



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 14th day of October 2020

Background

1. This appeal relates to s. 19 of the Irish Nationality and Citizenship Act, 1956 (hereinafter "the Act of 1956") and the procedure to revoke Irish citizenship. At the heart of the appellant's case is the contention that s. 19 of the Act of 1956 is a category of power that can only be exercised lawfully by the courts. The appellant (hereinafter referred to as "the appellant" or "Mr. Damache") argues that the power to revoke citizenship falls outside the saving provisions in Art. 37 of the Constitution, and that, as a result, any conferral onto the executive of such power is unconstitutional.
2. The circumstances in which this issue came to light concern a situation in which the first named respondent (the Minister) formed an intention to revoke the citizenship of the appellant. The appellant was born in Algeria and he is an Algerian national by birth. He came to Ireland in July, 2000, claimed asylum and following an unsuccessful appeal to the Refugee Appeals Tribunal, was informed by the Minister by letter of the 3rd December 2002 that his application for asylum was refused. On the 12th December 2002, the appellant married an Irish citizen by birth. He applied for naturalisation on the 26th July 2006 on the basis of his marriage and became naturalised as an Irish citizen pursuant to s. 17 of the Irish Nationality and Citizenship Act, 1956 on the 3rd November, 2008 when he made a declaration of fidelity to the State in the District Court. He was furnished with a Certificate of Naturalisation dated the 27th November 2008 which was transmitted to him by letter dated the 1st December 2008, a letter which drew attention to the terms of s.19 of the Act of 1956 and advised that there was a power to revoke the Certificate of Naturalisation on the grounds set out in s. 19.
3. It transpired that the appellant while resident in Ireland was involved in terrorism related activities and ultimately, following his extradition to the United States, in July, 2018, he

pleaded guilty before a federal court in Philadelphia, United States to having conspired to materially assist an Islamist terrorist conspiracy. He was then sentenced in October, 2018 to a term of 15 years imprisonment and as a result of that the respondent informed the appellant of his intention to revoke his citizenship on 18th October 2018, by statutory notice in terms of s 19(2) of the Act of 1956.

4. S. 19(2) and (3) of the 1956 Act sets out the process to be followed after such an intention to revoke citizenship has been formed by the Minister. Generally, if the intention to revoke is opposed by a person subject to the intended revocation, a committee of inquiry will consider the case. The committee then issues a recommendation upon which the Minister makes his final decision. In this case however, the process has not proceeded beyond the respondent informing the appellant of his intention to revoke his citizenship.
5. After becoming aware of the respondent's intention, the appellant filed judicial review proceedings in which he sought, *inter alia*, an order of *certiorari* of the notice of the respondent's intention to revoke his citizenship, an order prohibiting the respondent from revoking his citizenship and a declaration that s. 19 of the Act of 1956 is unconstitutional and incompatible with the State's obligations under Union Law and under Arts. 6 and 13 of the ECHR. The matter came before the High Court, where Humphreys J. refused the relief sought but ordered a stay on the revocation.
6. As mentioned, this appeal is concerned with the contention by the appellant that s. 19 of the Act of 1956 is unconstitutional. The basis of this contention is the appellant's argument that only the judiciary can legally revoke a person's citizenship and that the revocation of citizenship cannot be an administrative power. The reason the appellant advances for the latter argument is that the revocation cannot be fairly 'adjudicated' upon by the respondent because he is not a disinterested party by virtue of the fact that he is seeking that very revocation. The appellant argues that this violates the principle contained in the maxim *nemo iudex in causa sua*, and that on that basis the respondent cannot exercise that power.
7. In making an application for leave to appeal to this Court in circumstances where leave was sought directly from the High Court (a "leapfrog" appeal), the appellant argued that this case raises issues of general public importance and an appeal would be in the interests of justice, and also that exceptional circumstances exist justifying the leapfrog appeal. The appellant argued this case would *inter alia* provide clarity on the question of whether a particular power is an administrative, executive function or a judicial function. The appellant also contended that some conflicting authorities exist on this point and a number of other cases dealing with revocation of citizenship would stand to benefit from clarity from this Court. Although the respondent contended that the appellant may be premature in seeking relief (given that the Minister has not yet given a final decision in this matter), he only opposed the application in part and the Determination of this Court notes that in light of the effect on other revocation matters, the respondent appeared to concede that it would be in the interests of justice that the constitutionality of s. 19 be

authoritatively settled. Other issues were brought to the attention of the Court and these are more fully set out in the Determination but it suffices to say that in all the circumstances the Constitutional threshold for a leapfrog appeal was met, with the Court placing some reliance on the position of the respondent that clarity would be desirable.

8. It is worth noting that the Determination made it very clear that the focus of this appeal should be the arguments advanced by the appellant "...that challenge the general constitutionality of the power conferred by s. 19 as it would be exercised in every case that comes before the respondent. In other words, the applicant here launches a systemic attack upon the section." It is therefore the broader question of the constitutionality of s. 19 which formed the basis of this Court granting leave to appeal.

The High Court Judgment

9. At para 7 of the judgment, Humphreys J. sets out the details of the appellant's naturalisation and they are repeated herein because they are helpful in understanding the precise circumstances in which the Minister formed his intention to revoke the citizenship of the appellant. Humphreys J. explained that on 26th July, 2006, the appellant applied for Irish citizenship using the appropriate form for naturalisation known as Form 8, prescribed by s. 17 of the Irish Nationality and Citizenship Act 1956 and the Irish Nationality and Citizenship Regulations 2002 (S.I. No. 567 of 2002). The application was made on the basis of the appellant being married to an Irish citizen. The process of naturalisation requires an applicant to make a declaration of fidelity to the nation and loyalty to the State as provided for by s. 15(1)(e) of the 1956 Act, and the appellant made such a declaration before a judge of the District Court on 3rd November, 2008. This was made in the prescribed form (Form 7), which states: "I Charaf Damache (*sic*)... hereby solemnly declare my fidelity to the Irish nation and my loyalty to the State". As stated on the form, this was done in open court. On 10th November, 2008, the appellant wrote to the Minister asking for information on how to give up his previous Algerian citizenship. The appellant was formally naturalised by Certificate of Naturalisation dated 27th November, 2008 which was transmitted to the appellant by letter dated 1st December, 2008, a letter which drew the appellant's attention to the revocation provisions of s. 19 of the 1956 Act.
10. The subsequent history of the matter is somewhat complicated and I gratefully adopt the account set out in paras 8 to 18 of the High Court judgment. The cartoon Humphreys J. refers to is the publication on 18th August, 2007, by a Swedish regional newspaper of a cartoon depicting the Islamic prophet Muhammad:
 - "8. The publication of the cartoon referred to earlier in this judgment provoked unrest in several Muslim countries in 2007. In September, 2009, the Garda Síochána commenced an investigation into an alleged conspiracy to murder the cartoonist concerned. It was suspected that the applicant was involved in that conspiracy, along with other persons resident in Ireland, and in particular that on 9th January, 2010, the applicant made a threatening phone call to an individual in the United States as part of that series of events.

9. It appears that in 2009, the applicant entered into an Islamic marriage ceremony with an American citizen, Ms. Jamie Paulin Ramirez, who seems to have been one of the other individuals that was said to have been involved in the alleged conspiracy and indeed was also at one stage in federal custody in the U.S. On 28th January, 2010, Ms. Paulin Ramirez sought permission to remain in the State on the basis of her relationship with the applicant, albeit that the Islamic marriage ceremony could not have been legally effective during the subsisting currency of the applicant's legal marriage to Ms. Cronin. On 24th March, 2010, that applicant was refused.
10. In the meantime, on 8th March, 2010, D/Superintendent Dominic Hayes granted a search warrant under s. 29 of the Offences against the State Act 1939, as amended by s. 5 of the Criminal Law Act 1976, in relation to the applicant's dwelling. That search warrant was executed on the following day. The applicant was arrested for the offence of conspiracy to murder and various items were removed from his home including a mobile phone. The applicant was then charged, not with the more serious offence for which he was arrested, but with an offence contrary to s. 13 of the Post Office (Amendment) Act 1951 to the effect that on 9th January, 2010, he sent a message by telephone of a menacing character. It was alleged that the phone call was made on the mobile phone seized during the search.
11. A book of evidence was served on 24th May, 2010. On 2nd December, 2010, the applicant sought judicial review seeking to prohibit his trial on the basis of a contention that any evidence obtained on foot of the search warrant was unconstitutionally obtained and on the grounds that s. 29 of the 1939 Act was invalid. That challenge was dismissed by Kearns P. in *Damache v. D.P.P.* [2011] IEHC 197 (Unreported, High Court, 13th May, 2011). The applicant then appealed that decision to the Supreme Court where he was successful (*Damache v. D.P.P.* [2012] IESC 11 [2012] 2 I.R. 266 [2012] 13 I.L.R.M. 153 (Denham C.J., Murray, Hardiman, Fennelly and Finnegan JJ. concurring)).

U.S. criminal investigation in relation to terrorist conspiracy and consequent extradition application

12. In the meantime, a U.S. warrant for the arrest of the applicant was issued on 16th November, 2010 by a United States Magistrate Judge for the Eastern District of Pennsylvania. That related to an allegation that the applicant had conspired to create a terrorist cell in Europe, and participated in the attempted theft of U.S. identity documents that were used by a co-conspirator in Pakistan. On 18th January, 2013, the State received a request made by the U.S. seeking the applicant's extradition. The High Court issued a warrant for the applicant's arrest under s. 26 of the Extradition Act 1965 on 15th February, 2013.
13. In February, 2013, the applicant pleaded guilty before Waterford Circuit Court to the charge of sending a message of a menacing character by telephone. His success in the constitutional proceedings in relation to s. 29 appears to have

resulted in the prospect of more serious charges being prepared against him being abandoned. He received a four-year prison sentence backdated to when he was arrested.

14. On 27th February, 2013, the applicant was arrested pursuant to the extradition warrant and brought before the High Court. He then brought a Notice of Motion dated 22nd July, 2013 seeking various reliefs including discovery. After a two-day hearing of that Motion, the relief sought was refused by Edwards J. (*A.G. v. Damache* (High Court, not circulated, *ex tempore*, 31st July, 2013)). That decision appears to have been appealed to the Supreme Court (Supreme Court Rec. No. 375/13, lodged on 20th August, 2013) but the appeal was eventually struck out on 11th March, 2014 for failure to lodge books of appeal.
15. The applicant then commenced judicial review proceedings [2013 No. 670 J.R.] challenging the decision not to prosecute him on the matters for which his extradition was sought, and also seeking a declaration that s. 15 of the Extradition Act 1965, as substituted by s. 27 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, was unconstitutional. Those proceedings were commenced on 6th September, 2013 and were mentioned *ex parte* before Michael White J. during a vacation sitting. He directed that that application should be made on notice to the respondents, which was done, and ultimately leave was refused by Edwards J. in *Damache v D.P.P.* [2014] IEHC 114 (Unreported, High Court, 31st January, 2014). The applicant then brought a second leave application making a further challenge to the decision not to prosecute him in Ireland, and leave was also refused by Edwards J. in *Damache v. D.P.P.* [2014] IEHC 139 (Unreported, High Court, 28th February, 2014). Those leave refusals were reversed by the Supreme Court in an *ex tempore* decision on 11th March, 2014.
16. The substantive extradition proceedings plus the two judicial reviews came before Donnelly J., who ultimately granted the applicant relief (*Attorney General v. Damache* [2015] IEHC 339 (Unreported, High Court, 21st May, 2015)). That was appealed by the State to the Court of Appeal, and in *Damache v. D.P.P.* [2018] IECA 130 (Unreported, Court of Appeal, 12th April, 2018) that court, per Hedigan J., Birmingham P. and Mahon J. concurring, allowed the appeal and reversed the High Court decision in part. However, prior to the Court of Appeal judgment, the applicant, who does not appear to have been on bail at the time, left the State (as it would seem he was entitled in principle to do) and travelled to Barcelona. He was promptly arrested by the Spanish authorities on foot of an extradition warrant issued by the United States and ultimately he was extradited there in July, 2017. He pleaded guilty in federal court in Philadelphia in July, 2018 to a charge that, while resident in Ireland in or about 2010, he materially assisted an Islamist terrorist conspiracy. In October, 2018, following a plea bargain with federal prosecutors, he was sentenced to 15 years' imprisonment with credit for time

served in Ireland and Spain together with furnishing a consent to be deported to either Ireland or Algeria on his release.

The proposal to revoke the applicant's citizenship

17. On 18th October, 2018, the Department of Justice and Equality sent a statutory notice pursuant to s. 19(2) of the 1956 Act, advising the applicant of an intention to revoke his citizenship on the grounds that he had failed in his duty of loyalty to the nation and fidelity to the State, having pleaded guilty to a terrorist offence. The letter invited the applicant to indicate whether he wished to apply for a committee of inquiry into the proposal. The specific grounds as stated in the letter were: "You were extradited to the USA from Spain in 2017 and in July 2018 you pleaded guilty to conspiracy to provide material support and resources to terrorists. You are currently awaiting sentencing for those offences in the USA".
18. The applicant's solicitors replied on 15th November, 2018, objecting to the proposed revocation and asking for clarification in respect of the procedures involved and the reasons for the intended revocation. The Department replied on 28th November, 2018 stating that the procedures before the committee of inquiry were a matter for the committee but the Minister anticipated certain procedures would obtain, which it can generally be said would be fairly familiar types of processes in any fair-procedures-based hearing."
11. The appellant filed judicial review proceedings on 11th January, 2019, seeking *inter alia certiorari* of the notice of intention to revoke the appellant's citizenship dated 18th October, 2018 and an order of prohibition restraining the Minister from revoking the appellant's citizenship. The appellant's statement of grounds sought a number of declarations, specifically that s. 19 of the Act of 1956 is contrary to the Constitution, the ECHR (as applied by the European Convention of Human Rights Act 2003) and EU law, including the EU Charter on Fundamental Rights. Damages for breach of ECHR rights were also sought.
12. On 14th January, 2019 Humphreys J. granted leave together with an *ex parte* stay on the revocation of citizenship and when the matter next came before the court on 21st January, 2019, the stay was extended.
13. Delivering judgment on 31st May, 2019 Humphreys J. addressed the issue of the constitutionality of s.19 and he said at para 29 of his judgment that "(a)s a post-1937 statute, the 1956 Act enjoys a presumption of constitutionality." He went on to say that "(o)ne of the consequences of that presumption is the so-called double construction rule that a statute should be given a constitutional interpretation if possible."
14. In addressing the question of whether revocation of citizenship is a judicial function, Humphreys J. said at para 36:

“36. The short answer to this question is clearly not. It is well within the core of the executive function to decide on the grant or revocation of citizenship and, subject to legislative regulation, that is a core executive function in more or less any nation state. There was never any judicial involvement in the making of such decisions (as opposed to their review) as a matter of Irish or UK legal history. There is certainly no evidence of a widespread practice of judicial involvement in the making of such decisions at international level. Furthermore, the issue arises out of an administrative process not a contest *inter partes*. It is true that loss of citizenship does deprive an applicant of a number of rights but that in itself does not make it a judicial process. It would be a power grab without precedent for the judicial branch of government to arrogate to itself the power to make the decision on as opposed to supervising the legality of such a process.”

15. At para 52, he also said that:

“52. ...The question of whether a power is judicial does not depend on whether its exercise has drastic effects, and certainly not on that alone. The fact that in a particular case an executive decision has drastic consequences does not mean that it is no longer an executive decision. The questions of whether the function is judicial, and if so whether it is limited, are the logically prior ones.”

16. In relation to the ECHR, Humphreys J. said *inter alia* at para 55 that:

“55. ...nonetheless it is true that a “disproportionate” deprivation of citizenship could breach art. 8 (see Ramadan v. Malta (Application no. 76136/12, European Court of Human Rights, 21st June, 2016), K2 v. the United Kingdom (Application no. 42387/13, European Court of Human Rights, 7th February, 2017)). But that is not a ground to declare the statute incompatible with the ECHR. The statute, like any statute, must be interpreted as required by the 2003 Act with a conforming interpretation if possible. If an adverse decision is ultimately made that the applicant claims is disproportionate, judicial review will be open to him at that point, albeit that the court is not in that context making its own completely *de novo* assessment of whether the decision is proportional but rather whether the Minister has conducted a proper proportionality assessment or whether there was a manifest unlawfulness in the outcome of that assessment such that it could not be sustained on judicial review principles.”

17. He went on to say at para 57 that:

“...the deprivation of citizenship on grounds of involvement in terrorism is not in itself arbitrary or necessarily disproportionate. Article 15 of the Universal Declaration on Human Rights 1948 provides not that there shall be no deprivation of citizenship but that ‘no one shall be arbitrarily deprived of his nationality’.”

18. The High Court also rejected the appellant’s arguments based on the EU Charter, for the reasons set out in para 66 of its judgment:

“66. It has not been altogether demonstrated that revoking Irish nationality is covered by the EU Charter merely because it has the consequence that EU citizenship is thereby revoked, but I will assume in favour of the applicant that that is so. On that premise, while the applicant’s pleadings on the EU law issue are somewhat convoluted, they essentially appear to make three points:

- (a) Breach of requirements of good administration in art. 41 of the Charter. That has not been demonstrated. Article 41 is not equivalent to requiring judicial decision-making in all administrative processes and certainly not here (see also *Balc v. Minister for Justice and Equality* [2018] IECA 76 (Unreported, Court of Appeal, 7th March, 2018) by analogy).
- (b) Lack of an effective remedy under art. 47. That fails for similar reasons. An effective remedy will be available here in the form of judicial review (see by analogy *Balc* and Case C-89/17 *Secretary of State for the Home Department v. Banger*).
- (c) Breach of the principle of proportionality, see Case C-135/08 *Rottmann v. Freistaat Bayern* (para. 58) and Case C221/17 *Tjebbes v. Minister van Buitenlandse Zaken*. The applicant makes the argument that the terse reasons provided in the letter of 18th October, 2018 are such that it cannot be properly assessed whether revocation is a proportionate measure. That fundamentally misunderstands the process. What is before the Minister is only a proposal, not a decision. Insofar as reliance is placed on the, if I may respectfully say so, characteristically informative, well-written and enjoyable opinion of Advocate General Bobek in Case C-556/17 *Alekszj Torubarov v. Bevándorlási és Menekültügyi Hivatal*, that deals with a very different situation where a decision made in the course of judicial review was not properly implemented. That does not arise here. A point was made under this heading in the applicant’s submissions that where refugee status is proposed to be revoked there was a full right of appeal to that High Court under s. 21(5) of the Refugee Act 1996 (see *Nz.N. v. Minister for Justice and Equality* [2014] IEHC 31 (Unreported, High Court, 27th January, 2014) at para. 32 per Clark J.). That may well be so but that does not establish that a procedure of an appeal to the High Court is necessary as a matter either of national or European law. It is not.”

19. In making his order, Humphreys J. said at paras 67 and 68 that:

“67. Insofar as the case involves a challenge to the legislation in principle, it is fundamentally misconceived and fails. Insofar as it involves a challenge to the legislation as applied to this applicant, that has not been made out. It ignores the presumption of constitutionality and the requirement of a conforming interpretation. It asserts disproportionality in the context where the facts have yet to be found, a decision has yet to be made and indeed the applicant has yet to come clean on a range of factual matters. Much as in *Habte*, this applicant seeks a

pre-emptive order to cut off at the knees an inquiry that has yet to even begin. That is not an appropriate procedure.

68. The legislature has provided for the procedure of an independent committee of inquiry chaired by a judicial figure to report prior to any decision on the revocation of the applicant's nationality. That process should be allowed to continue and indeed to conclude."

20. It is against this judgment which the appellant now appeals.

Citizenship

21. At the outset of the discussion of the issues in this case it may be helpful to make a few observations on citizenship. Article 9 of the Constitution deals with the entitlement to citizenship. Having provided that those who were citizens of Saorstát Eireann prior to the coming into operation of this Constitution saying that they "shall become and be a citizen of Ireland," Article 9.1.2 then provided as follows:

"The future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law."

22. Article 9.2 deals with the position of children born in Ireland and the circumstances in which they may or may not, as the case may be, acquire Irish citizenship or nationality. Finally, Article 9.3 provides as follows:

"Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens."

23. The latter requirement is reflected in the terms of the declaration which was required to be made to a judge of the District Court in accordance with the provisions of s. 15(1)(e) of the Act of 1956, as amended, at the time that Mr. Damache became an Irish citizen. As can also be seen, Article 9 reflects the fact that the acquisition and loss of Irish nationality and citizenship is to be determined in accordance with law of which the 1956 Act as amended contains the provisions by which this process is regulated.

24. There are a number of other provisions in relation to citizens contained in the Constitution. For example, Article 40.1 provides:

"All citizens shall, as human persons, be held equal before the law."

25. It is neither necessary nor appropriate in the context of this case to engage in a discussion of the extent to which certain fundamental rights provisions in the Constitution can be invoked by those who are non-citizens. As Barrington J. in the case of *The State (McFadden) v. Governor of Mountjoy Prison* [1981] I.L.R.M. 113 at page 117 observed:

"The substantive rights and liabilities of an alien may be different to those of a citizen. The alien, for instance, may not have the right to vote or may be liable to deportation. But when the Constitution prescribes basic fairness of procedures in the administration of the law it does so, not only because citizens have rights, but

also because the Courts in the administration of justice are expected to observe certain forms of due process enshrined in the Constitution. Once the Courts have seisin of a dispute, it is difficult to see how the standards they should apply in investigating it should, in fairness, be any different in the case of an alien than those to be applied in the case of a citizen.”

26. The importance of citizenship was reflected on by O’Donnell J. speaking in the case of *P. v. Minister for Justice* [2019] IESC 47 at paragraph 2 of his judgment on the issue of the discretion of the Minister to grant a Certificate of Naturalisation where he observed as follows:

“The origin of the procedure, and the extremely broad discretion conferred upon the Minister, lies in some fundamental conceptions of sovereignty. It is a basic attribute of an independent nation that it determines the persons entitled to its citizenship. A decision in relation to the conferral of citizenship not only confers the entire range of constitutional rights upon such a person, but also imposes obligations on the State, both internally in relation to the citizen, and externally in its relations with other states.”

27. The loss of citizenship, entailing as it does the loss of protection of the full range of constitutional rights conferred upon a citizen, is a matter of grave significance to the individual concerned. It may in some cases, render the individual stateless. As the individual concerned becomes an alien on the loss of citizenship that person becomes subject to the risk of deportation. The individual concerned will no longer be entitled to obtain an Irish passport and that will have an impact on the individual’s ability to travel. The State will no longer have any obligation to provide consular assistance to the individual concerned as they would in the case of an Irish citizen who runs into difficulties when abroad. Other rights, such as the right to vote in the State will be lost. For an individual who had obtained Irish citizenship and did not have citizenship by descent in a Member State of the European Union, the loss of citizenship in Ireland will result in the loss of citizenship of the European Union with all that that entails.
28. The manner in which the revocation of citizenship can affect an individual, bearing in mind some of the consequences outlined above, is thus a matter of grave significance for the individual concerned. There are many practical benefits that flow from citizenship including, *inter alia*, such matters as entitlements to social welfare, health services and so on. For that reason, it is important to ensure that the process by which citizenship can be revoked is a robust process which properly balances the rights of the State to make such a decision with the rights of the individual concerned. At the heart of this case is the question as to whether the process for revocation of citizenship provided for in s. 19 of the Act of 1956 is sufficiently robust to withstand the challenge to its constitutionality in these proceedings.

Prematurity

29. As has been mentioned previously, the first relief sought in these proceedings was *certiorari* of the statutory notice of intention to revoke the applicant’s citizenship. Further

relief was sought including an order of prohibition restraining the Minister from making an order revoking Mr. Damache's citizenship and a declaration that s. 19 of the Act of 1956 is repugnant to the Constitution. The Minister in the statement of opposition made the point that Mr. Damache was not entitled to maintain these proceedings on the basis that the same were premature and/or futile and accordingly sought that the proceedings should be dismissed on that basis. It was also said that Mr. Damache had failed to exhaust all of his alternative remedies.

30. Given that the Minister had merely issued a statement of intention to revoke citizenship, it is not entirely surprising that when judicial review proceedings were commenced objection was taken to the commencement of such proceedings on the basis that they were premature. In general, *certiorari* is a remedy designed to quash a decision which has been reached in excess of jurisdiction by the decision maker or where there is an error on the face of the record. In circumstances where a decision has not been made but it is merely proposed to be made, relief by way of *certiorari* does not lie and in those circumstances, it could readily be said that an application to quash the making of a particular decision in advance of the decision being made would be premature. Nevertheless, it would not be unusual for someone who is seeking judicial review by way of *certiorari* to include a number of other reliefs including a challenge to the constitutionality of legislation which governs the making of the particular decision. It will sometimes be the case that the process under challenge provides a mechanism to deal with the possibility of an adverse outcome by way of some form of statutory appeal or otherwise. Therefore, there may be an argument to the effect that judicial review does not lie to quash an administrative decision until all remedies under the particular process have been exhausted. This issue was addressed by the trial judge in paragraph 28 of his judgment where he said as follows:

"As far as the claim in the statement of grounds for *certiorari* of the notice of intention to revoke is concerned, the circumstances in which a mere proposal can properly be judicially reviewed are very limited indeed. I discussed this matter in the context of a proposal to revoke citizenship in *Habte v. Minister for Justice and Equality* [2019] IEHC 47 [2019] 2 JIC 0405 (Unreported, High Court, 4th February, 2019) which, while under appeal, referred to the early authorities of *Ryanair Ltd. v. Flynn* [2000] 3 I.R. 240 per Kearns P. and *A.B. v. Minister for Justice and Equality* [2016] IECA 48 (Unreported, Court of Appeal, 26th February, 2016) per Ryan P. to draw the conclusion that judicial review of a mere proposal would only be appropriate in exceptional circumstances such as if it was *ultra vires* or for an improper purpose. Neither of those exceptions apply here. There is in any event, as I noted above, no independent basis for *certiorari* of the mere proposal concerned. The challenge is wholly dependent on the challenge to the statute, to which I now turn."

31. I agree with the view expressed by the trial judge to the effect that the circumstances in which a mere proposal can be judicially reviewed are very limited indeed. The trial judge went on to observe that in this case the challenge to any proposed decision was

dependent on the challenge to the legislation at issue. Thus, while it is important to emphasise the fact that judicial review will not normally lie for the purpose of seeking to quash a proposal to make a particular decision, this case involves, as was observed in the determination granting leave, “a systemic attack upon the section”, with the result that the principal issue before the Court is the question of the constitutionality of s. 19 of the Act of 1956. That being so, counsel on behalf of the Minister in the course of the hearing before this Court accepted that the question of prematurity of the proceedings was no longer in issue.

32. For completeness, I should add that a similar issue was raised in *Habte*, referred to above, and as mentioned by the trial judge, he had when giving judgment in that case, reached a similar view. That decision was, at the time of delivering judgment in the High Court in these proceedings, under appeal to the Court of Appeal and in their judgment, the Court of Appeal agreed with the view of the trial judge on this issue. (see para. 105 onwards of the judgment of the Court of Appeal, delivered on 5th February 2020, [2020] IECA 22.)

The Law

33. Before embarking on a discussion of the issues arising on this appeal, it would be useful to set out the relevant provisions of the Act of 1956 which are challenged in these proceedings:

“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) 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 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 act other than marriage 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*."
34. The elements of s. 19 which are of particular relevance are s. 19(1)(b) which is the basis of the Minister's proposal to revoke citizenship in this case and s. 19(2) and s.19(3) which are the provisions which are the focus of the challenge to the constitutionality of s. 19. Briefly, as can be seen, the Minister may revoke a certificate of naturalisation if satisfied that the person concerned has "by any overt act" shown himself to be in breach of the declaration of citizenship. As the trial judge noted at para. 59 of his judgment, "...terrorist activity, conspiracy or assistance could in principle be taken to be a breach of the duty of loyalty to the state." Of course, it is not for this Court to consider whether the appellant has failed in his duty of fidelity and loyalty to the State.
35. S.19(2) as can be seen above obliges the Minister to notify a person whose citizenship may be revoked, of his intention to revoke and further, obliges him to state the grounds therefor and sets out the right of the person concerned to apply to the Minister for an inquiry as to the grounds for the revocation.
36. S.19(3) makes provision for the inquiry referred to in s. 19(2). Once an inquiry is sought, the Minister is obliged to refer the matter to a Committee of Inquiry. The Committee is appointed by the Minister. As can be seen, the chairman of the Committee has to be someone with judicial experience. Having conducted their inquiry, the Committee reports its findings to the Minister. It will be noted that there is no obligation or requirement on the part of the Minister to accept their findings.
37. Is the process of revocation provided for in s. 19 of the Act of 1956 a judicial or executive act? The argument put forward on behalf of Mr. Damache is that s. 19 is unconstitutional because the gravity of the decision involved is such that it should be made by an independent body and further, it is contended that the nature of the decision is such that it should only be made by the courts. In the first instance it is necessary to consider the

arguments as to whether the decision to revoke citizenship is a decision which amounts to the administration of justice.

38. The starting point for a discussion on this issue is Article 34.1 of the Constitution which provides that:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution.”

39. This raises the question as to whether the process by which citizenship is revoked involves the administration of justice. Both parties have referred to the leading decision in this area, namely *McDonald v. Bord na gCon* [1965] I.R. 217, as did the *amicus curiae*. Although the decision of the High Court in that case was reversed, the Supreme Court approved the observations of Kenny J. set out at page 230 to 231 of his judgment where he said:

“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;
- 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.”

40. Counsel on behalf of Mr. Damache has sought to demonstrate that the revocation of citizenship comes within the *McDonald* criteria. Thus it is argued that:

1. There is a dispute between the Minister and Mr. Damache as to his citizenship status and the rights associated with it.
2. The function of the Minister, as well as being a party to the controversy, is to resolve the dispute and to adjudicate on whether the appellant should retain his citizenship or have it revoked.
3. There is no appeal. The determination of the Minister is final.
4. The making of the revocation order, and its manifold negative consequences, can be enforced by the executive.
5. The consequences of revocation are of an order of gravity characteristic of the consequences of orders reserved to the Court. While unprecedented as a function

in this jurisdiction, in some comparable common law jurisdictions, control of contested revocation decisions is a judicial function.

Thus, it is argued on behalf of Mr. Damache that the criteria set out by Kenny J. are satisfied.

41. The point is also made that the greater the impact on fundamental rights, the more likely it is that the decision-making power will be deemed to be the administration of justice. Referring to the final criteria identified by Kenny J. in *McDonald*, it was submitted that the administration of justice can be identified by reference to orders that have historically been characteristic of the courts' remit and in this regard it was argued that the courts have traditionally reserved to themselves the power to adjudicate in contexts which have a profound impact on rights. It is said that the involvement of the courts in such areas gives legitimacy to such decisions.
42. It is contended on behalf of Mr. Damache that the revocation of citizenship procedure is similar to the disciplinary procedures of professional bodies albeit the consequences are more drastic. It is further argued that the circumstances in which it may be suggested that a citizen has failed in their duty of fidelity to the State may involve allegations of activity of a subversive, terrorist or treasonous nature. While it is accepted that the revocation procedure is not criminal in nature and that revocation does not amount to criminal sanction, it is contended that the decision-making process resembles a trial and sentencing stage of the criminal justice process so that following a hearing in which alleged criminal or morally questionable behaviour is considered, judgment is passed on the conduct of the person. It is then necessary for a proportionality assessment to be carried out weighing the competing personal and public interest considerations. Once an order is made severe consequences can flow for the person concerned.
43. Given the drastic consequences of a decision to revoke, it is further argued that any consideration of an application to revoke should require a heightened standard or proof, (see for example, *Knauer v. United States*, 328 US 654).
44. Finally, reference was made to the provisions of Article 37.1 of the Constitution which provides:

"Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."

45. In this context, the trial judge had said:

"...I would have upheld the plea by the respondents that 'while the primary submission of the respondents, therefore, is that s. 19 does not breach Article 34 at all, insofar as it does, it is submitted that the limited nature of s. 19, confining the

power of the Minister to a single act, exercisable on very limited grounds, falls within Article 37.”

46. This view of the trial judge was criticised by reference to the conclusion of the trial judge that the powers exercised by the Minister under s. 19 are limited powers within the meaning of Article 37.1 of the Constitution. Reference was made to the judgment of Kingsmill Moore in the case of *In Re Solicitors Act, 1954* [1960] I.R. 239 at page 263 and 264 where he stated as follows:

“What is the meaning to be given to the word ‘limited’? It is not a question of ‘limited jurisdiction’ whether the limitation be in regard to persons or subject-matter. Limited jurisdictions are specially dealt with in Article 34.3.4. It is the powers and functions’ which must be ‘limited’, not the ambit of their exercise. Nor is the test of limitation to be sought in the number of powers and functions which are exercised. The Constitution does not say ‘powers and functions limited in number’. Again it must be emphasised that it is the powers and functions which are in their own nature to be limited. A tribunal having but a few powers and functions but those of far-reaching effect and importance could not properly be regarded as exercising ‘limited’ powers and functions.

The judicial power of the State is by Article 34 of the Constitution lodged in the Courts, and the provisions of Article 37 do not admit of that power being trenched upon, or of its being withdrawn piecemeal from the Courts. The test as to whether a power is or is not ‘limited’ in the opinion of the Court, lies in the effect of the assigned power when exercised. If the exercise of the assigned powers and functions is calculated ordinarily to affect in the most profound and far-reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as ‘limited’.”

Relying on that passage, it is submitted by Mr. Damache that the loss of citizenship is a power or function which could not be described as limited.

47. The Court also had the benefit of detailed submissions from the amicus curiae on this issue. In their submissions, counsel on behalf of the *amicus curiae* referred to much of the case law which considers what is or is not the administration of justice starting with the case of McDonald referred to above. Reference was made in the course of their submissions also to the decision of this Court *in Re Solicitors Act, 1954* and to the judgment of Kingsmill Moore J. in which it was stated at pages 274 to 275 as follows:

“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.”

48. Reference was also made to a decision of Kearns P. in the case of *Akpekpe v. The Medical Council and Ors* [2014] 3 I.R. 420 where having referred to the decision in *Re Solicitors Act* stated:

“. . . 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.”

49. However, crucially, it was noted on behalf of the *amicus curiae* that the concerns as to the impact on rights is not of itself determinative of the issue as to whether a particular decision amounts to the administration of justice or not. Reference was also made to the decision of this Court and the judgment of O’Donnell J. in the case of *O’Connell v. The Turf Club* [2017] 2 IR 43 where it was noted by O’Donnell J. 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.”

50. It was further noted that Hedigan J. observed in the case of *Purcell v. Central Bank of Ireland* [2016] IEHC 514 that:

“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).”

51. Thus, in their submissions the *amicus curiae* made the point that even though the exercise of the legislative and executive powers of the State, or indeed private contractual powers, can have a significant impact on rights, this does not convert them into the administration of justice.

52. Accordingly, the *amicus curiae* has made the point that the degree of impact on an individual’s rights is not relevant for the purpose of identifying “the administration of justice”. Nevertheless they argue that it is relevant in two respects, namely:

- “(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 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.
- (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).”

53. The *amicus curiae* in its submissions argued that the Minister’s power under s. 19 met four of the criteria identified by Kenny J. in *McDonald* but acknowledged that the power exercised by the Minister was not one that has traditionally been exercised by the Courts, that is “the making of an order by the Court which as a matter of history is an order characteristic of Courts in this country”. It was further noted that the procedure under s. 19 does not have the ‘coercive trappings of a judicial process (e.g. power to compel witnesses)”. It was further acknowledged that there are multiple examples of situations in which the Courts have held that it is part of the core of the executive power to determine the right to citizenship and whilst acknowledging that many of those cases were decided in the context of naturalisation, the logic would appear to follow that it applies equally to the revocation of citizenship.
54. The *amicus curiae* concluded its submissions on this point by saying that if it was concluded that the power in s. 19 constitutes the “administration of justice” for the purposes of Article 34.1, then the power must be considered to be an unconstitutional grant of such a power to the Minister. This is because it is contended that if the power constituted the “administration of justice” it could only be rendered constitutional by Article 37.1 but in the context of the power it is submitted that this power could not be described as “limited” given the fundamental impact on the rights of the person the subject of the power.
55. I now want to consider the submissions made on behalf of the Minister in this respect.
56. The Minister in his submissions has also referred to the criteria in the *McDonald* case and set out a number of arguments as to why the power under s. 19 is not the “administration of justice”. Dealing with the criteria *seriatim*, the Minister stated that there is no dispute between the parties as to Mr. Damache’s legal rights. Thus, there is no dispute or controversy as to the existence of legal rights. It is accepted that he is a naturalised citizen and that if a decision was made to revoke the certificate of naturalisation he will no longer be an Irish citizen. Reference was made to the decision in the case of *Keady v. Garda Commissioner* [1992] 2 I.R. 197. In that case procedures under the Garda Síochána (Discipline) Regulations 1971 were found not to involve an administration of justice. Under those Regulations the Garda Commissioner could refer an alleged breach of discipline to a Tribunal of Inquiry established under the Regulations. The Inquiry would make findings as to whether or not there had been a breach of discipline under the Regulations and thereafter, the Commissioner could decide what disciplinary action could be taken. It was found that this was not an “administration of justice” as it consisted of an inquiry and not a “*lis*” or dispute as to the existence of legal rights and obligations. Secondly, it was pointed out that the procedure under s. 19 does not involve the imposition of a penalty. Further it is pointed out that no order is made by the Minister which is characteristic of the Courts nor is any order made enforced by the Gardaí, sheriffs or prison authorities. It was submitted that the scheme under s. 19 is more

consistent with the revocation of a licence or administrative benefit, which may be withdrawn on the satisfaction of certain conditions. In support of the arguments made in this regard reference was made to the decision in *O'Connell v. The Turf Club*. Particular reliance was placed on paragraph 94 of the judgment of O'Donnell J. where he stated in respect of the fourth and fifth criteria set out in *McDonald* as follows:

"In particular, it does not appear to me that the decisions of the respondent can satisfy the fourth or fifth criterion. Decisions of the respondent imposing penalties for example are not enforceable as a judgment and there is no process for converting such a decision into a judgment. It cannot be enforced of its own right, and instead the respondent must seek to recover any such fine in litigation, in proceedings indeed akin to those in *Rogers v. Moore & Ors.* [1931] I.R. 24. Furthermore, the making of such disciplinary orders up to and including the warning of a person from a racecourse, have not only not been characteristic of the courts as a matter of history, they have as a matter of history been the exclusive function of a body such as the respondent."

57. Relying on that passage, the point is made by the Minister that a decision under s. 19 is not enforceable as a judgment or capable of being converted into a judgment. It was further pointed out that the revocation of citizenship has as a matter of history been reserved to the executive. Therefore, it is contended that having regard to the fifth of the *McDonald* criteria this must lead to a conclusion that the revocation of the privilege of naturalisation is not a judicial power. It is argued that the grant of naturalisation and the deprivation of it, particularly in the case of a naturalised citizen where citizenship is granted as a matter of privilege and not as of right, are executive powers formerly exercised at the prerogative of the Crown.
58. It is also noted by the Minister in the course of its submissions 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. (See for example *Laurentiu v. Minister for Justice* [2016] 2 I.R. 403, at paragraph 37). Reference was also made to a decision from the courts of the neighbouring jurisdiction in which it has been held that the cancellation of a passport was an aspect of the Crown prerogative which had not been removed by legislation. (See *R. v. Foreign Secretary, ex parte Everett* [1989] 1 QB 811, at page 817). The point was also made that the conferral of citizenship on non-nationals by the process of naturalisation is not a power that was traditionally exercised by the courts. Therefore, it is argued the deprivation of citizenship despite its significant consequences did not as a matter of history fall within the role of the courts or "administration of justice" but constituted the exercise of an executive power to be exercised judicially, that is to say fairly and independently and entrusted by the legislature to the Minister for Justice. It was further pointed out that any such decision is amenable to judicial review for its lawfulness.
59. The Minister in his submissions noted that the *amicus curiae* accepted that the fifth of the *McDonald* criteria could not be satisfied in this case. It was further pointed out that the

fact that the decision to revoke citizenship has a larger, even severe, impact on rights does not bring the decision-making process within the ambit of the “administration of justice” and reliance is placed on the decision of the Court of Appeal in its judgment in the case of *Habte v. Minister for Justice* [2020] IECA 22. In that case it was concluded by the Court of Appeal that “the grant or revocation of citizenship does not on any version of fact or law fall within [the ambit of the administration of justice]”.

60. The Minister further takes issue with the assertion of the *amicus curiae* that the legal effect of revocation means that the decision is enforceable in like manner as a judgment of a court. It is pointed out that no process of execution is provided for or applicable to the Minister’s decision. The fact that the decision has legal effects does not mean that this criterion is met. The effects such as deportation are dealt with by means of an entirely separate statutory procedure and involve the making of a separate decision and order.
61. The Minister further made a submission that if contrary to his arguments the decision under s. 19 amounts to “the administration of justice”, then Article 37.1 of the Constitution applies and the Minister does not accept the contention on the part of Mr. Damache that the deprivation of citizenship is of such far reaching consequence that Article 37 could not apply. It is argued on behalf of the Minister that insofar as Mr. Damache relies on the decision of this Court *in Re Solicitors Act, 1954*, that that decision has been described in Keady by O’Flaherty J. as “anomalous” and was distinguished by Keane C.J. in *Melton Enterprises Ltd. v. Censorship of Publications Board* [2003] 3 I.R. 623 in part on the basis of the historical role of the courts in disciplining solicitors.
62. A number of further points are made on behalf of the Minister. It is noted for example that the fact that a certificate of naturalisation can be revoked was pointed out to Mr. Damache at the time of the grant of the certificate and further that the grounds on which this may be done were also indicated. It is said that naturalisation differs from other forms of citizenship under Irish law in that the power to revoke a certificate is an inherent part of the nature of this particular type of citizenship. It is further argued that no specific impact or prejudice has been proven on the facts of this case and it is said that the effects of deprivation of citizenship may be much less in the case of a person who for example immediately after naturalisation departs the State and becomes liable to revocation under paragraph (c) of the provisions of s. 19(1). In such a case it is said that the impact on the person could be relatively limited. Accordingly, it is argued that the limited nature of s. 19, confining the power of the Minister to a single act, exercisable on very limited grounds, falls within Article 37.

Discussion and decision on this issue

63. Much of the focus in this case has been on the appellant’s contention that the process provided for in s. 19 amounts to the administration of justice and thus is unconstitutional by reference to Article 34.1 and is not saved by the provisions of Article 37.1 of the Constitution. The question of what is or is not the administration of justice has been the subject of a considerable amount of case law. One of the areas in which this issue has arisen for consideration is in the exercise of disciplinary functions by professional bodies,

such as can be seen in the case of *Geoghegan v. Institute of Chartered Accountants* in Ireland [1995] 3 I.R. 86. The role of the Garda Commissioner in disciplinary matters in relation to members of the Gardaí was considered in the case of *Keady* to which reference has already been made. The *Solicitors Act* case referred to previously is another such example. The topic is discussed at some length in *Kelly: The Irish Constitution*, 5th Ed. commencing at paragraph 6.1.17.

64. This Court considered the issue recently in the case of *O'Connell v. Turf Club* [2017] 2 IR 43. In that case, a jockey and trainer were subject to an inquiry under the Rules of Racing and the jockey concerned was ultimately disqualified from riding for a number of years. The trainer was not found to be in breach of the Rules of Racing. One of the issues discussed in the case was whether or not the decision-making function of the Turf Club amounted to the administration of justice by a body other than the courts contrary to Article 34 of the Constitution. It was held in that case that the respondent's decision did not have all the characteristic features of the administration of justice. Its decisions were not enforceable as judgments and their making had not been characteristic of the courts as a matter of history. Instead, as a matter of history, they had been the exclusive function of a body such as the respondent. The observations of O'Donnell J. in that case on what is understood by the administration of the justice bear repeating. At paragraph 93 of his judgment he stated:

"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. Furthermore, it must be recognised that the case law on this area is difficult and some of the decisions are not easily reconciled. The line between bodies required to act judicially or fairly, and those exercising judicial functions, is not one easily drawn in any jurisdiction, but is here more complicated by the existence of Article 37. It is now however, much too late to seek any comprehensive theory, even if such was desirable. Instead the resolution of these cases must be found within the existing case law and the guidance which they offer. As the majority of the Constitutional Review Group noted in this regard in its report of the Constitutional Review Group 1996 (Stationery Office, Dublin, 1996) at page 155:

'...there is no completely satisfactory answer to the problem raised and ... there are great difficulties in formulating a different set of words which deal adequately with these complex issues'.

The more refined and complicated aspects of this issue do not arise in this case however because in my view, there are relatively clear routes to a decision here.

First, the finding that the respondent's power to impose disciplinary decisions is not dependent on statute weakens, although it does not completely undermine, the appellants' case in this regard. Second, the classic test laid out by Kenny J. in *McDonald v. Bord Na gCon & Anor* [1965] I.R. 217, and later adopted by the Supreme Court in that case, seems to suggest that the decisions of the respondent

do not constitute the administration of justice. In particular, it does not appear to me that the decisions of the respondent can satisfy the fourth or fifth criterion. Decisions of the respondent imposing penalties for example are not enforceable as a judgment and there is no process for converting such a decision into a judgment. It cannot be enforced of its own right, and instead the respondent must seek to recover any such fine in litigation, in proceedings indeed akin to those in *Rogers v. Moore & Ors.* [1931] I.R. 24. Furthermore, the making of such disciplinary orders up to and including the warning of a person from a racecourse, have not only not been characteristic of the courts as a matter of history, they have as a matter of history been the exclusive function of a body such as the respondent.

The facts of *McDonald v. Bord Na gCon* [1965] I.R. 217 provide an even more useful point of comparison. That case concerned the related field of greyhound racing. There, the power was entirely statutory in its form being conferred. Under s.47 of the Greyhound Industry Act 1958, the board could make an exclusion order against an individual greyhound trainer. The Supreme Court held that this did not amount to the administration of justice. In such circumstances it is difficult to see how the function of the respondent could be said to amount to the administration of justice, consistent with the outcome in *McDonald v. Bord na gCon.*"

65. I readily accept that the power of the Minister under the provisions of s. 19 of the Act of 1956 is not the same as the power exercised by a body such as Bord na gCon or the Turf Club or any other form of disciplinary procedure. For that reason, one can understand why counsel for Mr. Damache and for the Minister and indeed counsel on behalf of the *amicus curiae* have all focused their arguments on the criteria set out by Kenny J. in the case of *McDonald v. Bord na gCon.*
66. At issue in this case is the process by which an individual certificate of naturalisation can be revoked. As the trial judge observed in his judgment 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."
67. He referred to the case of *Laurentiu* mentioned previously and *Sivsvivadze v. Minister for Justice and Equality* [2015] IESC 53, [2016] 2 I.R. 403 at paragraph 37 in support of this. He also referred to the fact that a similar view was taken in the neighbouring jurisdiction and referred to the case of *R. v. Secretary of State for Foreign and Commonwealth Affairs ex parte Everett* to which reference has been made previously. He looked at the history of naturalisation and pointed out that originally the process was done by means of a private Act of Parliament and that ultimately the function was transferred to the executive. As he pointed out it has never been part of the function of a court to make a decision in relation to the naturalisation of any individual. 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. For that reason, I am satisfied that this is not a case in which the fifth of the criteria identified by Kenny J. has been satisfied.

68. I should add that prior to the hearing the Court made a request for clarification as to whether there was any evidence before the High Court in relation to the practice in the United Kingdom, the United States, Canada and New Zealand in relation to judicial involvement in the making of decisions to revoke citizenship. The response on behalf of Mr. Damache included the following:

“During the one day allotted for the hearing on the 30th May 2019, the learned trial judge referred to a lengthy article on the history of denaturalisation in the United Kingdom. (Weil and Handler: ‘Revocation of citizenship and Rule of Law: How Judicial Review defeated Britain’s First Denaturalisation Regime’). He rose briefly to give the parties the chance to consider the article, but it was not possible to make a considered submission on it during the course of the hearing. The learned trial judge subsequently relied on the article in support of a finding that the revocation was, ‘a core executive function in more or less any nation state’.

In response to this finding, the appellant, before this Honourable Court, has referred to case law from other jurisdictions, which undermine this assertion. While revocation is invariably initiated by the executive, frequently the power to make the final decision is reserved to the courts.”

69. Leaving aside for a moment the criteria in *McDonald*, it is clear that the information before the Court in regard to the comparative position in other jurisdictions is scanty to say the least and it would be very difficult to base any decision on a matter as important as this on such limited information. In any event, such limited information as there is does not persuade me that the decision in relation to revocation of a certificate of naturalisation is something that must be done by a court.
70. Whilst I have referred in particular to the fifth of the criteria identified by Kenny J., I am also satisfied that the fourth criterion in *McDonald* is not met. It is quite clear that the revocation of a certificate of naturalisation has a number of legal effects and indeed as has been noted these may be drastic for the individual concerned. However, as was pointed out on behalf of the Minister, whilst the individual may lose the right to reside in this jurisdiction as a result of the revocation of the certificate of naturalisation, deportation of such an individual would involve the invocation of an entirely separate statutory procedure and the making of an entirely separate decision and order. In other words, the revocation of the certificate of naturalisation by itself would not automatically result in the deportation of the individual concerned. It is simply not something that is enforceable by court order without further and different procedures being followed and orders being made.

71. I do not consider it necessary to go through the remaining criteria set out in the case of *McDonald v. Bord na gCon* in order to reach a conclusion on this issue. I am satisfied by reference to the position in relation to the fourth and fifth criteria of *McDonald* that this is not a process that involves the administration of justice.

72. Finally and for completeness, it would be helpful to refer briefly to the conclusions of the Court of Appeal in *Habte* at para. 129 where Murray J. stated as follows:

“Apart from everything else, a significant feature of the test for whether a decision falls within the administration of justice as articulated by the Court in *McDonald v. Bord na gCon No. 2* 1965 IR 217 requires attention to whether a process is, as a matter of history, productive of an order characteristic of courts in the State (see *Keady v. Garda Commissioner* 1992 2 IR 197 at p. 205 (McCarthy J) at pp. 210-211 (O’Flaherty J.)). More recent case law reinforces the central importance of this question (*O’Connell v. The Turf Club* 015 IESC 57, 2017 2 IR 43 at para 94). As explained earlier, since at least the early twentieth century revocation of citizenship has been an executive function. Apart from the option of a reference to the High Court provided for under the 1918 act (a choice vested in the executive, not the holder of the certificate of naturalisation), from a judicial presence on the committee of enquiry provided for under that legislation (whose decisions do not bind the Minister), or from the overhanging jurisdiction of the courts by way of judicial review of any revocation decision, the courts have historically had no role in the decision to revoke citizenship. That is consistent with the general role of the Executive in relation to the entry, residence and exit of foreign nationals (*Bode v. Minister for Justice* 2008 3 IR 663). There is nothing in the text or interpretation of the Constitution to suggest that any aspect of this function, “drastic” in its effect or not had been transferred to the judicial branch.”

73. That statement as to the process of revocation is in accordance with my view that what is involved is not the administration of justice but is the exercise of an executive function.

The fair procedures argument

74. In addition to contending that the provisions of s. 19 of the Act of 1956 are unconstitutional as amounting to an administration of justice, it has also been argued on behalf of Mr. Damache that the provisions of s. 19 are unconstitutional in that they do not afford fair procedures to an individual who faces the possibility of the revocation of a certificate of naturalisation. As can be seen from the provisions of s. 19 of the Act, where it is proposed to revoke a certificate of naturalisation the Minister is obliged to give notice of that fact to the individual concerned stating the grounds relied on for revoking the certificate and advising the person concerned that they may apply for an inquiry as to the reasons for the revocation. For that purpose, the matter is then referred to a committee of inquiry appointed by the Minister and it is provided in s. 19(3) that the committee shall report their findings to the Minister. Some assistance can be found as to what is intended to occur before the committee of inquiry from a letter of the 28th November, 2018 written by the Department of Justice and Equality to the solicitors for Mr. Damache in

response to a query as to the nature of the procedure proposed. In the letter it was stated that the procedure would be as follows:

“The exact order and nature of proceedings will be at the discretion of the Chair and members of the committee but will generally be as follows:

If a person has opted for a hearing before the committee, the person will be invited to submit any final written representations to the committee via the Secretariat before the hearing is held.

These written submissions will be reviewed prior to the hearing by the committee members. The Minister will also receive these written submissions and will be given an opportunity to submit a written reply. These written submissions will be reviewed prior to the hearing by the committee members. On the day of the hearing, the Chair will open the hearing and introduce the proceedings.

It will be open to the Chair and members of the committee to direct questions to both parties to the hearing.

The Minister’s representative will present the reasons for the proposed revocation of the certificate of naturalisation and the evidence that is supporting the reasons.

The person who is the subject of the proposed revocation or their representative will be entitled to make a presentation.

The person who is the subject of the proposed revocation or the representative will be entitled to query the evidence presented by the Minister’s representative. Any such queries are to be directed through the Chair.

The Chair of the committee may offer an opportunity for final representations by either party.

The Chair will close the hearing.

The committee will deliberate and compile its report for submission to the Minister.”

75. That letter went on to give further guidance as to the composition of the committee of inquiry. Section 19(3) indicates that the committee would have a Chairman “having judicial experience” and such other persons as the Minister may think fit. Having set that out, the letter then states:

“There are three committee members, two of whom are members of the legal profession and one is a former member of Dáil Éireann.”

76. Presumably one of those persons identified as members of the legal profession is someone who has had “judicial experience”. The letter went on to point out that the findings of the committee are not binding on the Minister and it was further confirmed that there is no right of appeal set out in the Act.

77. A number of issues have been raised as to why it is contended on behalf of Mr. Damache that the Act does not meet the constitutional requirements for fair procedures. They can be identified as the absence of an independent decision-maker, breach of the principle of *nemo iudex in causa sua*, and the appearance of pre-judgment. It is also contended that there is no justification of the necessity for the breaches of fair procedures contended for. Before dealing with these matters in detail, it would be worth considering the submission on behalf of Mr. Damache as to a comparison of the procedures provided for under s. 19 with the procedures upon which it would appear to have been modelled taken from the provisions of s. 20(7) of the British Nationality Act 1948 and the regime which operated in that jurisdiction from 1918 until 2002. Reference is made in the submissions on behalf of Mr. Damache to the article cited by the trial judge in the course of his judgment by Patrick Weil and Nicholas Handler entitled "*Revocation of citizenship and rule of law: how judicial review defeated Britain's first denaturalisation regime*". As described in that article the history of denaturalisation was established in the United Kingdom principally by the British Nationality and Status of Aliens Act 1918. In the course of the article at page 296 it was noted that:

"The Home Office has retained the authority to revoke citizenship continuously from 1914 until the present. Rather, beginning in the middle of the twentieth century, the power simply fell into disuse. . . . Between 1973 and 2000, the power was not used at all."

78. The article goes on to describe how the process was carried out when initiated in that jurisdiction and at page 297 it describes the process in some more detail:

"This article makes unprecedented use of the Home Office's own archives on denaturalisation to propose a novel explanation for its disappearance. In particular, a largely overlooked provision in the BNSA of 1918 required a committee – composed of judges, and completely independent of the Home Office – to review the Secretary of State's decisions to deprive citizens of their nationality. Although this committee was initially intended to be little more than an advisory board, over time it grew to wield immense power within the Home Office, and it used this power in myriad ways to constrain and, ultimately, eclipse the Home Secretary's denaturalisation authority. In effect, it created a system of judicial review for all denaturalisation decisions within the Home Office."

79. Ultimately, as is referred to at page 340 of the article, it was noted as follows:

"A 1960 Home Office memorandum summarised the *de facto* policy of the Office, recording that:

'Although the Secretary of State was not bound by statute to act on the findings of the committee, their recommendations were, in practice, always accepted. Even if the decision of the committee was considered to be mistaken, it was, nevertheless, acted upon.'"

80. The position outlined above in relation to the process that existed in the United Kingdom and which operated a similar system to that contained in s. 19 until 2002 is noteworthy from the point of view that, although the English legislation, like the Irish legislation, did not bind the Secretary of State to accept the committee's decision, by 1960 the practice had developed whereby the views of the committee concerned were considered to be binding. There is no suggestion in this case that the Minister is in any way bound by the decision of the committee and indeed the letter of the 28th November, 2018 referred to previously makes it abundantly clear that the findings of the committee are not binding on the Minister.
81. Having regard to the similarity between the former system operative in the United Kingdom and that provided for under s. 19, the point is made that the U.K. committee procedure operated as a *de facto* appeal to an independent body. Clearly, the committee of inquiry set up under s. 19(3) could not be described in those terms. Another point made on behalf of Mr. Damache is that the U.K. Secretary of State ceased to present the reasons for revocation before the committee or appear as a party to the proceedings. The position of presenting the State's case to the committee of inquiry in the U.K. was left to the Treasury Solicitor's Department. Thus, the committee evolved over the years so that it is contended on behalf of Mr. Damache that it operated to provide a *de facto* appeal to an independent body.
82. Having made the comparison between the U.K. system and the Irish system, the submissions then considered the specific grounds relied on to say that there is a lack of fair procedures starting with the question of the lack of an independent decision-maker. Effectively, the Minister having proposed the revocation of the certificate of naturalisation is the person who makes the final decision on the revocation of the certificate. Even though a committee of inquiry is part of the process provided for by the Oireachtas, the Minister having expressed the view that he intends to revoke the certificate, then appoints the committee of inquiry, presents the case for revocation to the committee of inquiry and then the committee of inquiry having made its findings, the Minister makes the decision in circumstances where he is not bound by the findings of the committee of inquiry. Much reliance was placed on behalf of Mr. Damache on a Canadian Federal case, *Hassouna v. Minister for Citizenship* [2017] FC 473. In that case, the court found that legislation which removed in "non-complex" cases the power of the courts to conduct a hearing on appeal from the decision of the Minister was unconstitutional. Gagné J. made a number of observations on the rights acquired by citizenship stating at paragraphs 77 to 78 as follows:

"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)).”

83. She went on consider the importance of the effect of a loss of citizenship and what impact that had on the requirement of fair procedures given the significance of the effect on the person concerned. At paragraph 85 she continued as follows:

“85. I am of the view that the nature of the decision being made, and the importance of the decision to the affected individuals clearly augur in favour of a high degree of procedural fairness being owed to the Applicants. The fundamental importance of the nature of the decision, specifically a determination of the Applicants’ right to remain Canadian citizens, weighs in favour of a high degree of procedural fairness. The revocation of citizenship ‘has exceptional importance to the lives of those with an interest in its result’ (Baker, above at para 31).

86. Clearly, citizenship revocation is an important decision. The Applicants are barred from applying for citizenship for ten years after the revocation. Some will revert to foreign national status and some may even be rendered stateless. This, along with the loss of many crucial rights associated with citizenship, augurs in favour of a high degree of procedural fairness.

87. Since there is no right of appeal from a revocation decision of the Minister under the Amended Act, the need for procedural fairness is all the more acute.

88. The Applicants submit that the Amended Act creates a discretionary regime lacking in basic procedural protections for the affected individuals. They contend that this is not consistent with fundamental justice as the procedural protections within subsection 10(3) of the Amended Act are too minimal.

89. The Respondent submits that the statutory scheme in the Amended Act provides individuals with sufficient protection to ensure that the principles of fundamental justice are met.

90. I side with the Applicants on this issue.

91. In order for the revocation process to be procedurally fair, the Applicants ought to be entitled to: (1) an oral hearing before a Court, or before an independent administrative tribunal, where there is a serious issue of credibility; (2) a fair opportunity to state the case and know the case to be met; and (3) the right to an

impartial and independent decision-maker. None of these are guaranteed under the Amended Act.”

84. Here, it is pointed out that the fact that the same person instigated, investigated and decided on the outcome would lead a reasonable observer to conclude that there was the appearance of pre-judgment as was the conclusion of Gagné J. in *Hassouna*. Accordingly, it is submitted that the structure of the process is at odds with the requirement of natural justice that justice must be seen to be done.
85. Reference is made to the observations of the trial judge at paragraph 45 to 46 where he stated as follows:

“Of course the fundamental misconception in this submission is the false premise that this is a judicial or quasi-judicial function. The submission misunderstands the nature of the process. Revocation is an executive decision made after an advisory inquiry before independent persons using fair procedures. The fact that members of the committee are appointed by the Minister does not mean that they are not independent. The core misunderstanding of the submission is that the Department ‘advocates before its own advisory body for that body to approve of its decision’. But in the context of the inquiry the Minister has not made a decision, he has only made a proposal; and it is perfectly legitimate to outline the reasons for that proposal to an advisory committee. . . .

The concept of justice being seen to be done does not arise because an executive process is not the doing of justice in the sense of the case law.”

86. Not surprisingly, counsel for Mr. Damache take issue with that statement and criticises the conclusion that since the process was not a judicial or quasi-judicial process, the same rules of natural justice did not apply. It was noted that the fact that the Oireachtas had provided for a committee process was demonstrable of the fact that contested cases would require an adversarial, quasi-judicial hearing between the Minister and the affected person. Although the hearing was delegated to a committee it was nonetheless the Minister who must make the decision following that hearing. It is said that the approach of the trial judge absolves the Minister from the requirement not to pre-judge the issue and is a breach of the State’s obligation to protect the personal rights of the citizen in such circumstances. Having regard to the “reasonable apprehension” test described in *Bula Limited v. Tara Mines (No. 6)* [2000] 4 I.R. 412 at 441, it is said that a reasonable person observing the revocation process would apprehend that the ultimate decision would be in line with the Minister’s stance throughout the process. It is emphasised that the committee is limited in the way in which it can deal with the matter and that the committee has no role in advising on the proportionality of any proposed revocation and as has been made clear previously, the Minister is not in any shape or form bound by the view of the committee.

87. In support of its submission, reference was made once more to the decision in *Hassouna* where it was said by Gagné J. in relation to a similar issue at paragraph 100 et. seq. as follows:

“100. The Applicants argue that the structure under the Amended Act lacks judicial independence and impartiality, whether the decision-maker is in fact the Minister himself or a delegate. To this, the Respondent submits that the investigation, the writing of the notice, and the determination of whether to proceed and ultimately revoke are done by three different persons and as such, the investigative and adjudicative functions are kept separate. Even in cases where the Minister’s delegate acts in both capacities, namely sends out the notice and renders the revocation decision, this does not demonstrate a lack of impartiality or independence.

101. I agree with the Applicants in that regard.

102. The Senior Analysts only send out notices when the threshold for misrepresentation is satisfied on a balance of probabilities (Cross-Examination of Amélie Laporte-Lestage at 70, 99). This is the same standard required under the Amended Act for the revocation of citizenship (Citizenship Act, above, s 10(1)). A reasonably informed bystander could reasonably perceive bias on the part of the adjudicator, when the adjudicator who must decide on a balance of probabilities whether a misrepresentation has occurred, has already determined on a balance of probabilities that a misrepresentation occurred by virtue of having sent out the initial notice.”

88. Reference is also made to the cases of *Heneghan v. Western Regional Fisheries Board* [1986] ILRM 225, *O’Donoghue v. The Veterinary Council* [1975] I.R. 398 and *Prendiville v. Medical Council* [2008] 3 I.R. 122. It is perhaps worth citing a passage from the judgment of Carroll J. in *Heneghan* at page 229 where she held as follows:

“. . . there was a lack of natural justice in the way the dismissal was carried out. Mr. Kennedy was the Prosecutor in the dismissal. It was at his instance, related to the behaviour of Mr. Heneghan to him personally, that he sought to dismiss him. He was also himself in the position of gathering evidence. He heard representations and then acted as Judge on the allegations which he himself made and he then decided to dismiss.

Mr. Heneghan is an office-holder under the Fisheries Act. Mr. Kennedy is not his employer. He is a fellow officer who is his supervisor. Mr. Heneghan was entitled to natural justice in regard to any suspension or any dismissal.

He did get notice of the grounds alleged against him and an opportunity to make representations but there was no regard for the principle ‘*nemo iudex in causa sua*’.

. . . In a much milder case (*O'Donoghue .v. The Veterinary Council* [1975] IR 398) where a member of the Council who voted to suspend a Veterinary Surgeon, had allowed his name to be used as Prosecutor in the inquiry preceding the resolution to suspend, but otherwise took no part, it was held the decision was void because the principle *nemo iudex in causa sua* was not observed.

This case is much stronger. Here Mr. Kennedy was witness, Prosecutor, Judge, Jury and Appeal Court.”

89. Finally, it was contended on behalf of Mr. Damache that there was no necessity for the Minister to act as both instigator of the revocation process and as the ultimate decision-maker. In this regard reference was made to the decision of Finlay Geoghegan J. in *North Wall v. Dublin Dockland Development Authority* where she concluded that there was no difference in standards as between administrative and quasi-judicial decision-making when assessing whether the appearance of pre-judgment or bias had been made out. She concluded that in both such cases, the reasonable apprehension test applied. In doing so she referred to a decision of Keane J. (as he then was) in the case of *Radio Limerick One Limited v. Independent Radio and Television Commission* [1997] 2 I.R. 291 where he stated at page 316 as follows:

“There is a further consideration applicable to bodies of this nature which is relevant to the present case. Because of the factors to which I have already referred, a body such as the Commission may not, in given circumstances, present the appearance of strict impartiality required of a court administering justice. That, however, does not relieve the Commission of the obligation to take every step reasonably open to it to ensure that its conclusions are reached in a manner, not merely free from bias, but also of the apprehension of bias in the minds of reasonable people . . .”

90. Thus, it is contended that the process contained in s. 19 of the Act of 1956 does not comply with the obligation to ensure that the resulting decision does not lead to the apprehension of pre-judgment.
91. The submissions on behalf of the *amicus curiae* to a large extent echo those of the appellant. The point is made that s. 19 of the Act of 1956 is unconstitutional having regard to the lack of procedural safeguards entailed in a power which has such a significant impact on an individual’s rights. In that context reference is made to the fact that the status of a citizen under the Constitution entails special protection of civil rights in a number of references contained in the Constitution. The point was also made that as a citizen of Ireland a person is also a citizen of the E.U. and therefore enjoys the rights which attach to citizenship of the European Union. Reference was also made to the observations of Gagné J. referred to previously in the case of *Hassouna* as to the rights obtained as a result of citizenship and the rights that would be lost in the event of revocation of citizenship.

92. The point forcefully made on behalf of the *amicus curiae* is that the more significant the impact of a particular decision on a person's right, the more robust the procedural safeguards must be. In this context reliance is placed on the decision in the case of *Flanagan v. University College Dublin* [1988] I.R. 724 in which Barron J. at pages 730 to 731 said as follows:

"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 protection to the person concerned in one case and so 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."

93. The point was also made that in the context of naturalisation the courts have recognised that fair procedures continue to apply to decisions in this area notwithstanding the fact that they are decisions which belong to the executive sphere. Thus in *A.P. v. Minister for Justice and Equality* [2019] IESC 47, O'Donnell J. stated:

"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 *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."

94. Thus, the point is made that, relying on the two decisions referred to, it is clear that applicants for naturalisation who are obviously non-citizens when applying for naturalisation and who are engaged in a process which is one which is a function of the executive and discretionary in nature are entitled to procedural safeguards in the course of the process. It is thus argued that the procedural safeguards surrounding the revocation of citizenship, which as is pointed out on behalf of the *amicus curiae*, by definition involves a person who is a citizen enjoying the full panoply of constitutional

rights, must be commensurately higher. Thus, it is contended on behalf of the *amicus curiae* that it is unfair and in breach of the appellant's right to constitutional justice that there is no independent arbiter appointed by law with power to confirm, amend or set aside the Minister's decision to revoke citizenship. In this context reference was made also to the decision of this Court in an earlier case involving this appellant, namely *Damache v. DPP* [2012] IESC 11, which concerns the importance of an independent decision-maker, and *Dellway v. NAMA* [2011] 4 I.R. 1 as to the requirements of constitutional justice in prescribed procedures. Therefore, it is contended that it is necessary that there should be an independent arbiter with decision-making powers as a matter of constitutional fairness in applications to revoke a certificate of citizenship.

95. In the course of their submissions, the *amicus curiae* laid emphasis on a number of international instruments in which the issue of citizenship and the loss of citizenship may have on an individual is discussed. It is not necessary to set those out here but the point is made that given the importance of the status of citizenship generally and the effect that loss of citizenship can have on an individual, the process by which citizenship may be lost should be robust. Four points are then made on behalf of the *amicus curiae* in regard to the provisions of s. 19. First it is contended that the manner in which the committee of inquiry is appointed is in breach of the principle *nemo iudex in causa sua* or alternatively the requirement for independence in circumstances where a reasonable apprehension of bias may arise as the appointment of the committee is made by the Minister proposing revocation.
96. Secondly it is contended that the procedures employed by the committee of inquiry are not specified in the legislation and that the principle *audi alteram partem* is breached as a result. It is particularly emphasised that 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.
97. The third point made is that the result of the committee of inquiry is a report that goes to the Minister. As the Minister is the decision-maker it is contended that the person affected must have the opportunity of understanding the Minister's view and putting their own arguments for consideration to the Minister. The point is made that it is inappropriate that the person impacted does not have the opportunity directly to influence the decision-maker. This is so notwithstanding that it is assumed that the Minister will consider the contents of the report furnished by the committee of inquiry which report will undoubtedly spell out the views of the person affected and perhaps reach conclusions on them which may be relied on by the Minister. Nevertheless as said, the person concerned does not actually have the opportunity to make their case directly to the decision-maker.
98. The fourth point made is that the determination of rights is not made by an independent tribunal given that the decision-maker is the Minister. It is pointed out that the person who initiates the proposal to revoke is the person who decides on the ultimate decision to reaffirm or refuse to reaffirm that proposal after the committee has reported its findings. This, it is submitted, is analogous to cases where the same party has acted as prosecutor

and judge. In those circumstances it is contended that the procedures set out in s. 19 are not sufficient to vindicate the rights of a person having regard to the significant implications that revocation will have on the person's rights.

99. The submissions on behalf of the Minister commence by pointing out that the Act of 1956 as a post-1937 Act enjoys the presumption of constitutionality. Insofar as a process has been set up under s. 19 of the Act, it is submitted that the presumption of constitutionality carries with it the presumption that the procedures provided for in s. 19 will be operated in compliance with fair procedures. In that context reference was made to *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317 where Walsh J. at page 341 stated as follows:

"At the same time, however, the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts."

100. There can be no issue with that statement as to the fact that proceedings, procedures, etc., provided for in an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. As has been seen, the principal argument made on behalf of the appellant is the fact that s. 19 does not provide for an independent decision-maker. This approach is supported by the *amicus curiae* as has been seen. However, it is contended on behalf of the Minister that the arguments made on behalf of the appellant misunderstand the process and do not have appropriate regard to the role of the committee of inquiry.
101. The Minister makes a number of points about the process provided for under s. 19. First of all, it is noted that Mr. Damache is entitled to be notified of the reasons for the proposed revocation. Secondly, he is entitled to be notified of his right to apply to the Minister for an inquiry as to the reasons for the revocation. It is pointed out that the committee of inquiry must consist of a chairman having judicial experience and it is said that this is indicative of the impartiality and independence of the committee from the Minister. Further the point is made that the committee must report its findings to the Minister and that the Minister must consider the findings of the committee in reaching a decision on whether to revoke or not to revoke the certificate of naturalisation.
102. The Minister goes on to make the point that there is "no contest between the appellant and the Minister, and as the Minister is not exercising judicial power or administering justice, the maxim *nemo iudex in causa sua* is of no application". It is nonetheless accepted that the Minister is bound to act judicially, that is to say impartially and further the point is made that he is subject to the supervision of the Court by way of judicial review. The point is made on behalf of the Minister that the procedures before the committee are a matter for the committee itself but it is anticipated that the Minister

would attend at the hearing to present the evidence on which the notice was based. Notwithstanding that, it is argued that the hearing before the committee is not adversarial and further that it does not constitute the determination of a *lis inter partes*. The point is made that the issue before the committee is whether the person in respect of whom the notice of revocation has been served and who seeks to have an inquiry made is to determine whether that person has failed in his duty of fidelity to the nation and loyalty to the State. In other words have the terms of s. 19(1)(b) been met? The point is made that the decision ultimately made by the Minister is judicially reviewable and falls to be assessed by reference to the legal tests of rationality and reasonableness having regard to any findings made by a committee of inquiry. It is said that this provides protection against any potential breach of the requirements of fair procedures. For that reason it is contended that the trial judge was correct in relation to the conclusions contained in paragraph 45 of his judgment which is set out above.

103. A further point was raised by the Minister in relation to an argument that was put forward on behalf of Mr. Damache to the effect that "the risk of the decision being tainted by partiality therefore arises not only from the Minister's role as a politician who is subject to pressure to take action against terrorists and other disloyal persons". Whilst this matter was referred to in the submissions of the appellant, it is not an issue that arises from the notice of appeal. The notice of appeal contended that the High Court erred, *inter alia*, "in assessing whether the revocation process leads to the appearance of pre-judgment, by failing to have regard to the fact that the first named respondent makes a proposal to revoke citizenship which would take effect if unchallenged, and then advocates for that proposal before its advisory committee in an adversarial process. This involvement at all stages of the process creates the impression in the mind of the reasonable observer that the first named respondent would be unlikely to be diverted from his initial proposal to revoke citizenship." Thus, I think it is clear that the issue being raised on behalf of the appellant concerns the structure of the procedure itself as is pointed out in the remainder of paragraph 25 of the written submissions. Further, the point made as to the Minister's role as a politician was not raised in the Statement of Grounds in these proceedings. Consequently, leave was not granted to the appellant to raise any question of partiality by reason of the Minister's role as a politician and insofar as that suggestion was made in the submissions to this Court, it does not arise from the notice of appeal as I have mentioned. Before proceeding any further in considering the issues as to whether the process contained in s. 19 affords the necessary safeguards to protect the individual who is facing the potential revocation of a certificate of naturalisation, I want to make it clear that I reject any argument based on the Minister's role as a politician or on the basis that he is subject to some form of inappropriate pressure to "take action against terrorists and other disloyal persons." This was never raised as an issue in the statement of grounds and does not arise from the Notice of Appeal to this court. When a similar argument was raised before the trial judge, he rejected it. (see paras. 48-49 of his judgment.) There is no evidential basis for making such an argument and it should not have been made in the submissions given that leave was never granted to raise such an issue. I propose to make no further comment on this aspect of the arguments.

104. In support of the arguments made on behalf of the Minister that the procedures provided for by s. 19 do not give rise to pre-judgment on his part, reference was made to the decision of the Court of Appeal in the case of *Habte* referred to previously. In that case, the s. 19 procedure was described at length in the judgment of Murray J. The application in that case contended that the provisions of s. 19(1)(a) of the Act was invalid having regard to the Constitution. Those arguments were rejected. Proceedings were initiated following the service of the notice of intention to revoke a certificate of naturalisation. The Minister relied on that case to argue that the Court therein rejected an argument as to pre-judgment by the Minister. Reference was made to paragraph 114 of the judgment in which the following was stated by Murray J.:

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

105. Those observations were made in respect of the argument in that case that by initiating the process by serving a notice of intention to revoke, the Minister was, in effect, prejudging the final outcome of the process. The Minister emphasises that the Committee of Inquiry is independent in carrying out its role and further points out that the Minister must act impartially. The point is also made that the findings of the Committee are amenable to judicial review on grounds, *inter alia*, of reasonableness.

106. Finally, the point was made that there has never been a suggestion that the matters relied on to revoke in this case are not capable of constituting a reason to revoke within the meaning of s. 19(1)(b). Thus, it is said to be difficult to see how the Minister could be said to be subjugating his judgment to political expediency given that the matters relied on come within the confines of the statutory provisions.

107. The Minister then proceeded to make submissions on the decision in *Hassouna* on which much reliance has been placed by Mr. Damache. That case concerned a number of judicial review cases challenging the constitutionality of the revocation or proposed revocation of citizenship on grounds of fraud or misrepresentation under the Citizenship Act, RSC 1985, c. C-29, as amended by the Strengthening Canadian Citizenship Act, SC 2014, c. 22. The amending legislation provided for two different procedures, a judicial model for complex cases and an administrative model for “non-complex” cases. At issue in the proceedings was the process under the administrative proceedings. The Court in that case found that the administrative model violated s. 2(e) of the Bill of Rights, in circumstances where the applicants were not afforded (1) an oral hearing before a Court, or before an independent administrative tribunal, where there is a serious issue of credibility; (2) a fair opportunity to state the case and know the case to be met; (3) the right to an impartial and

independent decision maker; and (4) an opportunity to have their special circumstances considered when such circumstances exist.

108. The Minister makes the point that unlike the applicants in *Hassouna*, a naturalised citizen in this jurisdiction is entitled to an oral hearing before an independent Committee of Inquiry. The point is also made that the Committee of Inquiry is entirely independent of the Minister, who nevertheless remains the decision-maker. The citizen concerned has a fair opportunity to state the case he wishes to make. It is noted that the Committee is responsible for its own procedures and finally, it is noted that it follows from the provisions of s. 19(3) that any findings made by the Committee will be considered by the Minister.
109. The Minister also makes the point that the decision in *Hassouna* is of persuasive value only and argued that the provisions at issue in those proceedings were not entitled to the benefit of the double construction rule.
110. The Minister also made reference to the reliance by the appellant on cases such as *Heneghan* referred to above which, it is argued, involved an extreme example of a breach of the *nemo iudex in causa sua* principle and also to the cases of *O'Donoghue* and *Prendiville*. It is said that each of these cases can be distinguished from the present case given that in *Heneghan*, the same person acted as instigator, evidence gatherer and adjudicator on allegations he himself had made and in the other two cases, persons in the original complaint or hearings in relation to the complaint had a role in determining whether a sanction should be imposed on foot of the complaint. It is said that the arguments of the appellant based on these cases fails to take account of the presumption of constitutionality and the requirement that whatever is necessary for fair procedures can be implied into the statute. Notwithstanding this argument, the Minister further submits that as there is no "cause" or *lis* to which the Minister is a party, the principle enunciated in *East Donegal Cooperative Ltd.* referred to above simply does not apply.
111. Finally, the Minister made some observations on the arguments put forward by the Appellant derived from the article by Weil and Handler referred to previously. It is said that the most important positive difference identified by the authors between the denaturalisation regime under the pre-2002 legislation commencing with the British Nationality and Status of Aliens Act 1914-18 and concluding with the 1948 legislation and the regime created by the post 2002 legislation was "the presence in the former of meaningful judicial review, which preceded the Home Secretary's decision."
112. The reference to "judicial review" is then referred to by the Minister as "the judicial involvement or oversight achieved through the Committee process which has since been removed from the UK statute books but remains *in situ* in this jurisdiction." In the UK, under the regime now in operation, there is only a right of appeal to an adjudicator appointed under s. 81 of the 2002 Act.
113. The Minister concluded his arguments on this issue by maintaining that no reasonable apprehension of bias can arise from the appointment of Committee members by the

Minister and should any element of bias emerge, this would be restrained by the Courts. Reference was made to the decision in the case of C-175/11 *HID v Minister for Justice*, where the Court of Justice was satisfied that the former Refugee Appeals Tribunal was sufficiently independent to constitute a “court or tribunal” for the purposes of providing an effective remedy and that the fact that its members were appointed by the Minister did not compromise their independence.

Decision on the fair procedures argument

114. The importance of citizenship to the status of an individual has already been described in the course of this judgement. Article 9.1.2 of the constitution expressly refers to the fact that the acquisition and loss of citizenship is to be determined in accordance with law. The Act of 1956 embodies the legislative provisions designed to enable individuals to acquire Irish citizenship and has been set out in the course of this judgement, the Act in section 19 contains provisions for the loss of citizenship in respect of those who obtained citizenship by means of naturalisation. There can be no doubt as to the serious effects that flow from the loss of citizenship. These include rights guaranteed under the Constitution in respect of citizens; the many practical benefits that flow from being a citizen of Ireland, not least the fact that in the case of Mr Damache, loss of Irish citizenship entails loss of citizenship of the European union; the loss of the right to an Irish passport and the loss of consular assistance when abroad and the loss of various benefits that enure to a citizen, such as social welfare, access to health services and so on. The severity of the loss of citizenship has, as pointed out previously, been referred to in a number of international instruments. Thus, in Resolution 32/5 of the Human Rights Council (2016), adopted by the UN General Assembly in July 2016, it was stated at paragraph 13 as follows:

“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”

115. 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, to paraphrase the Resolution referred to above, must observe minimum procedural standards in order to comply with the State’s human rights obligations. Before considering the main arguments of the parties on this issue, I propose to consider in the first instance the decision of the Court of Appeal in the case of *Habte* referred to above.

116. The appeal in that case concerned two sets of proceedings (2019/118 and 2019/1130 in the first of which Ms. Habte sought a declaration as to her date of birth on the Certificate of Naturalisation and the provision of a “true and accurate” Certificate of Naturalisation and an order of *certiorari* quashing the refusal of the Minister to amend the Certificate. The trial judge declined to make an order as to the date of birth but accepted that the Minister had a power to cancel the certificate and re-issue a new certificate. The Minister appealed that decision. He then commenced the process of revoking the certificate under s. 19 on the basis that the certificate had been procured by misrepresentation, leading to

the second set of proceedings. Amongst other issues, it was contended on behalf of Ms. Habte that s. 19(1)(a) of the Act of 1956 was invalid having regard to the provisions of the Constitution. Ms. Habte was unsuccessful in those proceedings and she appealed against that decision.

117. The Court of Appeal accepted that there was a power to cancel and amend the certificate and then proceeded to consider whether in the circumstances of that case the Minister was nonetheless entitled to embark on the s. 19 procedure. For that purpose, the Court of Appeal set out an overview of the s. 19 procedure. Much of the argument in that case focused on the contention by Ms Habte that the proposition put forward in accordance with section 19 (2) amounted to a decision which in itself resulted in revocation. The Court of Appeal rejected that suggestion noting that the legislation expressly permitted the formation of an "intention" and not the making of a "decision". The Court of Appeal addressed at length the question of the discretion of a court to refuse relief by way of judicial review where there is an alternative remedy. In dealing with this issue, Murray J at paragraph 113 of his judgement stated:

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

118. In that context, the procedure Murray J. was considering which was open to Ms Habte was the inquiry as provided for under section 19 (3). On the question of fair procedures, Murray J. went on to make the following observation:

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

119. A further reference was made to an argument based on fair procedures at paragraph 121 of the judgement of the Court of Appeal. In that context an argument had been made by Ms Habte to the effect that there was an absence of fair procedures because she was not informed of the intention to make a proposal to revoke citizenship nor given an opportunity to make representations in advance of the issuing of such a proposal. This

argument was rejected by the Court of Appeal relying on the decision of this Court in the case of *Crayden Fishing Co. Ltd. V. Sea Fisheries Protection Authority* 2017 IESC 74, 2017 3 IR 785.

120. Thus, I think it can be seen that while there was an argument made in *Habte* as to the validity of s. 19 by reference to complaints about the absence of fair procedures, the decision in that case did not address the question of fair procedures following the commencement of the inquiry process and therefore the conclusion in *Habte* that s. 19 was not invalid having regard to the provisions of the Constitution is not of assistance to this Court in considering the systemic challenge to the inquiry process under s. 19.
121. I now wish to turn to the arguments made about the lack of fair procedures once an intention to revoke has been notified to the individual concerned. As we have seen, when such a notice is served, the individual concerned can either decide to accept the revocation but if not, can apply “for an inquiry as to the reasons for the revocation”.
122. One of the first complaints made by Mr. Damache concerns the fact that it is the Minister who appoints the members of the Committee of Inquiry. This is said to be a breach of the principle, “*nemo iudex in causa sua*”. Reliance was placed on the decision in *Heneghan* and to *O’Donoghue* referred to above for this argument. The point is made that the Minister appoints the Committee, makes representations before the Committee and ultimately, makes the final decision on the issue of revocation. I have already referred in some detail to those decisions but I think that they are of some assistance on this issue. To take the case of *Heneghan*, in that case, the decision to dismiss Mr. Heneghan was made by the person who was the person “prosecuting” the dismissal. The reason for the dismissal was because of the conduct complained of Mr. Heneghan towards that person. The “injured party” was also the person who gathered the evidence, heard the representations and made the decision to dismiss. This was found to be a breach of the principles of natural justice. The decision of Kelly J. (as he then was) in *Prendiville v Medical Council* 2008 3 IR 122 is also of assistance. As he said at p. 156:

“There is no fixed standard of natural justice which is applicable in all circumstances. The standard is elastic. It varies in accordance with the circumstances. As was said by Keane J. in *Mooney v. An Post* 1994 ELR 103:-

‘... The concept [of natural justice] is necessarily an imprecise one and what its application requires may differ significantly from case to case. The 2 great principles – *audi alteram partem* and *nemo iudex in causa sua* – cannot be applied in a uniform fashion to every set of facts.’

The standard to be applied to a person whose conduct is under investigation therefore varies according to the circumstances. In the present case I am satisfied the high standards of natural justice must apply. The allegations made against the applicants were very serious and their whole professional standing was at stake. The applicants were entitled to expect that there would be strict adherence to the

rules of natural justice and that justice would not only be done but be seen to be done in their dealings with the council.”

123. There is no doubt that it is the proposal of the Minister that triggers the establishment of a Committee of Inquiry and that the Minister appoints the members of the Committee but insofar as it is said that the appointment by the Minister is a breach of the principles of natural justice, more specifically, of the principle of *nemo iudex in causa sua*, I disagree. Contrast the position with the facts in *Heneghan*, where the same person instigated the complaint, investigated the complaint, heard the representations and made the decision. See also *Prendiville* and *O'Donoghue*. There is nothing to suggest that the members of the Committee of Inquiry are anything other than independent in the exercise of their functions; there is nothing to suggest that the members of the Committee have any prior involvement in the matter and there is no suggestion that they have any interest in the outcome of the inquiry. It is specifically required by s.19 that the chairman of the Committee shall consist of a person having judicial experience. The question for me is whether or not the Committee is independent of the Minister. In the circumstances, notwithstanding that it is the Minister who makes the appointment of the members of the Committee of Inquiry, I am satisfied that there is nothing to demonstrate that that the Committee is anything but independent in the exercise of their functions and I would not find that there has been a breach of the principles of natural justice on that ground.
124. In reaching that conclusion, I am mindful of the emphasis placed by the Minister on the fact that following the service of a proposal, and assuming the individual concerned has requested an inquiry, no decision is made by the Minister until after the independent Committee of Inquiry has reported its findings. The Minister contrasts the position in this jurisdiction, given the involvement of a Committee of Inquiry, with that which pertained in Canada as described in the case of *Hassouna*. I accept, of course, the point made that the decision in *Hassouna* is of persuasive value only and that the Canadian provisions at issue are different to the provisions at issue in this jurisdiction. However, I think it would be helpful to make a number of observations. In the passage from *Prendiville* cited above, the point was made that high standards of judicial review must apply given that the allegations made against the individuals in that case were very serious. That was a case involving the professional standing of medical consultants in which their professional standing was at stake. The consequences for Mr. Damache in this case are no less serious and therefore, it follows that high standards of natural justice must apply.
125. The next point to make concerns an observation in *Hassouna* previously cited but to my mind, it bears repetition:

“In order for the revocation process to be procedurally fair, the Applicants ought to be entitled to: (1) an oral hearing before a Court, or before an independent administrative tribunal, where there is a serious issue of credibility; (2) a fair opportunity to state the case and know the case to be met; and (3) the right to an impartial and independent decision-maker.”

126. Given the importance and significant effect on an individual of the revocation of citizenship, it seems to me that, as Gagne J. has said, such standards must be available in order for the process to be fair. In our jurisdiction, some of these requirements are met. The individual is entitled to know the case to be met and is entitled to make representations. There is an independent Committee of Inquiry but as has been seen, its functions are limited. The inquiry is stated to be as to the reasons for the revocation. Having conducted the inquiry, the Committee reports its findings to the Minister who then makes a decision as to whether to revoke or not. As is clear from the provisions of s. 19 and confirmed in the letter of the 28th November 2018 as to the procedures to be followed in the event of an inquiry, the findings of the Committee are not binding on the Minister. Further, there is no right of appeal from the decision. I accept that the Minister acknowledges that the report of the Committee must be considered by the Minister including any findings of fact made by the Committee and that the Minister must consider the representations of the individual concerned. In short, the Minister has not disputed that he must act judicially in making a decision.
127. Further, the Minister sought to distinguish the position that pertained in the United Kingdom described in the article by Weil and Handler, referred to above, on which s. 19 was based, by referring to the form of "judicial review" that existed in that jurisdiction prior to the reforms brought in, in 2002. It was said that the Committee of Inquiry in the UK prior to 2002 was the means by which judicial involvement in the process was achieved and reliance is placed on the continued existence in this jurisdiction of the Committee process. With respect, I think this argument misses the point. As was explained in that article, the practice developed in that jurisdiction of the use of Treasury Solicitors to present the case for revocation and further and, more importantly, the position was taken that the decision of the Committee was binding on the Secretary of State. In other words, there was an independent decision-making body whose findings were binding on the Secretary of State. That is not at all the position under s. 19 of the Act of 1956 as has been made clear by the Minister
128. It may be useful to contrast the position of an individual faced with an intention to revoke a certificate of naturalisation with a person claiming international protection as a refugee pursuant to the International Protection Act 2015. They are entitled to an examination of their application at first instance. In the event that they are unsuccessful, there is a right of appeal to a Tribunal. The Minister is then required to give a declaration of refugee status save in exceptional circumstances provided for in s. 47(3) of that Act such as the person being a danger to the security of the State. The citizen who is facing a proposal to revoke a certificate of naturalisation does not have the same level of procedural safeguards. Following the service of a notice of intention to revoke, the individual is entitled to know the reasons for the proposal and can seek an inquiry as to the reasons for the proposal to revoke. He can make representations, call evidence and challenge the evidence against him. What he does not have is an "impartial and independent decision-maker". The person who starts the process is the Minister. Where there is a Committee of Inquiry, his representatives present the reasons for the proposed revocation and the evidence to support it. Although the Committee reports its findings to the Minister, the

Minister has made it clear that the findings of the Committee are not binding on him. The same person who initiated the process, whose representatives make the case for revocation before the Committee of Inquiry (where it is sought) ultimately makes the decision to revoke.

129. In my view, the process provided for in s. 19 does not provide the procedural safeguards required to meet the high standards of natural justice applicable to a person facing such severe consequences as are at issue in these proceedings by reason of the absence of an impartial and independent decision maker. For this reason, I have come to the conclusion that s.19 is invalid having regard to the provisions of the Constitution.
130. Bearing in my mind my conclusion on this issue, it follows that the existence of the remedy of judicial review in respect of the decision of the Minister does not provide an effective remedy where the problem is not with the manner in which the process is carried out but with the process itself.
131. Given my conclusions on this issue, it is not necessary to consider the arguments based on EU law or the European Convention on Human Rights.
132. Finally, I should make one observation. Mr. Damache has pleaded guilty to serious terrorist offences and is currently serving a lengthy term of imprisonment in the United States. It has never been suggested that the Minister was wrong to trigger the process of revocation under s. 19(2) of the Act of 1956. The issue was with the process provided for in s. 19 when an inquiry is sought by the individual concerned as to whether or not the certificate of naturalisation should be revoked.

Conclusions

133. I have considered in the course of this judgment the question of whether the revocation of a certificate of naturalisation amounts to the administration of justice. In this regard, I have considered the jurisprudence and am satisfied that the revocation of a certificate is not the administration of justice but is the exercise of an executive function. *Inter alia* I am satisfied that the fourth and fifth criteria as set out in *McDonald* are not met:

“(t)he 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; and

“(t)he making of an order by the Court which as a matter of history is an order characteristic of Courts in this country.”)

134. In considering the argued breach of natural justice, I have emphasised that because of the drastic consequences a revocation of a certificate of naturalisation may have for a person, a high standard of natural justice must apply to any such process, in line with cases such as *Prendiville*. I am satisfied that there is nothing to demonstrate that the Committee is anything but independent in the exercise of their functions and I would not find that there has been a breach of the principles of natural justice by reason of a lack of independence on the part of the Committee of Inquiry. However, for the reasons I

have set out in this judgment, the issue with s. 19 comes from the fact that the process provided for does not provide the procedural safeguards required to meet the high standards of natural justice applicable to a person facing such severe consequences as are at issue in these proceedings. In particular, 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. In the circumstances, I have come to the conclusion that s.19 is does not meet the high standards of natural justice required and is therefore invalid having regard to the provisions of the Constitution. For that reason, I would allow the appeal from the decision of the High Court.

135. Accordingly, I would allow the appeal.