Recent Developments in Citizenship Law

Introduction

Irish nationality law is contained in the provisions of the *Irish Nationality and Citizenship Acts 1956 to 2004* and in the relevant provisions of the Irish Constitution. A person may be an Irish citizen through birth, descent, marriage to an Irish citizen or through naturalisation. The law grants citizenship to individuals born in Northern Ireland under the same conditions as those born in the Republic of Ireland.

Law

Revocation of certificates of naturalisation.

19.(1) The Minister may revoke a certificate of naturalisation if he is satisfied—
(a) that the issue of the certificate was procured by fraud, misrepresentation whether innocent or fraudulent, or concealment of material facts or circumstances, or

(b) that the person to whom it was granted has, by any overt act, shown himself to have failed in his duty of fidelity to the nation and loyalty to the State, or

(c) 45 that (except in the case of a certificate of naturalisation which is issued to a person of Irish descent or associations) the person to whom it is granted has been ordinarily resident outside the State or, in the case of an application for a certificate of naturalisation granted under section 15A, resident outside the island of Ireland (otherwise than in the public service) for a continuous period of seven years and without reasonable excuse has not during that period registered annually in the prescribed manner his name and a declaration of his intention to retain Irish citizenship with an Irish diplomatic mission or consular office or with the Minister, or

(d) that the person to whom it is granted is also, under the law of a country at war with the State, a citizen of that country, or

(e) that the person to whom it is granted has by any voluntary 46act, other than marriage or entry into a civil partnership, acquired another citizenship.

(2) 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 the revocation.

(3) 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.

(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.

(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.

(6) Notice of the revocation of a certificate of naturalisation shall be published in Iris Oifigiúil.

***Damache v The Minister for Justice* [2020] IESC 63**

The Supreme Court earlier this year in the case of *Damache v The Minister for Justice* [2020] IESC 63 ruled that the law governing the procedure under which Irish citizenship can be revoked is unconstitutional.

The five-judge court ruled the procedure to revoke citizenship set out under the Irish Nationality and Citizenship Act 1956, specifically Section 19 of the Act, is unconstitutional on natural justice grounds.

In the High Court where the Appellant was unsuccessful, the Trial Judge, Mr. Justice Humphries had indicated at Paragraph 34:-

> *"The control of the entry and presence, and therefore of removal of non-Irish Nationals is an aspect of the executive power of the State."*

He made reference to Laurentiu –v- Minister for Justice [2016] 2.I.R. 403 which emphasised that the courts have recognised that the power to control the entry and residence of non-nationals in the State is an aspect of the executive power of the State.

Under section 19, the Minister for Justice initiates the revocation procedure, ultimately makes the decision whether to revoke or not and is not bound by findings of a three-person committee of inquiry appointed by the Minister, the court noted.

This process did not meet the high standards of natural justice applicable to a person facing such severe consequences as loss of citizenship and is therefore constitutionally invalid, it ruled.

The court made the finding of unconstitutionality when granting an appeal by Ali Damache, a native of Algeria who became a naturalised Irish citizen in 2008, over a notice of intention to revoke his Irish citizenship.

The October 2018 notice served by the Minister on Mr Damache outlined intent to revoke his Irish citizenship on the basis of having shown disloyalty to the State.

The appeal centred on the process around citizenship revocation, procedural safeguards and consequences of loss of citizenship on other rights.

The Supreme Court rejected the appellant's first argument, finding that the revocation of citizenship was an executive function, and not a judicial function.

The Court then proceeded to find in favour of the appellant's second point, holding that the fact the executive both initiated the proposal to revoke and made the decision to confirm or dismiss it, was contrary to fair procedures.

The Supreme Court ruled that the loss of Citizenship is a matter of *"grave significance"* and ruled that the process for revocation must be robust.

In delivering the Supreme Court ruling Ms. Justice Dunne set out that:

"Given the importance of the status of citizenship to an individual, I think it is quite clear that the process by which citizenship may be lost must be robust and at the very least …must observe minimum procedural standards in order to comply with the State's human rights obligations".

While the Court held that there was nothing to suggest that the members of the Committee of Inquiry were anything but independent in the exercise of their functions, it went on to find that the necessary procedural safeguards were not in place. Ms. Justice Dunne concluded that Section 19 is unconstitutional.

Ms Justice Dunne said an individual facing the prospect of revocation of citizenship must be entitled to a process which provides minimum procedural safeguards, including an independent and impartial decision-maker.

She noted, before a certificate of naturalisation can be revoked, the Minister shall give notice to the affected person who can apply for an inquiry as to the reasons for revocation. Any such application is then referred to a committee of inquiry appointed by the minister, consisting of a chairperson with judicial experience and other persons as the minister may think fit.

The committee comprises two lawyers and a former member of the Dáil.

The judge said she was satisfied there was nothing to demonstrate the committee is anything but independent in the exercise of their functions and she would not find a breach of natural justice by reason of a lack of independence on its part.

However, the issue with section 19 comes from the fact the process provided for does not meet the high standards of natural justice applicable to a person facing such severe consequences as are at issue in this case, she said.

> *"An individual facing the prospect of revocation of a certificate of naturalisation must be entitled to a process which provides minimum procedural safeguards, including an independent and impartial decision-maker".*

While the committee of inquiry is independent, its functions are limited, its findings are not binding on the Minister and there is no right of appeal from the Minister's decision, she noted.

This resulted in a situation where the same person who initiated the revocation process, and whose representatives make the case for revocation before the committee, ultimately makes the decision to revoke.

On that basis, she concluded Section 19 does not meet the high standards of natural justice required and is therefore invalid having regard to the provisions of the Constitution.

In delivering the Judgment of the Supreme Court, Ms. Justice Dunne references *Laurentiu* and the case of *Sivsivadze v. Minister for Justice and Equality* [2015] IESC 53, [2016] 2 I.R. 403 .Paragraph 37.

In discussing those cases, she states at Paragraph 36

> *"It can be seen therefore that from an historical point of view it has long been the function of the executive to decide on issues of naturalisation and it has never been the role of the courts to make such decisions. The decision at issue in this case, is of course not a decision to grant a certificate of naturalisation but rather the question of revocation of such a certificate. However, as a matter of logic I cannot see how that decision of itself is something outside the function of the executive or, in this case, the Minister to whom the function has been delegated by legislation."*

This can be seen in the context of the debate as to whether the revocation of citizenship was part of the administration of justice or otherwise. The court held that it was not part of the administration of justice and it is interesting to note that while the court enquired as to whether there was much information or evidence of precedents in other jurisdictions regarding revocation of citizenship, very little was available.

The court then went on to make reference to the Habte Judgment which I have dealt with earlier in the paper. It is interesting to note that at Paragraph 129 of the Judgment, the view of Mr. Justice Murray delivering the Judgment that the process of revocation is the exercise of an executive function.

While the court accepted that there was a Committee, the fact that the Minister was not bound by the Committee and ultimately made the decision, was the key aspect of the success of Mr. Damache's claim.

There is an interesting historical parallel with the United Kingdom and in particular the fact that there was an equivalent to Section 19 until 2002. The court believed that to be noteworthy. (See Para 80**)** However, despite that, since 1960 in the UK the practice had developed whereby the views of the Committee concerned were considered to be binding. Ultimately, the decision was made on the basis that the Minister having proposed the revocation is the person who makes the final decision on the revocation of the Certificate.

The Appellant's case to a large extent depended on a Canadian Federal Case of *Hassouna v. Minister for Citizenship* [2017] FC 473. It would have to be said that the Supreme Court appears to have taken on board much of the views in that particular case in respect of the grave consequences for a person whose citizenship is revoked. Much of the argument centred on the issue that if there is a significant impact on your rights, that would lead to the decision in question being one that could be classified as administration of justice. While the court rejected that argument, they did acknowledge it was a key factor in an analysis of fair procedures and the more significant the impact of a particular decision on a person's rights, the more robust the procedural safeguards must be.

The court went on to place much reliance on the decision of *A.P. v. Minister for Justice and Equality* [2019] IESC 47, **(**See Para 93 of Damache**)** citing Mr. Justice O' Donnell stated as follows:-

> "*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*."

In concluding and determining that there had been a breach of fair procedures, the Supreme Court went on to consider the case of Habte –v- Minister for Justice [2020] IECA 22. In that case the Court of Appeal had accepted that there was power to cancel or amend a Certificate of Naturalisation and proceeded to consider whether in the circumstances of that case the Minister was entitled to embark on the Section 19 procedure. The court went on to set out an overview of the Section 19 procedure. However, as is noted, much of the argument focused on the contention of Ms. Habte that the proposition put forward in accordance with Section 19.2 amounted to a decision which itself resulted in revocation. The Court of Appeal rejected that suggestion.

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> *"The Supreme Court pointed out it did not address the question of fair procedures following the commencement of the inquiry process and therefore the conclusion in Habte that Section 19 was not invalid having regard to the provisions of the Constitution was not of assistance."*

I would respectfully suggest that that it is hard to reconcile the two decisions simply based on the stage of the process. While the court in this particular instance accepted that the prematurity argument should fail because of the nature of the rights affecting the Appellant, it seems to me that there may have been a desire not to engage with other stages of the process but this may be litigated again..

Iurescu (A Minor) v The Minister for Justice and Equality **[2019] IEHC 535**

Iurescu is an interesting case. It is an application by a child quashing a decision of the Minister to refuse her a Certificate of Naturalisation. It arose against a background where the father had applied for Naturalisation as an Irish Citizen in 2014. While his application was pending, he made a separate application on behalf of the minor. He made a Statutory Declaration and as is common in all these cases he was asked about convictions in the State and confirmed he had a Traffic Offence, Public Order Offences and had been convicted for assault. He was refused a Certificate of Naturalisation and the separate application on behalf of his child was also refused.

In the High Court Mr. Justice Keane reviewed the provisions of Section 15 of the Act of 1956 and the case turned on the proper interpretation of Section 15.3 of the Act of 1956 which states:-

> "*In this Section, applicant means, in relation to an applicant for a Certificate of Naturalisation by a minor, the parent or guardian of, or person who is in loco parentis, to the minor."*

Mr. Justice Keane then went on to look at the history of citizenship and the various amendments to the 1956 Act including the 2004 Act. The argument made in the case by the Applicant was that she was a separate applicant who was entitled to apply for naturalisation. The Minister's position was that it is the parent or guardian who must meet the conditions for naturalisation. Ms. Justice Keane comments in the Judgment on various absurdities, namely, if one parent applied and they are of good character, then the child gets citizenship but in the alternative if the other parent is of bad character they don't. He went on then to accept that the Minister's submission as to how it could be established whether the child could have formed a character, good or bad, could have a meaningful intention of good faith to reside in the State, and make the meaningful declaration had some force.

Mr. Justice Keane at Paragraph 50 stated as follows

> *"The interpretation of s. 15(3) that I believe to be at once more consistent with justice and with the purpose of the Act of 1956 is that whereby the 'applicant' in that section in relation to an application for a certificate of naturalisation by a minor born in the State is the parent or guardian of, or person in loco parentis to, the minor, whereas the applicant who must meet the conditions of naturalisation to the satisfaction of the Minister is the minor born in the State."*

I understand that this Judgment was not appealed. I also understand however that it has given rise to some practical difficult problems.

It is difficult to see how the definition can be split in this way and like many citizenship provisions in outdated legislation it requires revisiting.

Roderick Jones Case

High Court

***Jones v Minister for Justice and Equality* [2019] IEHC 519**

In finding against Mr Jones, Mr Justice Barrett said the Minister's discretionary practice of allowing applicants six weeks out of the country, for holiday or other reasons, and more time in exceptional circumstances, is not permitted by law.

He noted section 15.1 provides, on receipt of an application for a certificate of naturalisation, the Minister "may, in his absolute discretion, grant the application if satisfied that the applicant has had a period of one year's continuous residence in the State immediately before the date of the application".

The judge found section 15.1 allows the Minister no discretion in relation to the "continuous" residence requirement. He said, according to the Oxford Dictionary of Current English, "continuous" means "unbroken, uninterrupted, connected throughout in space or time".

While disagreeing with how the Minister concluded Mr Jones is ineligible at this time for a certificate of naturalisation under section 15.1, the refusal conclusion was still correct, he found.

There was thus no point in granting Mr Jones the reliefs sought because of the court's interpretation of the word "continuous" in section 15.1.

The judge said his decision "might seem unfair" in a world where many people travel abroad for work and take foreign breaks more than once a year but it is what the relevant law requires. The cure for any such unfairness "lies in the gift of the legislature", he added.

Court of Appeal

***Jones v Minister for Justice and Equality* [2019] IECA 285;**

The court overturned the continuous residency finding of the High Court requiring a person's physical presence in the state, allowing for no absences whatsoever, in the 365-day period prior to an application.

The court also found that the policy of the Minister in allowing absences from the state for work, and other reasons, and more time in exceptional circumstances, was not a rigid or inflexible policy and that the policy was reasonable.

Looking at the specific findings regarding the unbroken residence in the previous 365 day period, the Court of Appeal ruled as follows:

1. *That the High Court judge erred in law in his interpretation of the term "continuous residence" provided in section 15(1)(c) of the 1956 Act. It found that the construction is unworkable, over unworkable, overly literal, unduly rigid and gives rise to an absurdity. "Continuous residence" within the meaning of the sub-section does not require uninterrupted presence in the State throughout the entirety of the relevant year nor does it impose a complete prohibition on extra-territorial travel as the High Court suggests.*

2. *That such an approach creates an anomaly which defeats one of the fundamental purposed of the legislation by introducing a significant obstacle to compliance with one of the conditions for eligibility to apply for naturalisation which most applicants would find impossible to meet.*

3. *The construction accorded to the relevant part of s. 15(1) (c) by the High Court have rise to a clear absurdity so as to engage s. 5(1)(b) of the Interpretation Act 2005, allowing an objective assessment of the "plain intention" of the provision.*

4. *The term "continuous residence" is wholly distinct and separate from the concept of "ordinary residence" or "residence" per se. The term of words ought to be construed harmoniously. The words "continuous residence" in the context in which they appear in s. 15(1)(c) (first part) do not impose an obligation on an applicant that he be wholly precluded from leaving the jurisdiction at any time during the relevant year.*

5. *The task of ascribing ordinary meaning to the words "continuous residence" requires that they be construed harmoniously. Contrary to the contentions advanced on behalf of the appellant to the effect that the Minister should merely have examined whether the appellant was continuously resident in the State for the previous year "in the sense of continuously having his home here and not being resident elsewhere" as meeting the test of "continuous residence" such an approach does not withstand scrutiny. The concepts of "residence" and "ordinary residence" are*

materially different from the concept of "continuous residence". Such an approach would disproportionately elide the weight to be attached to "continuous" and render that word nugatory – a word which does not appear in the second part of s. 15(1) (c).

6. *In ascertaining the plain intention of the Oireachtas for the purposes of section 5(1)(b) of the Interpretation Act 2005 with respect to the words "one year's continuous residence" it is to be inferred that the legislature attached significant importance to physical presence within the State during the relevant year.*

Six Weeks Policy

The court found that the Minister is permitted to operate the six weeks absence policy and ruled specifically as follows:

1. *The Minister's approach to the construction of "one year's continuous residence" in the first part of s.15(1)(c) is to operate a clearly communicated practice or policy of allowing Applicants six weeks absence from the state, for work and other reasons, and more time in exceptional circumstances. An Applicant must otherwise generally be physically present in the State during the particular year and an application may be refused if there are significant absences.*

2. *The Minister has not adopted a rigid or inflexible policy in construing compliance with the first part of s.15(l)(c). It is apparent that the objective of the Minister is to adopt a purposive, reasonable and pragmatic approach to the operation of that part of the sub-section. It is to be inferred from the criteria referenced in the decision sought to be impugned that a reasonable level of absences in connection with an applicant's employment or otherwise is not inconsistent with "continuous residence in the State" during the relevant one year.*

3. *The non-statutory rule or policy operated by the Minister whereby the requirement in the first part of s.15(1)(c) of "one year's continuous residence in the State immediately before the date of his*

application" could not generally be satisfied in circumstances where the applicant is absent from the State for in excess of six weeks during the relevant year immediately prior to the application in the absence of wholly exceptional circumstances does not amount to a fettering of discretion. Neither does it amount to the imposition of an extra-statutory barrier to naturalisation nor is it unlawful.

4. *The ministerial approach does not fetter discretion but rather facilitates flexibility, clarity and certainty in the operation of the first limb of the sub-section and assists applicants in establishing with certainty how the criterion of "one year's continuous residence in the State" is to be satisfied for the purposes of eligibility to apply for a Certificate of Naturalisation. The approach is sensible and is within the terms of the legislation and is consonant with the public good having regard to the nature of the decision in question and in particular in circumstances where it pertains to what has been described in the jurisprudence as "the purely gratuitous conferring of a privilege in exercise of the sovereign authority of the State.*

The court concluded that the approach taken in the case of the Applicant himself was "reasonable" and that the Minister for Justice was correct in finding that the Applicant did not satisfy the continuous residency requirement. They found the fact that most of the Applicants absences from the state were not work related was "material" and thereof the Ministers Policy is not unlawful.

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