 IR 86.
[5] *Geoghegan*, at p.98.

justice". In his oft-cited decision in *In re Solicitors Act, 1954*[6] (the "*Re Solicitors Act*"), Kingsmill-Moore J in the Supreme Court noted that:

> "*The imposition of a penalty, which has such consequences, would seem to demand from those who impose it the qualities of impartiality, independence and experience which are required for the holder of a judicial office who, under the criminal law, imposes a fine or short sentence of imprisonment…It seems to the Court that the power to strike a solicitor off the roll is, when exercised, an administration of justice, both because the infliction of such a severe penalty on a citizen is a matter which calls for the exercise of the judicial power of the State and because to entrust such a power to persons other than judges is to interfere with the necessities of the proper administration of justice.*"[7]

12. A similar position was taken by Kearns P in his decision in *Akpekpe v. Minister for Justice*[8] ("*Akpekpe*"), where he held, after citing in *Re The Solicitors Act*, that "*…it may be said that the nature of the finding and sanction is the critical factor which decides whether Article 34 of the Constitution (which requires that justice be administered by courts) is engaged. There must be a distinction drawn between major and minor sanctions, and the less the sanction may be said to affect an individual's rights, the less it may be argued that a right of appeal to the courts must necessarily exist as a matter of natural or constitutional justice.*"

13. It is respectfully submitted that the finding *Re Solicitors Act* on this point was based on the premise that only instances of the "administration of justice" attracted robust procedural safeguards, and thus any decision involving a significant interference with rights must involve the "administration of justice" because it necessarily needed to attract significant procedural safeguards. This is no longer the position, given the evolution of jurisprudence on natural and constitutional justice. This was explicitly noted by Murphy J in the High Court in *Geoghegan*:

[6] [1960] I.R. 239.
[7] *Re Solicitors Act*, at pp.274-275.
[8] [2014] 3 IR 420.

> "*The concern expressed by the distinguished judge* [Kingsmill-Moore J in *Re Solicitors Act] in that regard and any influence which those considerations might have had on the court in reaching its decision have, I think, since been laid to rest by the evolution and extension of the principles of natural and constitutional justice which apply now even to domestic tribunals.*"[9]

14. Only *Re Solicitors Act* was cited to Kearns P in argument in *Akpekpe*, and thus it cannot be considered of strong precedential value on this particular issue. The position may have been put to rest by O'Donnell J in *O'Connell* v The Turf Club when he noted that there are "*…very many bodies which adopt court-like procedures and which may make orders and determinations which have severe impact on individuals which can far exceed the orders made by courts*",[10] and yet held that this was not determinative of the issue. As Hedigan J subsequently put it at [8.6] in *Purcell v Central Bank of Ireland*,[11] "*The severity of the impact of sanctions on individuals subject to such a process is not the test (see per O'Donnell J. in O'Connell v. The Turf Club, para. 54).*"

15. The logic behind the proposition that the extent of impact on rights is not an indicator of the exercise of the judicial power is of some force: there are clearly circumstances where the exercise of a judicial power has limited impact on rights (e.g. the small claims procedure in the District Court), and nevertheless clearly entails the administration of justice. Similarly, the exercise of both the legislative and executive powers of the State, or even private contractual powers, can have significant impacts on rights, but this does not convert them into the administration of justice.

16. However, even if the extent of the impact on the person's rights is irrelevant for the purposes of identifying the "administration of justice", it is submitted that it is a consideration in at least two respects relevant to present purposes:

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[9] *Geoghegan*, at p.100.
[10] [2015] IESC 57.
[11] [2016] IEHC 514.

a. Where the exercise of a power is considered to entail the "administration of justice" for the purposes of Article 34.1, the extent of its impact on rights is a relevant (and possibly, *the* relevant) consideration for the purposes of assessing whether the power is "limited" and thus permissibly granted under Article 37.1 of the Constitution.[12]
b. Secondly, and irrespective of whether or not the exercise of a power constitutes the "administration of justice", the more significant its impact on a person's rights, the greater the procedural safeguards they should be afforded in relation to its exercise (see below).

17. It is unclear whether the power contained in section 19 is properly seen as judicial and as involving the "administration of justice" for the purposes of Article 34.1 of the Constitution. The power is not one that has traditionally been exercised by the Courts.[13] The procedure established under section 19 does not have the coercive trappings of a judicial process (e.g. power to compel witnesses).[14] Further, there are multiple instances in which the courts have held that it is part of the core of the executive power to determine the right to citizenship (i.e. membership of the Irish polity).[15] While these cases were decided in the context of naturalisation, the logic would appear to follow that it applies equally to the revocation of citizenship.

18. Balanced against this, however, the Commissions submits that the Minister's power under section 19 meets at least four out of the five criteria identified by Kenny J

[12] See, in this respect, Kingsmill-Moore J *Re Solicitors Act*, at pp.263-264.
[13] With respect to the fifth criterion identified by Kenny J – "*the making of an order by the Court which as a matter of history is an order characteristic of Courts in this country"* – (As identified by the trial judge in the present case) in this jurisdiction denaturalisation has never been within the purview of the court, nor could the making of such an order be said to be a characteristic of a court order.
[14] With respect to the ability to coercively invoke the power of the State in the process or to enforce its outcome, there is nothing in the section 19 procedure that suggests an ability to enforce the taking of evidence or, the compelling of witnesses for the purposes of carrying out the procedure. The procedure is described as an "inquiry" and its remit does indeed appear to be limited and inquisitorial in nature.
[15] It is the historic view of the Courts that matters related to naturalisation are considered part of the historical core of the exercise of the executive power. Although he was overturned on appeal, Hogan J in *XP v. the Minister for Justice and Equality* [2018] IECA 112 held (in relation to naturalisation provisions of the 1956 Act) that: *"Perhaps the first thing to note about the provisions in this context is that the decision whether to grant citizenship by naturalisation is an executive act which is provided for by a law enacted by the Oireachtas in accordance with Article 9.1.2. In other words, the decision to grant citizenship by naturalisation represents an autonomous act of sovereign power by the State in accordance with the Constitution."*

above.

a. *A dispute or controversy as to the existence of legal rights or a violation of the law* – It is hard to envisage a situation in which the Minister and the person would not take opposing views on the question of whether the certificate should be revoked. Moreover, the revocation of citizenship has significant implications for the rights of the person concerned[16], although admittedly it could not be said to determine them in the sense of declaring their existence of extent. Rather, the revocation itself alters or effect the person's rights.[17]

b. *The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty* – As set out above, the term "determination" must be read sufficiently broadly to encompass impacting on existing or subsisting rights. Revocation on the basis of section 19(1)(b) where a person has "*failed in his duty of fidelity to the nation and loyalty to the State"* arguably constitutes the imposition of a liability or the infliction of a penalty. This, it is submitted, is similar to a criminal sanction on the individual, and may in fact have a more significant impact of their rights than incarceration or other criminal sanctions.

c. *The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties* – The revocation of a certificate of naturalisation is a final determination of the person's legal rights once the certificate is revoked (and confirmed if any judicial reviewed of that decision is taken), the determination is final insofar as the person ceases to be an Irish citizen, with all of the impacts for their rights that this entails.

d. *The enforcement of those rights or liabilities or the imposition of a penalty*

[16] See the discussion on the difference in rights inhering in citizens and non-citizens in the judgment of Hogan J (Court of Appeal) and O'Donnell J (in the Supreme Court) *NHV v Minister for Justice [2018] 1 IR 246 ("NHV").*

[17] It is submitted that the feature set out by Kenny J should not be read as if they were a statutory code. A "determination" that impacts the person's right could arise from a declaration as to the extent or existence of the rights, but also a decision actually impacting on those rights.

by the Court or by the executive power of the State which is called in by the Court to enforce its judgment – The section 19 procedure can result in the removal of the certificate of citizenship, which automatically results in the removal of citizenship, and thus of the contingent rights associated with citizenship. The loss of these rights leaves a person open to other enforcement measures (e.g. deportation, or exclusion from the State) that might otherwise have been impossible in respect of a citizen, but the revocation of a certificate is otherwise self-executing.

19. Should the Court conclude that the power in section 19 constitutes the "administration of justice" for the purposes of Article 34.1, it is submitted that the power must then be considered to be an unconstitutional grant of such a power to the Minister. If the power constituted the "administration of justice", it could only be rendered constitutional by Article 37.1, but it is submitted that in no way could the power be described as "limited", in light of the fundamental impact on the rights of the person the subject of the power.

Procedural Safeguards to be Afforded to a Person Affected by the Exercise of the Power

20. The extent to which procedural safeguards are necessary is not dictated by the characterisation of the power as judicial or executive, but rather by the extent of its impact on the rights of the person the subject of it. It is submitted on behalf of the Commission that section 19 of the 1956 Act is unconstitutional and/or incompatible with the requirements of European law (EU and ECHR), having regard to the lack of procedural safeguards entailed in a power which has such a significant impact on an individual's rights.

21. In the first instance, the Supreme Court in *NHV* declined[18] to definitively decide the extent of the rights that may inhere in a citizen as distinct from a non-citizen. Proceeding, however, from the principled basis proposed by O'Donnell J in that case that certain rights inhere by virtue of a person's humanity, while others inhere

[18] See [16] of the judgment of O'Donnell J.

by virtue of their citizenship, it is still clear that there are at least some rights that non-citizens are not entitled to enjoy under the Constitution. At a minimum, these are participatory rights, such as those in relation to voting. There may be others, although the Commission is of the view that they should be as limited as possible in number given the important protections that would otherwise be foregone by a non-citizen.

22. The point of departure for an assessment of the extent to which a revocation of citizenship impacts or, interferes with rights must be to acknowledge the very fundamental nature of protection for citizenship in our legal order. Article 9 of the Irish Constitution provides for the acquisition and loss of citizenship and provides that acquisition or loss shall be determined in accordance with law. Holding the status of citizen under the Constitution entails special protection of civil rights in references throughout the Constitution (perhaps most notably in Article 40 but also Articles 2, 12, 16, 28A, 44, 45 and 47). As a citizen of Ireland, an individual is also a citizen of the EU and thereby benefits from the myriad of rights which attach to citizenship of the European Union.[19] The Court of Justice has held that EU citizenship was not merely the bundle of economic rights granted under the Treaties on European Union,[20] but a status expressive of a social role in the Union.[21] Thus, EU citizenship is a distinct social and legal status putting the individual in a direct legal relationship with the EU and an independent legal order.

23. As Gagne J held in *Hassouna v Canada* [2017] 4 FCR 555 at paras 76-78:

> *"[76] … Once acquired, the rights flowing from citizenship have vested.*

[19] EU citizenship was created by the *Treaties on European Union* and bolstered in the *European Union Charter of Fundamental Rights*, and in Council Directive 2004/38/EC. In the 1992 TEU, Article 8(1) stated that "[c]itizenship of the Union is hereby established. Every person holding the nationality of a member State shall be a citizen of the Union". In 1997, the *Treaty of Amsterdam*, article 17, observed that "[c]itizenship of the Union shall complement and not replace national citizenship". Most recently, the 2012 *TFEU* restates the above as: "[e]very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

[20] *D'Hoop v. Office National de l'emploi* [2002] ECR 1-06191

[21] *Kempf v. Staatsecretariis van Justitie* [1986] ECR 1741. See further William Thomas Worster, Brexit and the International Law Prohibitions on the Loss of EU Citizenship, International Organizations Law Review 15 (2018) 341-363.

Therefore, once acquired, citizenship is a right (Taylor v Canada (Minister of Citizenship and Immigration, 2006 FC 1053 at para 44).

[77] The Applicants have already obtained citizenship and as a result possess a bundle of derivative rights such as the right to vote (a right under section 3 of the Charter), the right to enter or remain in Canada (a right under subsection 6(1) of the Charter), the right to travel abroad with a Canadian passport, and access to the Federal Public Service. These are the rights they obtain once they transition from being permanent residents to citizens.

[78] The balance of rights which would be lost, were the Applicants to revert to foreign nationals – which is the case for the Applicants who allegedly misrepresented on their permanent residence applications – is even larger. Those affected individuals who would become foreign nationals would lose, on top of the rights enumerated above, access to most social benefits that Canadians receive, such as health care coverage; the ability to live and work in any province (rights under subsection 6(2) of the Charter), or study anywhere in Canada; and, for a period of ten years, the ability to apply for Canadian citizenship (Citizenship Act, above, s 22(1)(f)).

24. Accepting that there are certain (not fully defined) rights that are not available to non-citizens, it stands to reason that the loss of citizenship necessarily entails the stripping of some rights from an individual. It is a well-established principle of Irish jurisprudence that the more significant the impact on a person's rights, the more robust the procedural safeguards must be. As Barron J put it in *Flanagan v. University College Dublin*[22] ("*Flanagan*"):

"*Once a lay tribunal is required to act judicially, the procedures to be adopted by it must be reasonable having regard to this requirement and to the consequences for the person concerned in the event of an adverse decision. Accordingly, procedures which might afford a sufficient*

[22] [1988] IR 724.

protection to the person concerned in one case, and so be acceptable, might not be acceptable in a more serious case. In the present case, the principles of natural justice involved relate to the requirement that the person involved should be made aware of the complaint against them and should have an opportunity both to prepare and to present their defence. Matters to be considered are the form in which the complaint should be made, the time to be allowed to the person concerned to prepare a defence, and the nature of the hearing at which that defence may be presented. In addition depending upon the gravity of the matter, the person concerned may be entitled to be represented and may also be entitled to be informed of their rights. Clearly, matters of a criminal nature must be treated more seriously than matters of a civil nature, but ultimately the criterion must be the consequences for the person concerned of an adverse verdict."[23] (Emphasis added)

25. In the area of naturalisation, the courts have already recognised that fair procedures do continue to apply to decisions taken in the area notwithstanding their executive character. In *AP v. the Minister for Justice and Equality (AP)* O'Donnell J held:

"*The procedures under the 1956 Act are a clear example of this, since, by definition, they apply only to non-citizens seeking naturalisation. That decision relates to status, and does not, at least directly, engage other rights. There is no doubt, however, that fair procedures must be applied to any such decision. Accordingly, I would approach this question as it was approached in in Mallak v. Minister for Justice [2012] IESC 59, [2012] 3 I.R. 297: that is, as a question of fair procedures in administrative law. It is apparent, without in any way depreciating the significant concerns that arise in this case from the point of view of Mr. P., that nevertheless different considerations may be involved where a decision can be said to directly affect constitutionally protected rights.*"[24]

26. As a result of the decisions in *Mallak* and *AP*, it is clear that applicants for

[23] *Flanagan*, at pp.730-731, emphasis added.
[24] *AP v Minister for Justice and Equality* [2019] IESC 47 ("*AP*").

naturalisation, who are by definition non-citizens, and who are engaged in a process that is quintessentially executive and discretionary in nature, are nonetheless entitled to procedural safeguards such as being told of the reasons for which a decision concerning their application was made. It stands to reason that the procedural safeguards surrounding the revocation of citizenship, which by definition takes place in respect of a citizen who enjoys the full panoply of constitutional rights, must be commensurately higher.

27. It is the Commission's position that it is inherently unfair and in breach of the appellant's right to constitutional justice as protected under those provisions of the Constitution that confer rights on citizens and/or 40.3 of the Constitution and/or by laws which vest statutory rights in persons entitled to citizenship of the State, that there is no independent arbiter appointed by law with power to confirm, amend or set aside the Minister's decision to revoke citizenship. Decisions such as the decisions of this Court in *Damache v. DPP* [2012] IESC 11 (as to the importance of an independent decision maker) and *Dellway v NAMA* [2011] 4IR 1 (as to the requirements of constitutional justice in prescribed procedures) support a constitutional requirement that an independent arbiter with decision making powers is required as a matter of constitutional fairness. In *Damache*, this Court ruled that the procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker in a process which may be reviewed. The process should achieve a proportionate balance between the requirements of the common good and the protection of an individual's rights. The reasoning underpinning the *Damache* decision applies with even greater force in this case where the interference is so much more and amounts to complete revocation of citizenship rights rather than powers of entry and search.

28. Clearly, loss of citizenship is not solely a constitutional law issue. It is noted that in *Ramadan v Malta* ECHR 21 June 2016 the European Court of Human Rights ('ECtHR') held that 'an arbitrary revocation of citizenship might in certain circumstances raise an issue under Article 8 of the ECHR because of its impact on the private life of the individual' (para 85). As noted in the ECtHR "*Guide on Article 8 of the European Convention on Human Rights"* (updated on 31 August 2019):

"The right to citizenship has been recognised by the Strasbourg Court, under certain circumstances, as falling under private life (Genovese v. Malta). Although the right to acquire a particular nationality is not guaranteed as such by the Convention, the Court has found that an arbitrary refusal of citizenship may, in certain circumstances, raise an issue under Article 8 by impacting on private life (Karassev v.Finland (dec.); Slivenko and Others v. Latvia (dec.) [GC]; Genovese v. Malta). The loss of citizenship that has already been acquired may entail similar –if not greater –interference with the person's right to respect for his or her private and family life (Ramadan v. Malta, §85; K2 v. United Kingdom (dec.),§49, in the context of terrorism-related activities). To determine whether such interference breaches Article 8, two separate issues must be addressed: whether the decision to revoke citizenship was arbitrary (a stricter standard than that of proportionality); and what its consequences were for the applicant (Ramadan v. Malta,§§86-89; K2 v. the United Kingdom (dec.),§50)."

29. It is further posited that insofar as a revocation of citizenship entails a determination of rights and obligations, the protections of Articles 6 and/or 13 of the ECHR also arise for consideration. Once citizenship is granted a significant number of important civil rights vest. Where rights and obligations are determined, Article 6 provides for a right to a hearing before an independent and impartial tribunal, while Article 13 guarantees a right to an effective remedy. It is clearly the case that a decision by the Minister under section 19, following an inquiry as there provided for, is not a determination of rights by an independent and impartial tribunal.

30. Further, the Human Right Council has adopted a number of Resolutions that address the right to a nationality and prohibition of the arbitrary deprivation of nationality.[25] The most recent - Resolution 32/5 entitled *"Human Rights and the arbitrary deprivation of nationality*" (2016) states at paras. 11-16:

[25] See Resolution 7/10 (2008), Resolution 10/13 (2009), Resolution 13/2 (2010), Resolution 20/4 on the Right to a Nationality: Women and Children (2012), Resolution 20/5 (2012), Resolution 26/14 (2014) Resolution 32/5 (2016).

"11. Reiterates that the right to identity is intimately linked to the right of nationality;

12. Urges States to register every child's birth, regardless of the child's or the child's parents' nationality, statelessness or legal status, and to ensure that proof of identity is available to all children;

13. Calls upon States to observe minimum procedural standards in order to ensure that decisions concerning the acquisition, deprivation or change of nationality do not contain any element of arbitrariness and are subject to review, in conformity with their international human rights obligations;

14. Urges States in regulating loss and deprivation of nationality to ensure incorporation in their domestic law of safeguards to prevent statelessness;

15. Calls upon States to ensure that such safeguards are implemented and access of persons arbitrarily deprived of their nationality to effective remedies, including, but not limited to, restoration of nationality, is provided;

16. Also calls upon States to consider whether loss or deprivation of nationality is proportionate to the interest to be protected by the loss or deprivation, including in the light of the severe impact of statelessness, and to consider alternative measures that could be adopted;" (Emphasis added)

31. The UN Secretary General of the Human Rights Council has also issued a number of reports on human rights and arbitrary deprivation of nationality.[26] Of particular note, the UN Secretary General Report dated 19 December 2011 and entitled "*Human Rights and Arbitrary Deprivation of Nationality"*[27] analyses the impact of arbitrary deprivation of nationality on the enjoyment of human rights, including political rights, right to freedom of movement, right to liberty, right to an effective remedy, the right to work, the right to social security, access to health care and housing. This Report notes

[26] See Report of the Secretary-General on human rights and arbitrary deprivation of nationality - A/HRC/10/34, Report of the Secretary-General on human rights and arbitrary deprivation of nationality - A/HRC/13/34, Report of the Secretary-General on human rights and arbitrary deprivation of nationality - A/HRC/19/43, Report on discrimination against women on nationality-related matters, including the impact on children - A/HRC/23/23, Report of the Secretary-General on human rights and arbitrary deprivation of nationality - A/HRC/25/28, Report of the Secretary-General on the impact of the arbitrary deprivation of nationality - A/HRC/31/29.

[27] A/HRC/19/43.

that arbitrary deprivation of citizenship places affected persons in a more disadvantaged situation concerning the enjoyment of their human rights not only because some of these rights may be subjected to lawful limitations that otherwise would not apply, but also because these persons are placed in a situation of increased vulnerability to human rights violations.

32. A further Report of the UN Secretary-General on this issue, which examines the legislative and administrative measures which may lead to the deprivation of nationality[28] identifies the effect of loss or deprivation of nationality as follows:

> *23. Loss or deprivation of nationality renders the person concerned an alien with respect to their former State of nationality, causing them to forfeit the rights they held as nationals. This may cause cumulative human rights violations, which can be especially severe if the effect of loss or deprivation of nationality is statelessness.47 This section provides an overview of a number of other issues relating to the effect and consequences of denationalization.*

The Report also flags other potential effects of loss of nationality, including the impact on nationality of dependents, stateless persons, and of specific note "expulsion";

> *Expulsion*
>
> *26. One of the core functions of nationality under international law is that it provides the holder with the right to enter and reside in his or her State. Without this legal bond, the person concerned — as an alien — becomes subject to immigration law.52 In rendering a national an alien, loss or deprivation of nationality "make[s] him or her subject to expulsion from the State whose nationality he or she possessed until that time".53 Nevertheless, the International Law Commission has suggested that "a State shall not make its national an alien by deprivation of nationality for the sole purpose of expelling him or her".54 According to the Human Rights Committee in its general comment on article 12 of the International Covenant on Civil and Political Rights, reference to a person's right to enter "his own country" in article 12 is*

[28] General Assembly 19 December 2013 A/HRC/25/28.

broader than the concept of "country of nationality".55 Where "nationals of a country […] have been stripped of their nationality in violation of international law",56 a person whose nationality has been withdrawn will continue to hold the right to enter and reside in that country, as his or her "own country" under international law. Equally, the person may continue to enjoy their private or family life in that country, which can also form a barrier to expulsion."

33. The clear nexus between the loss of Irish citizenship and the status of citizen of the European Union, means that the lawfulness of the process of revocation also falls to be scrutinised by reference to the provisions of EU law and more specifically Articles 2, 6 and 19 of the TEU and Article 47 of the Charter which provide for the effective judicial protection of fundamental rights in fields covered by Union law. EU law recognises that protection of nationality from loss is more rigorous than protection of the acquisition of nationality.[29] Partly on this basis, the Court of Justice has concluded that when revoking nationality, the Member State impacts the individual EU citizenship, thus EU law may limit the state's freedom of action. The principle of effective judicial protection of individuals' rights under EU law, referred to in Article 19 of the TEU and Article 47 of the Charter requires a sufficient level of procedural safeguards.[30] In particular, as confirmed in *El Hassani*:

> "*...an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must, in particular, <u>have jurisdiction to consider all the relevant issues</u>*."[31] <u>(Emphasis added)</u>

34. It is submitted that the procedures set out in section 19 do not meet the requisite threshold either under the Constitution and/or under the ECHR and/or under EU law, for the following reasons:

[29] See *Rottman v. Freistaat Bayern* [2010] 1-1449
[30] *Tall v Centre public d'action sociale de Huy (C-239/14) EU:C:2015:824* at [51] and the case law cited.
[31] *El Hassani v Minister Spraw Zagranicznych* (Case C-403/16) [2018] 2 C.M.L.R. 19. para 39, applying *Berlioz Investment Fund SA v Director of the Direct Taxation Administration,* Luxembourg (C-682/15) EU:C:2017:373; [2018] 1 C.M.L.R. 1, para 55.

a. Firstly, the Committee of Inquiry appointed in the event an inquiry is appointed by the Minister. The Minister therefore has ultimate control over its composition. This breaches the principle of *nemo iudex in causa sua* or the requirement for independence in circumstances where a reasonable apprehension of bias may arise as the appointment of the Committee comes from the Minister proposing the revocation.

b. Secondly, the actual procedures employed by the Committee are not specified in the legislation, and the principle of *audi alteram partem* is breached as a result. Certainly, the extent to which the person the subject of the proposed revocation may be able to engage with the Committee and put forward their case is unclear on the face of the legislation.

c. Thirdly, the result of the Committee of Inquiry is a report that goes to the Minister. The Minister is the decision-maker, and in order for the fair procedure rights of the person impacted by the decision to be vindicated, they must have the opportunity of understanding the Minister's view and putting forward their own arguments for consideration. While it must be assumed that the Minister will consider the contents of the report received, ultimately that report will filter that person's views, and potentially reach conclusions on them which may be relied on by the Minister. It is inappropriate that the person impacted does not have the opportunity directly to influence the decision-maker.

d. Fourthly, as the decision maker is the Minister, the determination of rights is not a determination by an independent tribunal. The person who provides the decision to make a proposal to revoke will decide on the ultimate reaffirming or refusal to reaffirm that proposal after the Committee have reported their findings. Thus, we submit, the situation is analogous to cases where the same party has acted as prosecutor and judge.[32]

[32] In *Heneghan v Western Regional Fisheries Board* [1986] ILRM 225, Carroll J found there was a lack of natural justice when the prosecution in the dismissal, in addition to participating in gathering evidence, also acted as a judge on the allegations. Similarly, in *O'Donoghue v Veterinary Council*

35. Having regard to the foregoing, it is submitted that the procedures set out in section 19 are not sufficient to vindicate the rights of a person in respect of whom a revocation is proposed, having regard to the potentially significant implications that the revocation will have for their rights. Accordingly, it is respectfully submitted that revocation of citizenship engages and/or interferes with a person's constitutional and/or ECHR rights as protected by the ECHR Act 2003 and/or Articles 2, 6 and 19 of the TEU and Article 47 of the Charter of Fundamental Rights and Freedoms of the EU.

B. Whether judicial review provides for a sufficient procedural safeguard in respect of a decision to revoke a certificate of naturalisation.

36. In *Donegan v. Dublin City Council & Ors.* [2012] IESC 18, this Court found a summary procedure under section 62 of the Housing Act, 1966 incompatible with the requirements of Article 8 of the ECHR, notwithstanding the existence of judicial review as a remedy. The Court (McKechnie J.) specifically addressed the question of whether the procedural safeguards required under the ECHR where a person's fundamental rights were at stake could be met by access to a remedy in judicial review proceedings in the following terms:

> *"128. When considering the adequacy of judicial review as a sufficient safeguard in this context it must therefore be done with reference to the s. 62 application; the question is whether judicial review will provide a sufficient safeguard against an interference, by virtue of the provisions of that section. In this regard it is patently clear that it could not. As already noted, the function carried out by the District Court is merely to ensure that the requirements of subs (1) of the section have been established, and if so, to issue an order under that section. Any judicial review of this decision, save possibly where the District Court Judge patently failed to comply with the section itself, would be bound to fail.*

[1975] IR 398, the decision to suspend a veterinary surgeon was overturned because one of the members of the council who voted on the status of the surgeon had his name used as a prosecutor in the inquiry preceding the vote. This was held to be a violation of *nemo iudex causa sua*,

Certainly the court, on judicial review, could not enter into an assessment of the facts or personal circumstances behind the application, such matters are not even within the consideration of the District Court Judge. Judicial review of a s. 62 application could in no way be capable of resolving a conflict of fact between the Council and a person subject to the application.

129. Therefore, I do not believe that the remedy of judicial review gives any comfort in the context of the State's obligation to show respect for the right to one's home within Article 8 of the Convention……

131. Thus although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact."

37. It is respectfully submitted that since the decision of this Court in *Donegan*, it is clear that the right to a hearing before an independent arbiter of fact cannot be substituted by access to a remedy in judicial review and the absence of sufficient procedural safeguards where there is an interference with fundamental rights, such as apparent in this case, is incompatible with the ECHR. True it has been held in a number of other cases that judicial review may constitute an effective remedy (see eg *Efe v Minister for Justice*[33], *ISOF v Minister for Justice*[34], *NM v Minister for Justice*[35] and *Balc v Minister for Justice*[36]) and it is submitted that this question is ultimately context specific, and may depend on the particular factual matrix in a particular case. This is evident from the reasoning in *Donegan v Dublin City Council* where this Court considered that judicial review was not an effective remedy for the purposes of the applicant's Article 8 rights in the context of section 62 of the Housing Act 1966, as follows (at para.143):

"(6) In determining whether an interference is Article 8 compliant, the regulatory framework within which the measure has been established and operates will be assessed. Questions such as, (i) is the framework procedure

[33] [2011] IEHC 214, [2011] 2 IR 798.
[34] [2010] IEHC 457.
[35] [2016] IECA 217.
[36] [2016] IEHC 47.

sufficient to afford true respect to the interests safeguarded by the Article, (ii) is the decision making process fair in such a way as to respect that right, (iii) has the affected person an opportunity to have any relevant and weighty arguable issues tested before an independent tribunal and, (iv) has that person an opportunity to have such an issue considered against the measure, to determine its proportionality.

(7) Where any one or more of these requirements, when considered collectively and having regard to the margin of appreciation, is absent, it may be considered that the safeguards necessarily attendant on Article 8 for the purposes of its vindication have not been satisfied. A violation in such circumstances may follow.

(8) The suggested procedural safeguard as applying in this jurisdiction is the remedy of judicial review; as above-established, s. 62(3) cannot be relied upon in this regard. Whilst, in a great number of cases judicial review will be a sufficient and appropriate remedy, by which issues between public landlords and their tenants, arising out of that relationship, can be resolved, there will undoubtedly be some rare cases in which such remedy will not be suitable. This results from the nature and scope of judicial review and, in particular, from the limitation of its operation relative to the factual dispute."

38. When one considers the context of section 19 of the 1956 Act, however, the lack of procedural safeguards within the procedure there prescribed is such that on the approach developed in *Donegan* by this Court, one must conclude that judicial review would not constitute an effective remedy. The Court in judicial review proceedings cannot become an arbiter of contested facts such as may arise in the section 19 process.

39. The UN Secretary General Report referred to above[37] also considers the procedural safeguards and the right to an effective remedy:

[37] General Assembly 19 December 2013 A/HRC/25/28.

"Due process considerations

31. To ensure that nationality regulations are not applied arbitrarily and relevant safeguards against statelessness are implemented effectively, States should ensure that adequate procedural standards are in place. In particular, decisions relating to nationality should be "issued in writing and open to effective administrative or judicial review".74 International law thus obliges States to provide for an opportunity for the meaningful review of nationality decisions, including on substantive issues.75

32. The practice of States varies on this point. Some explicitly safeguard the right to appeal any decision on nationality.76 Other States provide for an appeal only with regard to certain nationality decisions.77 Others deem all nationality decisions to be the exclusive competence of the executive and not subject to review.78 The latter approach raises due process concerns as this leaves people more vulnerable to an abusive application of the law.

…

34. In addition to providing for the possibility to appeal and related due process guarantees, States should ensure that there is an effective remedy available where a decision on nationality is found to be unlawful or arbitrary. This must include, but is not necessarily limited to, the possibility of restoration of nationality.79 In some States, the review body or court has the authority to directly confer, reinstate or confirm nationality.80 In others, the ruling in appeal does not have direct effect and is, rather, an instruction to the competent authority in nationality matters to reconsider its position. In such situations, action by the competent authority is critical to the fulfilment of the effective remedy.81 Furthermore, States should provide reparations, as appropriate, for any related rights violations suffered.82" (Emphasis added)

40. In the Report, the UN Secretary General sets out the following conclusions and recommendations:

"38. The right of every individual to a nationality is clearly regulated in

international human rights law, which provides for the explicit recognition of that right. International human rights law also explicitly provides for the prohibition of arbitrary deprivation of nationality.

…

40. Even where loss or deprivation of nationality does not lead to statelessness, States must weigh the consequences of loss or deprivation of nationality against the interest that it is seeking to protect, and consider alternative measures that could be imposed. Under international law, loss or deprivation of nationality that does not serve a legitimate aim, or is not proportionate, is arbitrary and therefore prohibited.

…

44. Decisions on nationality must be open to an effective judicial review. In the context of loss or deprivation of nationality, a person should continue to be considered as a national during the appeals procedure."
(Emphasis added)

41. It is submitted that when considering whether judicial review provides a sufficient procedural safeguard in respect of a decision to revoke a certificate of naturalisation, the impact of EU law is particularly instructive. In Case C-135/08 *Rottman v Freistaat Bayern*[38] the Court of Justice held (at para.42):

"The situation of a citizen of the European Union who is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC (citizenship) and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law." (Emphasis added)

42. The Court of Justice further held at para.45:

[38] [2010] ECR I-01449.

"Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law (Micheletti and Others, paragraph 10; Mesbah, paragraph 29; Case C-192/99 Kaur [2001] ECR I-1237, paragraph 19; and Zhu and Chen, paragraph 37)." (Emphasis added)

43. The Court of Justice acknowledged (at para.51) that it is not contrary to EU law for a Member State to revoke a grant of citizenship by naturalisation where the said grant was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality. The Court went on at paras 54-56 to state:

"A decision withdrawing naturalisation because of deception corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality. That consideration on the legitimacy, in principle, of a decision withdrawing naturalisation on account of deception remains, in theory, valid when the consequence of that withdrawal is that the person in question loses, in addition to the nationality of the Member State of naturalisation, citizenship of the Union.

It is, however, for the national court to ascertain whether the withdrawal decision observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examining the proportionality of the decision in the light of national law. Having regard to the importance which primary law attaches to the status of citizen of the European Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union, and to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality." (Emphasis added)

44. More recently in Case C-221/17 *Tjebbes v Minister van Buitenlandse Zaken*[39] the Court of Justice noted at paras 30-32:

> *"…[T]he Court has already held that, while it is for each Member State, having due regard to international law, to lay down the conditions for acquisition and loss of nationality, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by EU law, the national rules concerned must have due regard to the latter (judgment of 2 March 2010, Rottmann, C-135/08, EU:C:2010:104, paragraphs 39 and 41 and the case-law cited).*
> *Article 20 TFEU confers on every individual who is a national of a Member State citizenship of the Union, which, according to settled case-law, is intended to be the fundamental status of nationals of the Member States (judgment of 8 May 2018, K.A. and Others (Family reunification in Belgium), C 82/16, EU:C:2018:308, paragraph 47 and the case-law cited).*
> *Accordingly, the situation of citizens of the Union who, like the applicants in the main proceedings, are nationals of one Member State only and who, by losing that nationality, are faced with losing the status conferred by Article 20 TFEU and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of EU law. Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to EU law (judgment of 2 March 2010, Rottmann, C-135/08, EU:C:2010:104, paragraphs 42 and 45)."* (Emphasis added)

45. The Court of Justice went on at para.40 to note:

> *"However, it is for the competent national authorities and the national courts to determine whether the loss of the nationality of the Member State concerned, when it entails the loss of citizenship of the Union and the rights attaching thereto, has due regard to the principle of proportionality so far as concerns the consequences of that loss for the situation of the person concerned and, if*

[39] ECLI:EU:C:2019:189.

relevant, for that of the members of his or her family, from the point of view of EU law (see, to that effect, judgment of 2 March 2010, Rottmann, C-135/08, EU:C:2010:104, paragraphs 55 and 56).” (Emphasis added)

46. The Court of Justice concluded at para.42:

“It follows that…in situations…in which the loss of the nationality of a Member State arises by operation of law and entails the loss of citizenship of the Union, the competent national authorities and courts must be in a position to examine, as an ancillary issue, the consequences of the loss of that nationality…

…

As part of that examination of proportionality, it is, in particular, for the competent national authorities and, where appropriate, for the national courts to ensure that the loss of nationality is consistent with the fundamental rights guaranteed by the Charter, the observance of which the Court ensures, and specifically the right to respect for family life as stated in Article 7 of the Charter, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of the Charter (judgment of 10 May 2017, Chavez-Vilchez and Others, C-133/15, EU:C:2017:354, paragraph 70).”

(Emphasis added)

47. It is submitted that recent decisions of the Court of Justice demonstrate that reading Article 47 in tandem with Article 19(1), second sub-paragraph, the TEU has the potential for far reaching implications on the right to an effective remedy. Article 19(1), second sub-para, states that:

“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law” (Emphasis added)

48. In *Case C-619/18 Commission v Poland* Court of Justice judgment of 24 June 2019 concerning changes to the Polish Supreme Court, the Court held:

> *"47. In that context, Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice (see, to that effect, judgments of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 32, and of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 50 and the case-law cited).*
>
> *48. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields (judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 34 and the case-law cited).*
>
> *49. The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 35 and the case-law cited).*
>
> *50. As regards the material scope of the second subparagraph of Article 19(1) TEU, that provision moreover refers to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter (judgment of 27 February*

2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 29).''[40] (Emphasis added)

49. Article 19(1) TEU refers to *''the fields covered by Union law*, irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter.

50. It is accordingly submitted that in circumstances where *Rottmann* and *Tjebbes* held that revocation of citizenship is within the scope of EU law, *per Commission v Poland*, the responsibility for ensuring the full application of EU law and judicial protection of the rights of individuals falls on national courts and tribunals and to the Court of Justice. The latter court's approach to the requirements of proportionality requires a determination of the imperative requirements in the general interest, the suitability and necessity of the measure. Purported justifications are expected to be supported by evidence.[41]

51. In those circumstances it is respectfully submitted that the procedure set out in section 19 of the 1956 Act is not a sufficient procedural safeguard, and the availability of judicial review is not sufficient to cure this deficiency as a court in judicial review proceedings is not in a position to determine conflicts of fact or to substitute its decision for that of the Minister having regard to the necessity for the measure or the imperatives of the public interest when weighed against the impact on the fundamental rights (including rights under EU law) of the appellant.

IV. CONCLUSION

52. For all of the reasons set out, it is submitted that the Court should grant a declaration

[40] See also *Commission v Poland* (changes to the Ordinary Court) (Case C-192/18) ECLI:EU:C:2019:924, *Associação Sindical dos Juízes Portugueses* (reduction in Portuguese judiciary's pay) (Case C-64/16) ECLI:EU:C:2018:117 and *LM* (execution of European Arrest Warrants) (Case C-216/18 PPU) ECLI:EU:C:2018:586.

[41] For example, the Court of Justice's recent ruling in *Léger* (C-528/13).on the proportionality of measures excluding gay men from blood donation clearly demonstrates that EU law requires a national court reviewing proportionality to have regard to detailed and specific evidence demonstrating the necessity of the impugned measures in a manner which results in the Court making a determination on proportionality.

that section 19 of the 1956 Act is repugnant to the Constitution and/ or a declaration pursuant to section 5 of the ECHR Act 2003 that section 19 is incompatible with Articles 6 and, or 8 and, or 13 of ECHR and/or does not comply with EU law.

Siobhán Phelan SC

Patricia Brazil BL

7th February 2020

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