



THE SUPREME COURT

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

**Clarke C.J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.**

BETWEEN:

ALI CHARAF DAMACHE

APPELLANT

AND

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

RESPONDENTS

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

Judgment of Ms. Justice Dunne delivered the 10th day of February 2021

Background

1. This Court delivered judgment on 14 October 2020 on foot of proceedings which concerned the provisions of s.19 of the Irish Nationality and Citizenship Act, 1956 (hereinafter referred to as "the Act of 1956"), and the procedure provided in that section to revoke a certificate of naturalisation granted to an individual on the grounds provided for in s.19(1) of the Act of 1956.
2. In the judgment it was found that the process provided for revocation in s.19 does not provide the procedural safeguards required to meet the high standards of natural justice applicable to a person facing revocation of a certificate of naturalisation by reason of the absence of an impartial and independent decision maker.

3. Submissions were made to this Court as to the precise form of order which it was appropriate to make in the light of the judgment of the Court. Ms. Stack, S.C., on behalf of the Minister, has urged the Court not to find s.19 of the Act of 1956 to be invalid in its entirety but to find those provisions of s.19 which concern the process by which revocation takes place invalid leaving in place those provisions of the section which contain the power of revocation and certain other provisions of the section which relate to the consequences of revocation. For example, it is said that there is nothing in the judgement which would necessitate the removal of s.19(6) which relates to the publication of notice of revocation of a certificate of naturalisation in *Iris Oifigiúil*.
4. Counsel for the Minister, therefore, proposed that the provisions of s.19(1), s.19(2), subject to the severance of certain words therein, s.19(4), s.19(5) and s.19(6) need not be declared invalid. It is conceded that the entirety of s.19(3) cannot stand in the light of the Court's judgment. The words which the Minister accepts should be excised from s.19(2) are as follows:

"and the right of that person to apply to the Minister for an inquiry as to the reasons for the revocation."

The balance of s.19(2), after the deletion of those words, should read as follows:

"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."

5. The reason why the Minister accepts that the words referred to above should be excised from s.19(2) is because of the reference to a right to apply "to the Minister" in the latter part of s.19(2), and it is accepted that those words would not satisfy the requirement set out in the judgment that the process of review would be independent of the Minister.
6. Insofar as the remainder of s.19 is concerned, it is contended that it would not be necessary for this Court to declare the remaining parts of s.19 to be unconstitutional. Sections 19(1), (5) and (6) are regarded by the Minister as being necessary to be considered together, in that they are bound up with the substantive power to revoke a certificate of naturalisation, the basis upon which the power may be exercised, the effect of the exercise of the power of revocation, namely, that once the certificate of naturalisation has been revoked, the person concerned shall cease to be a citizen and, finally, the publication of notice of the revocation of the certificate.
7. Equally, it is contended that s.19(4) does not, as such, deal with revocation, but simply relates to circumstances in which a child of a person who has been granted a certificate of naturalisation under the Irish Nationality and Citizenship Act, 1935 had their name entered on the certificate of naturalisation and that entry is deemed to be a certificate of naturalisation under the Act of 1935. Clearly, the deeming provision contained in s.19(4) has nothing whatsoever to do with the process of revocation and, therefore, it is contended that it is not necessary to declare that this part of s.19 is invalid, particularly

bearing in mind that striking down this provision could have adverse effects on any such children who may have benefited from the deeming provision.

8. Finally, it is submitted on behalf of the Minister that in the event that this court was concerned about the provisions of s.19(1), (5) and (6) remaining operative without any procedural safeguards that an order of prohibition could be made pending the introduction of the procedural safeguards required by the judgment. It was envisaged on behalf of the Minister that this would be provided "*in the first instance, by way of administrative procedure which would be binding on the Minister.*"
9. Ms. McDonagh, S.C. on behalf of the appellant, contends that the entirety of s.19, apart from s.19(4), should be declared invalid. It is contended that it is necessary to strike down all the substantive provisions of s.19 which provide for revocation, and not just those sections that deal with the process of revocation. It was pointed out that to do otherwise would be to leave in place a power of revocation without any of the safeguards which the Oireachtas considered necessary when the Act was passed in 1956. She made the point that in the intervening period following the passage of the Act, our understanding and appreciation of the parameters required to ensure fair procedures has grown. Thus, it is contended that it was never the intention of the Oireachtas that the section would be operated without any safeguards, and it is contended that the Minister's approach would have that effect.
10. Counsel for the appellant said that it was unclear from the Minister's approach whether it was sought to retain the power to make revocation orders under s.19(1) only in cases where revocation is not contested, or whether it was to be retained in all cases but subject to an appeal to an independent body. Whatever the approach of the Minister may be, it was nonetheless contended that it was never the intention of the Oireachtas that the Minister could make a decision to revoke citizenship in contested cases without the input of an independent body. It is, therefore, suggested that to leave s.19(1) in place would not be in accordance with the legislative intent as appeared from the provisions of s.19 as originally enacted. It is suggested that the procedure now proposed by the Minister would be different in that the Minister would be making a decision without the input of the committee provided for in the Act. It is contended, therefore, that it is necessary for there to be consideration by the Oireachtas as to the process to replace that which has now been found to be constitutionally wanting.
11. Counsel for the appellant accepts that it is appropriate that there should be a power to revoke citizenship, and did not dispute the appropriateness of the grounds for revocation set out in s.19(1). However, it is pointed out that the power was one to be exercised by the Minister subject to the safeguards provided for in s.19. Although the power was only to be exercised in accordance with the safeguards provided for in s.19, the effect of the arguments of the Minister is that the power would remain but without any safeguards at all. This, it is contended, is not permissible, bearing in mind the intention of the Oireachtas as originally expressed in the Act. Even though the Court has found the safeguard to be insufficient, it was nonetheless provided for. Accordingly, the appellant

queries the Minister's proposals as to how the requirement identified by this Court as lacking, namely, an independent and impartial decision-maker, should be met. It is contended that contrary to the suggestion of the Minister to the effect that there would be provided, in the first instance, an administrative procedure which would be binding on the Minister, it is argued that no administrative procedure could comply with the requirements of Article 47 of the Charter and Article 6 of the ECHR, as any body set up by the Minister by way of administrative procedure would not be an impartial and independent tribunal *established by law*. (See Article 47 of the Charter).

12. Finally, it is contended that as s.19 has been found to be unconstitutional, the appellant's right not to be subjected to an unconstitutional revocation process has already been vindicated, and it is not necessary to grant an order of prohibition as proposed by the Minister.
13. Ms. Phelan, S.C. made submissions on behalf of IHREC, the *amicus curiae*. She took issue with the approach of the Minister in suggesting that only s.19(3) and part of s.19(2) should be revoked. She contended that the effect of the Minister's submission is that the power to revoke a certificate of naturalisation be left undisturbed, and that that power should exist without any statutory procedures at all in respect of which the process of revocation is conducted. She submitted 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 requirement of E.U. law. In this context, she referred to Article 47 of the Charter of Fundamental Rights which 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]

14. She takes issue with the proposal of the Minister which referred to "*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.*"
15. She submitted that such a proposal does not adequately address the findings of the Court set out in paras. 128-129 of the judgment, and further does not meet the requirements of E.U. law. It was contended that the Minister's proposal would remove the procedural safeguards controlling the power to revoke in their entirety, and that such a proposal ought not to be accepted.

16. She then made a number of submissions in relation to the issue of severability which will be considered further. She also took issue with the approach of the Minister in relation to s.19(4). She suggested that if the Minister's approach to severability was accepted and the Minister was left with a power to revoke under the provisions of s.19(1), 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. It is suggested that this was never the intention of the Oireachtas. I do not agree with this submission. Given that the effect of s.19(4) deems a child whose name is entered on a certificate of a person who had obtained a certificate of naturalisation under the Act of 1935 to have a certificate of naturalisation as a result of the entry on their parents' certificate, it is difficult to see how the revocation of the parent's certificate could have the effect contended for. This submission is at odds with the approach of the appellant who takes no issue with the proposal of the Minister that s.19(4) does not require to be struck down as a result of the judgment of this Court. I can see no basis for this argument. Section 19(4) is not in any way affected by the judgment of this Court.

Discussion

17. The starting point of any consideration of the precise form of order that is to be made as a result of the findings contained in the judgment of the Court must be Article 15.4.2° of the Constitution, which states:

"Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid."

18. It is clear, therefore, that in finding a statutory provision, or part thereof, to be unconstitutional, it may not be necessary to find all of the provision invalid - as Article 15.4.2° provides, a finding of repugnancy will lead to the offending legislation being struck down, but to the extent only of such repugnancy. In other words, a court should only strike down so much of a statutory provision as is necessary to be struck down in the light of the finding of unconstitutionality in the particular case.
19. This point was explained in the case of *Maher v. Attorney General* [1973] I.R. 140 at page 147 where Fitzgerald C.J. stated:

"The application of the doctrine of severability or separability in the judicial review of legislation has the effect that if a particular provision is held to be unconstitutional, and that provision is independent of and severable from the rest, only the offending provision will be declared invalid. The question is one of interpretation of the legislative intent. Article 15, s. 4, sub-s. 2, of the Constitution lays down that every law enacted by the Oireachtas which is in any respect repugnant to the Constitution or to any provision thereof shall, but to the extent only of such repugnancy, be invalid; therefore, there is a presumption that a statute or statutory provision is not intended to be constitutionally operative only as an entirety."

20. He continued at pp 147-148 as follows:

"But if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity. It is essentially a matter of interpreting the intention of the legislature in the light of the relevant constitutional provisions, and it must be borne in mind in all cases that Article 15, s. 2, sub-s. 1... provides that 'the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.' If, therefore, the Court were to sever part of the statutory provision as unconstitutional and seek to give validity to what is left so as to produce an effect at variance with legislative policy, the Court would be invading a domain exclusive to the legislature and thus exceeding the Court's competency. In other words, it would be seeking to correct one form of unconstitutionality by engaging in another."

21. The above passages were relied on by counsel on behalf of the Minister in making the case as to the extent to which certain provisions of s.19 could be struck down having regard to the findings of the court, but that the remaining provisions of s.19 could be severed from that which was found to be unconstitutional and left in place. Counsel on behalf of the appellant, also relying on the decision in *Maher*, contended that the test for severance could not be met in this case as *"what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently"*.

22. Counsel on behalf of IHREC referred also to the decision in *Somjee v. Minister for Justice* [1981] ILRM 324 in which Keane J., as he then was, stated:

"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."

23. That statement of the law was subsequently adopted and approved of by the Supreme Court in the case of *MacMathúna v. Ireland* [1995] 1 IR 484 at pp. 495-496, where Finlay C.J. stated as follows:

"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 judgement of Keane J. delivered in Somjee..."

24. It may also be of use to refer briefly to the decision of this court in *PC v. Minister for Social Protection* [2018] IESC 57 in which O'Donnell J. made the following observations at paragraph 20 of his judgement:

"The language of Article 15.4.2° does not put the issue beyond doubt, but it does perhaps offer some guidance. While it requires the invalidity of any legislative provision found repugnant to the Constitution, it also seems to require that the remedy be precisely tailored to exercise the offending element and no more. Thus the provision may be invalid 'but to the extent only of such repugnancy' (emphasis added). This is a clear direction to match the remedy to the wrong."

25. Finally, reference was made both on behalf of the Minister and IHREC to Kelly, *The Irish Constitution* (5th ed.) at para 6.2.321 where the authors said:

"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."

26. It is clear, therefore, that a court when it comes to considering the extent of a finding of invalidity in respect of a statutory provision should be careful in approaching the question of severability. The court can strike down legislation, or part thereof, only to the extent necessary. The court should not engage in a process which would involve leaving in place statutory provisions that are inextricably bound up with the provisions to be struck down so as to set at nought the legislative will discernible from the legislative framework at issue in the particular proceedings. Put simply, the court cannot engage in an exercise of severing the offending provision from the remainder of the legislation at issue and, by doing so, frustrating the will of the Oireachtas in enacting the legislation.
27. It is necessary, therefore, to consider the arguments to see if it is appropriate to sever s.19(3) and s.19(2) to the extent contended for by the Minister, leaving in place the remainder of s.19 of the Act of 1956.
28. Section 19 of the Act of 1956 consists of a number of separate parts. In the first place, it provides for the power to revoke a certificate of naturalisation and the grounds therefor

(Section 19(1)). Secondly, it provides for certain safeguards that must be observed before a certificate of naturalisation can be revoked (Section 19(2) and (3)). Thirdly, it provides for a number of ancillary provisions following revocation. (Section 19(5) and (6)). Finally, it contains a deeming provision in relation to a child whose name was entered on a certificate under the Act of 1935 (Section 19(4)). The latter is very much a stand-alone provision, as indicated previously, and there is no reason why this provision should be struck down by reason of the invalidity of any other provision of s.19. Accordingly, I am satisfied that there is no reason why this part of s.19 of the Act of 1956 cannot be severed from the offending portions of s.19

29. The proceedings in this case have always been about the adequacy of the procedural safeguards contained in s.19 before a certificate of naturalisation can be revoked. As was noted in the judgment, it was never suggested that a power to revoke could not be provided for, nor was it ever suggested that the grounds for revocation were inappropriate or suspect in any way. It was never suggested that the Minister was wrong to trigger the process of revocation under s.19(2) of the Act of 1956. What has always been at issue in the proceedings has been the process by which revocation can take place, and the adequacy otherwise of the safeguards provided in s.19(2) and (3) for a person who faces the possibility of revocation. This Court has found that process wanting. There is no issue on the part of the Minister that s.19(3) must be struck down having regard to the judgment of this Court. As has been seen, counsel on behalf of the Minister argued that only part of s.19(2) should be struck down. For my part, it seems to me that s.19(2) must also be struck down in its entirety, as it seems to me to be very much a part of the process involved in the revocation of a certificate of naturalisation and as such, to use the language of *Maheer*, "*is so inextricably bound up with the part held invalid*", that it cannot remain as part of s.19. I do not think that it is possible to sever part of the language contained in s.19(2), as contended for by counsel for the Minister, without doing violence to the legislative intent demonstrated by the Oireachtas when enacting these provisions. I would, therefore, propose that s.19(2) should also be declared to be invalid.
30. Turning then to s.19(1) of the Act of 1956, as mentioned in the previous paragraph, there has never been any suggestion made in the course of these proceedings that this subsection is invalid, having regard to any provision of the Constitution. Section 19(1) is very much in line with the provisions of s.10(2) of the Act of 1935, the predecessor to the Act of 1956. It contains the power to revoke and the grounds therefor. The main difference between the Act of 1935 and the Act of 1956 was the introduction of the safeguards in the Act of 1956, which have now been found to be inadequate in these proceedings. The argument has been made that it would be wrong to leave in place the power to revoke and the grounds therefor shorn of any procedural safeguards such as those contained in s.19(2) and (3). I disagree. Bearing in mind the constitutional imperative contained in Article 15.4.2° of the Constitution, I am satisfied that to strike down s.19(1) would be to do more than is necessary for the purpose of dealing with the constitutional invalidity found in s.19 regarding the process for revocation. Section 19(1) is not part of the process. It is the provision which contains the substantive power to revoke a certificate of naturalisation and the grounds for exercising that power. It has never been suggested

that it is unconstitutional and, therefore, I see no reason why this provision cannot be severed from the offending parts of s.19. Indeed, it might be observed that to strike down s. 19 (1) in circumstances where its constitutionality has never been attacked could lead to the situation that its provisions could not be re-enacted in the same terms by reason of having been struck down and that would be a peculiar outcome of these proceedings. Thus, a question mark would be placed over the power to revoke and the grounds therefor. This is a clear example of why a Court in striking down legislation should go no further than is necessary to deal with the particular invalidity identified in a piece of legislation.

31. I understand the concerns of the appellant and IHREC that to strike down s.19(2) and (3), and leave in place s.19(1), could lead to the possibility of revocations taking place absent any safeguards whatsoever. However, it is manifestly clear from the principal judgment in these proceedings that *"the process provided for in s.19 [did] 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"*. It is inconceivable that any contested revocation of a certificate of naturalisation would take place without appropriate safeguards having been put in place. The Minister is not unaware of these concerns, and in the course of the written submissions observed as follows:

"Should this Honourable Court entertain doubts in respect of subsections (1), (5) and (6) remaining operative without any procedural safeguards... an Order of prohibition could be made pending the introduction of the procedural guarantees required by the judgement, that is, the opportunity of seeking a review or appeal from an independent person or body..."

32. It was suggested on behalf of the Minister in this regard that it may be appropriate to grant an order of prohibition in terms more limited than that sought by the appellant, namely prohibiting the Minister from progressing the revocation of the certificate of naturalisation obtained by the appellant until such time as the Minister is in a position *"to offer a review or appeal of the Minister's decision (or alternatively of his intention to revoke) by an independent person or body."*
33. Counsel on behalf of the appellant takes issue with the suggestion that an order of prohibition might be granted and distinguishes the facts of this case from the decision in *Carmody v. Minister for Justice* [2010] 1 I.R. 635 upon which the Minister places some reliance for suggesting an Order of Prohibition. There are differences between the facts of *Carmody* and this case but I note, that despite the arguments now made on behalf of the appellant, one of the reliefs sought by the appellant was an order of prohibition. That was, of course, in connection with the process taking place in accordance with the safeguards then in place.
34. As I have said, I understand the concerns expressed by the appellant and IHREC about leaving in place s.19(1) without appropriate safeguards being in place. However, I think this concern can be met by the granting of the appropriate declarations striking down the

offending parts of the legislation. Given that it is clear from the principal judgment that there has to be a process which complies with fair procedures before a certificate of naturalisation can be revoked, it would be necessary to have such a process in being before any further step could be taken to revoke the appellant's certificate of naturalisation. It is therefore not necessary grant an order of prohibition. It is inconceivable that the Minister would proceed with the revocation of the certificate of naturalisation in the case of the appellant before such time as the constitutional frailty in the process of revocation identified by this Court has been remedied.

35. I should also deal with the position of s.19(5) and (6) of the Act of 1956. Just as there was no challenge in the proceedings to the power of the Minister to revoke a certificate of naturalisation or the grounds thereof contained in s.19(1), there has been no challenge to the provisions of s.19(5) and (6). These provisions are ancillary to the making of a decision to revoke a certificate of naturalisation. There is no reason why it is necessary to strike down these provisions following the finding of invalidity in respect of s.19(2) and (3). They simply deal with the consequences of revocation of the certificate of naturalisation, providing in subs. (5) that the person whose certificate of naturalisation has been revoked shall cease to be an Irish citizen, and in subs. (6) providing for the publication of the notice of revocation in *Iris Oifigiúil*. For that reason, I can see no basis for saying that these provisions need to be struck down because of invalidity of the procedures leading to revocation.
36. It follows from the above that before any revocation can take place it will be necessary to introduce a new process which meets the requirements of natural justice. It is apparent that the legislature in introducing the Act of 1956 went further than the legislature had gone in the Act of 1935 by introducing the safeguards in s.19, which have been found wanting in these proceedings. It is clear that in 1956, the legislature considered that before revocation of a certificate of naturalisation could take place that there had to be some safeguards available to the citizen affected by the proposal to revoke the certificate. Obviously, this was a concern of importance to the legislature. I note that the Minister has suggested that in the first instance it is proposed that changes to the process would be provided "*by way of administrative procedure which would be binding on the Minister*". Whether the process for revocation is to be provided for by legislation, or by administrative procedure, is a matter for the Oireachtas and it is not for this Court to advise, still less tell the Oireachtas and/or the Minister, or indeed, the Executive, how to proceed to remedy the invalidity in the process of revocation identified by the Court. Given that there was a statutory scheme in place, it would be appropriate for the Oireachtas to determine the basis of any proposed scheme to replace that which has been found wanting, whether the process should be dealt with by way of statutory amendment or alternatively, by way of statute empowering the Minister to create an administrative scheme. It follows therefore that the Minister may not establish an administrative scheme to exercise the powers under the surviving parts of the section without statutory authority.

37. Accordingly, I would grant a declaration to the appellant to the effect that s.19(2) and (3) of the Act of 1956 are invalid, having regard to the Constitution.