

**AN CHÚIRT UACHTARACH  
THE SUPREME COURT**

S:AP:IE:2021:000041

**O'Donnell C.J.  
Dunne J.  
Charleton J.  
O'Malley J.  
Baker J.**

**Between/**

**U.M. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M.M.)**

**Appellant**

**AND**

**THE MINISTER FOR FOREIGN AFFAIRS AND TRADE**

**AND**

**PASSPORT APPEALS OFFICER DAVID BARRY**

**Respondents**

**AND**

**THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION**

**Amicus Curiae**

**Judgment of Dunne J. delivered on 2nd day of June 2022**

**Introduction**

1. This appeal arises from the decisions of the first and second respondents to refuse the appellant's application for an Irish passport on the basis that he is not an Irish citizen.
2. The central issue in this case is whether the first and second respondents erred in their respective decisions to refuse to issue UM with an Irish passport, where UM's father and Next Friend, MM, had been physically present in the State for the period required by Section 6A of the Irish Nationality and Citizenship Act 1956 ("the 1956 Act"), but his presence was based on a declaration of refugee status that was subsequently revoked as it had been given on the basis of information which was false or misleading in a material particular. This involves a consideration of the effect of

revocation on a child of the person who had the benefit of a declaration of refugee status and whether Section 6A and 6B of the 1956 Act exclude the child from subsequently being entitled to citizenship notwithstanding that their parent had been in Ireland for the requisite period of time to enable the child to claim an entitlement to citizenship by reason of the revocation of the parent's declaration of refugee status.

### **Background**

3. UM ("the appellant") is the child of MM. MM is an Afghan national, who arrived in Ireland on the 22<sup>nd</sup> April 2005. On arrival in Ireland, MM applied for refugee status for reasons of religion and political opinion. MM was declared a refugee on the 14<sup>th</sup> July 2006 and on the 18<sup>th</sup> July 2006 was granted Stamp 4 permission to remain in the State. Between 2006 and 2012, MM's Stamp 4 permission was renewed periodically. On the 15<sup>th</sup> February 2007, MM married MJ, also an Afghan national, at a ceremony in Pakistan and on 26<sup>th</sup> June 2012, MJ was granted permission to enter and reside in the State following a successful application for family reunification.

4. In September 2012, MM returned to Afghanistan for two months, and approximately one month later, his permission to remain in the State lapsed. Upon his return to Ireland in November 2012, MM was stopped and interviewed by immigration officials in Dublin Airport. At that stage, it transpired that MM's fingerprints matched those of a Mr. Habibullah Hamidi who had been served with a notice of illegal entry into the UK. Mr. Hamidi had then claimed asylum in the UK in April 2002. This was refused on 23<sup>rd</sup> September 2004. This information was concealed by MM in his initial application for refugee status in Ireland. MM's permission to remain in the State was temporarily renewed on the 15<sup>th</sup> March 2013, and again on the 13<sup>th</sup> June 2013. On 10<sup>th</sup> June 2013, MM was contacted by the Department of Justice and informed that the Minister for Justice intended to revoke his status as a refugee, with effect from the 31<sup>st</sup> August 2013, on a number of grounds including the fact that he had returned to Afghanistan and stayed there for two months and that he had falsely stated that he had never applied for asylum in any other country previously. This decision was never appealed by MM.

5. On the 1<sup>st</sup> June 2013, UM was born in County Galway. On 4<sup>th</sup> February 2014, UM applied for an Irish passport and did so based on the fact that, prior to the appellant's birth, MM had, during four years immediately preceding his birth, been resident in Ireland for a period of not less than three years, albeit that that residency was

procured through false and misleading statements, and subsequently revoked pursuant to Section 21(1)(h) of the Refugee Act 1996. On the 11<sup>th</sup> June 2014, the Minister for Foreign Affairs and Trade (“the Minister”) informed UM that he intended to refuse the application pursuant to section 12(1)(a) of the Passport Act 2008 as he was not satisfied that UM was an Irish citizen by reason of MM’s refugee status having been revoked. A review of that decision was requested and conducted by the Minister who decided on review to affirm the decision as was notified by letter dated the 17<sup>th</sup> November 2014. In turn, that decision was upheld on appeal and it is this decision that is the subject of these proceedings.

6. UM commenced proceedings against the first and second respondents by way of judicial review seeking to quash the decision of the Minister and the decision on appeal. A declaration was also sought that UM is an Irish citizen. By way of an aside, the appellant and his immediate family’s position has changed since the Minister and the Passport Appeals Officer declined to issue an Irish passport to UM. UM's mother, MJ, was granted a declaration of refugee status on the 24<sup>th</sup> February 2015. A declaration of refugee status issued in respect of UM on the same day. The application for refugee status in his case was made without prejudice to the contention that he is entitled to Irish citizenship. MM has been granted permission to remain in the State following a successful family reunification application, and UM’s younger sister has been issued with an Irish passport (based on her mother’s presence in the State).

### **Legislative Overview**

7. Section 12(1)(a) of the Passport Act 2008 provides:

*“The Minister shall refuse to issue a passport to a person if—*

*(a) the Minister is not satisfied that the person is an Irish citizen.”*

8. The acquisition of citizenship is regulated by the Citizenship and Nationality Act 1956, as amended. Section 6(1) of the 1956 Act provides that:

*“Subject to section 6A (inserted by section 4 of the Irish Nationality and Citizenship Act 2004), every person born in the island of Ireland is entitled to be an Irish citizen.”*

Section 6(6) of the 1956 Act provides:

*“In this section ‘person’ does not include a person born in the island of Ireland on or after the commencement of the Irish Nationality and Citizenship Act 2004—*

*(a) neither of whose parents was at the time of the person's birth—*

...

*(iii) a person entitled to reside in the State without any restriction on his or her period of residence (including in accordance with a permission granted under section 4 of the Act of 2004)."*

**9.** Section 6A(1) is the gateway through which a child of non-citizen parents can obtain a grant of citizenship. That section provides for the circumstances where a child born in the island of Ireland may be entitled to Irish citizenship: —

*"A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years."*

**10.** Section 6B of the 1956 Act details the types of residence that are reckonable for the purposes of Section 6A citizenship. Relevant to these proceedings, and at the heart of this appeal, is Section 6B(4)(a), which states that residence for the purposes of Section 6A(1) will not be reckonable if *"it is in contravention of section 5(1) of the [Immigration] Act of 2004."*

**11.** Section 5 of the Immigration Act 2004 regulates the presence of non-nationals in the State. It states:

*"(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.*

*(2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State.*

*(3) This section does not apply to—*

...

*(b) a refugee who is the holder of a declaration (within the meaning of that Act) which is in force."*

**12.** Section 21(1) of the Refugee Act, 1996 (since repealed but applicable in this case) contained the power of the Minister for Justice to revoke a declaration of refugee status. Of importance to this appeal is Section 21(1)(h), which states:

“Subject to subsection (2), if the Minister is satisfied that a person to whom a declaration has been given—

...

(h) is a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the Appeal Board which was false or misleading in a material particular, the Minister may, if he or she considers it appropriate to do so, revoke the declaration.”

### **Judgment of the High Court**

13. On the 10<sup>th</sup> November 2017, Stewart J. ([2017] IEHC 741) gave judgment (joined with other Judicial Review proceedings raising a similar issue: *NA v. Minister for Justice, Equality and Law Reform*) refusing an order of *certiorari* quashing the decisions of the first and second respondents refusing to grant UM an Irish passport, and refusing to make a declaration that UM is an Irish citizen.

14. The appellant had argued that MM had resided lawfully within the State for three of the previous four years immediately preceding the appellant’s birth. It was argued that MM’s presence in the State was not in contravention of any of the non-reckonable periods outlined in Section 6B of the 1956 Act. In particular, the appellant argued that MM’s residence was not contrary to Section 5(1) of the Immigration Act 2004, as MM had been here with permission given by or on behalf of the Minister. The respondent argued that the term “residence” in Section 6A of the 1956 Act must be interpreted as meaning lawful residence, in that it is required to be regular and *bona fide* and cannot be comprised of or evidenced by a declaration of refugee status or permission to remain that was obtained by misrepresentation or fraud. The respondent referred to a number of authorities which support the proposition that an applicant cannot profit from their own fraud or misrepresentation, including *Roberston v. The Governor of the Dochas Centre* [2011] IEHC 24, *G.O. & Ors. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 190 and *A.G.A.O. v. Minister for Justice* [2007] 2 IR 492. However, the appellant submitted that Section 6A or Section 6B made no reference to the requirement that residence must be lawful and sought to distinguish the above-named cases as none of them dealt specifically with the term “residence” in the context of the accrual of citizenship at birth, nor did they involve a consideration of the direct consequences on the child of those particular applicants.

15. The appellant also argued that the revocation of refugee status pursuant to Section 21(1)(h) of the Refugee Act 1996 did not render that status void *ab initio*. To this end he cited the UNHCR *Note on the Cancellation of Refugee Status* which states that a declaration with the effect of rendering refugee status void *ab initio* is an act of cancellation rather than revocation and could not have been contemplated as the appropriate consequence of a declaration under Section 21(1)(h) of the 1996 Act. Reliance was also placed on the fact that the letter of revocation referred to revocation taking effect from a specific date as opposed to being void *ab initio*. The respondent relied on the decision of Clark J. in *Adegbuyi and Abramov v. Minister for Justice Equality and Law Reform* [2012] IEHC 484 as an authority for the proposition that revocation acts retrospectively. Further, the Minister submitted that the difference in terminology between cancellation and revocation is not a matter of substance. Rather, it refers to differences in process and not differences in outcome.

16. Stewart J. relied on the decisions in *Roberston, G.O.* and *A.G.A.O.* in deciding that residence as it is contemplated by Section 6A and Section 6B of the 1956 Act must be interpreted as meaning residence that is lawful, regular and *bona fide* before it can give rise to the accrual of citizenship rights. The trial judge emphasised that citizenship is a privilege, bestowed on non-nationals that are not entitled to citizenship by birth on behalf of the people, and as such, citizenship cannot be based upon a residency that was procured through fraud or misrepresentation. While Stewart J. acknowledged at para. 47 that UM was not culpable for the wrongdoing in this case, nonetheless, the acquisition of citizenship can only be achieved through lawful means. Consequently, Stewart J. refused to grant the reliefs sought by UM.

### **Judgment of the Court of Appeal**

17. The Court of Appeal refused to grant the reliefs sought by UM in a judgment delivered on the 11<sup>th</sup> June 2020 ([2020] IECA 154 — Murray J.; Donnelly J. and Ní Raifeartaigh J. concurring). In refusing the relief sought, Murray J. differed in his reasoning to that of the trial judge.

18. Murray J. identified the main issue in this case at para. 32: does the 1956 Act, as amended, and properly construed have the effect that a residence status conferred by the State on a parent on the basis of information that was false and misleading fall to be included or excluded in the calculation of the period required to confer an entitlement to citizenship?

**19.** The appellant submitted that Section 6B(4) of the 1956 Act is exhaustive in the types of residence that cannot be considered for the purposes of Section 6A. The appellant argued that the trial judge erred in finding that there was an unconditional requirement that residence in Section 6A be lawful, regular and *bona fide*. Murray J. noted that “residence” must be interpreted within the specific legislative context it appears in. While Murray J. accepted the general proposition that unlawful residence is not “residence” at all for the purposes of many legislative provisions, in specific legislative contexts, unlawful residence will be sufficient to satisfy a residency requirement. Murray J. noted, for example, that a person who is unlawfully resident in the State may nonetheless be ordinarily resident for the purposes of revenue legislation or for the purposes of private international law rules. Murray J. relied on *Rodis v. Minister for Justice, Equality and Law Reform* [2016] IEHC 360, where Humphreys J. applied the maxim *expressio unius exclusio alterius* for the purposes of defining residence under Section 15(1)(c) of the 1956 Act, which addresses the calculation of a period of residence in relation to application for naturalisation. Humphreys J. held that the Oireachtas had superseded the jurisdiction on what does and does not count as residence “[b]y expressly setting out types of persons in the State to which the concept of ‘residence’ does not apply...” Applying this analysis to UM’s case, the Court of Appeal decided that the Oireachtas had identified the precise forms of residence that are not reckonable for the purposes of an entitlement to citizenship based on Section 6A, and that no further exclusions could be implied into the legislation. Murray J. concluded that the trial judge erred in finding that residence under Section 6A(1) must be “lawful”, and that in order for MM’s presence in the State to be excluded for the purposes of Section 6A, it must contravene Section 5(1) of the Immigration Act, 2004 pursuant to Section 6B(4)(a).

**20.** Murray J. then turned to consider whether MM’s presence in the State was contrary to Section 5 of the Immigration Act 2004. This was considered by reference to two questions: firstly, whether a permission to remain in the State obtained on the basis of false information is a “permission” within Section 5(1) of the 2004 Act, and secondly, whether a declaration of refugee status which has been revoked as having been obtained on that basis is “in force” in the period prior to the revocation?

**21.** Turning to whether the declaration that MM was a refugee was “in force”, the appellant had to show that the revocation of refugee status pursuant to Section 21(1)(h)

of the Refugee Act, 1996 had a prospective effect. Murray J. held that the very nature of a false misrepresentation is such that one might expect a legislative intention that it only operates prospectively to be clearly expressed. He rejected the suggestion that a decision to revoke refugee status that was based on fraudulent and misleading information could only operate prospectively, citing *Adegbuyi v. Minister for Justice and Law Reform*, a decision which is also supported by the UNHCR *Note on the Cancellation of Refugee Status* which states that the withdrawal of refugee status because that status – for whatever reason – should never have been granted, operates retrospectively. In light of this, Murray J. rejected the argument that the use of “revocation” as opposed to “cancellation” was significant in interpreting Section 21. Murray J. agreed with the trial judge that the fact that the decision revoking MM’s refugee status stated that it would “take effect on 31<sup>st</sup> August 2013” did not affect the matter, as the question as to whether revocation took effect *ab initio* was a question of law.

**22.** The Court of Appeal then considered whether MM had been given “permission” by or on behalf of the Minister. At paras. 84 to 90, Murray J. indicated that there were seven significant features of the nature of permission when Section 5(1) was read together with Section 6B(4) of the 1956 Act. These points were:

1. A person who requires permission to be in the State but does not have it is unlawfully in the State.
2. The period of residence required under Section 6A is “a concept of lawful residence” (per O’Donnell J. (as he then was) in *Sulaimon v. Minister for Justice, Equality and Law Reform* [2012] IESC 63), particularly having regard to the wording of Section 6A(5) of the 1956 Act, which requires that equivalent reckonable residence in Northern Ireland be lawful.
3. “Permission” as it appears in Section 5(1) must be given a practical interpretation (per O’Donnell J. in *Sulaimon v. Minister for Justice, Equality and Law Reform* at para. 18).
4. Section 5(1) also envisages a breach where the terms of the permission granted by the Minister are contravened.
5. The permission granted is necessarily conditioned by any representations made to the issuing authority. This is clearly contemplated by Section 4(10) of the Refugee Act 1996, which states that “*an immigration officer shall*



*have regard to all of the circumstances of the non-national concerned known to the officer or represented to the officer by him or her.”*

6. The meaning of Section 5(1) must be determined in accordance with the principle identified by Hogan J. in *Roberston v. The Governor of the Dochas Centre* that a person may not benefit from their own wrongdoing.
7. The starting point of any examination of permission must be that permission that is obtained *via* fraudulent or misleading information is a nullity.

**23.** Murray J. concluded that MM did not have “permission” under Section 5(1) to be present in the State on any ordinary or natural interpretation of that section. Applying *Roberston*, the Court of Appeal held that the Court must look behind the permission obtained by MM to the deceit which it is grounded on.

**24.** Consequently, the Court of Appeal held that MM was in contravention of Section 5(1) of the Immigration Act 2004, and his residence must be excluded by virtue of Section 6B of the 1956 Act in the calculation of the period required to confer an entitlement to citizenship pursuant to Section 6A. While accepting that the appellant in this case was the perpetrator of no wrongdoing, Murray J. held that the Oireachtas was entitled to predicate the citizenship of children of non-nationals on their parents, and as such, UM’s innocence in the fraud committed by his father was not a significant factor.

### **Issues and Submissions**

**25.** By a Determination dated 1<sup>st</sup> November 2021 ([2021] IESCDET 120) the appellant was granted leave to appeal to this Court. At a hearing on the 19<sup>th</sup> January 2022, the Irish Human Rights and Equality Commission (“IHREC”) was added to the proceedings as an *amicus curiae*. In the course of case management, the parties prepared a joint issues paper and identified the following points of appeal:

1. What is the effect of the decision to revoke UM’s father’s refugee status, dated 10<sup>th</sup> June 2013, on the appellant?
2. Was the Court of Appeal correct in interpreting the decision of 10<sup>th</sup> June 2013 as having the effect of revoking UM’s father’s refugee status *ab initio*?
3. Did the Court of Appeal correctly apply sections 6, 6A and 6B of the Irish Nationality and Citizenship Act, 1956, as amended, to the facts of the case?

*The first issue*

26. Regarding the first issue, UM submits that the High Court and Court of Appeal judgments indirectly quash the Minister's revocation decision, which he submits has an express prospective effect, and replace it with a revocation decision that has more extensive consequences than the Minister intended. It is submitted that the Court of Appeal was wrong to overlook the express statement in the accompanying consideration document that the revocation would take effect on the 31<sup>st</sup> August 2013, which the respondents argue is a mistake that has no material impact on the legal principles arising here. The Refugee Act, 1996 conferred on the Minister for Justice a broad discretion not to revoke. The appellant argues that there is no basis upon which the respondents can now assert that the Minister for Justice, had he been aware of the retrospective effect of the decision, would have nevertheless revoked MM's refugee status. They further submit that the Minister for Justice might have decided to exercise a discretion to refuse to revoke MM's refugee status had he been aware that it would take effect retrospectively and deny the appellant an entitlement to citizenship. UM argues that the discretion provided for by the 1996 Act also contradicts the principle applied in the Court of Appeal that "fraud unravels everything". A further argument is made that a finding that revocation pursuant to Section 21(1)(h) renders a declaration of refugee status void *ab initio* would be in breach of UM's constitutional rights under Article 40.1, treating UM less favourably than children born to Irish parents.

27. The respondents argue that the revocation decision operates *ab initio* as it never should have been granted in the first instance. They say that the appellant is incorrect in saying that the decision of the Minister for Justice has been altered. The respondents argue that the effect of a revocation of refugee status is a matter of law and cannot be decided by reference to the handwritten date on the revocation decision that it would take effect from the 31<sup>st</sup> August 2013. Further, the respondents cite *B.K. v. Minister for Justice* [2011] IEHC 526 as authority that the recognition of a person as a refugee does not make that person a refugee but declares him to be one, and that the Court of Appeal's decision that revocation operates retrospectively is consistent with the characteristics of a declaration of refugee status. In this appeal, MM was never entitled to a declaration of refugee status and should never have been recognised as such. The respondents say that the appellant is incorrect in his assertion that Article 40.1 is engaged where a child such as UM may be impacted many years into the future by the revocation of refugee status upon which their citizenship is based. The respondent

argues that the appellant is not in a different position to any other child born in the State to a non-national who had no permission to be in the State at the material time.

**28.** IHREC submit that fraud or misrepresentation is the basis grounding the nullification of citizenship in many Member States but argue that those measures often include procedural safeguards and proportionality assessments that include a requirement to consider the impact nullification of citizenship will have on third parties. To this end, IHREC cites *Damache v. Minister for Justice and Equality* [2021] 1 ILRM 121 in arguing that fair procedures must be followed when determining the acquisition or loss of citizenship.

*The second issue*

**29.** In respect of the second issue, it is submitted that the statutory power under the Refugee Act, 1996 clearly envisages a power of prospective revocation, and not cancellation. The appellant relies on the UNHCR *Note on the Cancellation of Refugee Status* which distinguishes between different powers that may cause a person to lose refugee status, namely, cancellation, revocation and cessation. According to the Note, the latter two have effect into the future, and the first has the effect of rendering refugee status void *ab initio*. While the decision in *Adegbuyi v. Minister for Justice and Law Reform* suggests that revocation pursuant to Section 21(1)(h) is retrospective in effect, the appellant submits that this was an *obiter* comment. The appellant also argues that the Court of Appeal erred in deciding that fraud necessarily acts to unravel everything. UM submits that this blanket rule is not compatible with the Ministerial discretion clearly provided for in Section 21 of the 1996 Act. UM further argues that if the Court of Appeal is correct, children of non-national parents will be exposed to the rippling effects of that decision, for example, working illegally, long into the future. The appellant cites *A v. The Governor of Arbour Hill Prison* [2006] 4 IR 88 as an example of previous judicial recognition of the impracticalities of retroactivity and submit that the same reasoning can be applied by analogy to this case.

**30.** Conversely, the respondents argue that the legislation provides no discretion to the Minister to consider residence in contravention with Section 5(1) of the 2004 Act for the purposes of citizenship entitlements under Section 6A. The respondents maintain that the use of the term “revocation” rather than “cancellation” places no practical constraint on the Minister’s power to render refugee status null and void under Section 21(1)(h) of the 1996 Act. They cite *Adegbuyi v Minister for Justice and Law*

*Reform* in arguing that Section 21(1)(h) and the power therein operates as the equivalent to a cancellation. The respondents note that the UNHCR Note in fact supports the proposition that refugee status procured by fraud, when revoked, will have the effect of being null and void, a finding made by the Court of Appeal. The respondent does not accept that *A v. The Governor of Arbour Hill Prison* is applicable and argues that retroactivity does not arise to be considered. Rather, the issue is whether, on a proper construction of the legislative scheme, MM's permission to be present in the State could be said to be "in force."

**31.** IHREC submits that Section 52(10) International Protection Act, 2015, which replaced Section 21(1)(h) of Refugee Act, 1996, clarifies that the effect of a revocation of citizenship by reason of fraud or misrepresentation is prospective in its effect, and it cannot be said that it necessarily follows that fraud must only operate retrospectively.

**32.** A related argument made by the appellant is that the Minister, in revoking MM's status as a refugee resulting in the loss of an entitlement to citizenship accruing to UM, failed to carry out a proportionality assessment in accordance with EU law, and to this end rely on *Rottmann v. Freistaat Bayern* (Case C-135/08), EU:C:2010:104, [2010] E.C.R. I-1449, and *Tjebbes and Others v Minister van Buitenlandse Zaken* (Case C-227/17). The respondent relies on the case of *Kaur* (Case C-192/99), EU:C:2001:106, [2001] E.C.R. I-1237, where the CJEU accepted that for a citizenship question to fall under EU law there would have to be an actual revocation of an existing EU citizenship status, which is absent here. The Respondents also rely on *AP v. Minister for Justice* [2019] 3 IR 317, where Clarke C.J. held that *Rottman* applied only to the granting of citizenship as distinct from its revocation. IHREC submitted that *AP* could arguably be distinguished from these proceedings as it concerned acquiring citizenship through naturalisation. IHREC also relies on *JY v Wiener Landesregierung* (Case C-118/20), ECLI:EU:C:2022:34, in arguing that EU law may now be engaged in cases involving the acquisition of citizenship.

#### *The third issue*

**33.** On the third issue, UM submits that the Court of Appeal was correct to find that "residence" for the purposes of Section 6A of the 1956 Act does not have to be lawful, regular or *bona fide*. The appellant argues that the wording of Sections 6A and 6B are clear and unambiguous and do not require any further inspection beyond their ordinary meaning. However, the appellant does not accept that MM's residence was in

contravention of Section 5 of the Immigration Act, 2004, and therefore excluded by Section 6B. The appellant argues that even if the revocation of MM's refugee status had retrospective effect, it cannot be said that he was "*in contravention of section 5(1) of the Act of 2004*". The appellant argues that Section 5(1) does not apply to MM, as he was present in the State on foot of a declaration of refugee status that was "in force" pursuant to Section 5(3). This is evidenced by an initial grant of Stamp 4 permission in July 2006, which was renewed periodically thereafter. Failing that, the appellant argues that MM was present in the State with permission given by or on behalf of the Minister for Justice, and MM was resident in accordance with that permission. The appellant also argues that the permission to remain in the State and the granting of refugee status operate distinctly and independently from one another. Thus, even where the Court finds that the revocation of MM's refugee status was void retrospectively, according to the appellant, it does not necessarily follow that MM's permission was also invalid.

**34.** The respondents say the Court of Appeal correctly identified the appropriate principles that apply in interpreting Section 6A, Section 6B and Section 5(1). The Respondents submit that the interpretation urged on the Court by UM is at odds with the duty placed on those seeking asylum to act honestly and in good faith when engaging with Irish immigration services and disregards the misleading and false information that led to a grant of refugee status to MM in the first instance, citing *A.G.A.O. v Minister for Justice*. They submit that the appellant's interpretation of the measures would cause a scenario where the child of an applicant for refugee status who makes an honest application for asylum and remains in the State, would have no right to claim Irish nationality, while the child of a person who makes a fraudulent application, on the basis of which asylum is granted and is present for the same period, would be so entitled.

### **Discussion**

**35.** The acquisition or loss of citizenship is a matter of profound significance for the individual concerned. Citizenship is an important aspect of the status of any individual, as can be seen from the judgment of this Court in the case of *Damache v. MJE & Others*, in particular, paragraphs 21 to 28 inclusive. It would be helpful to cite two paragraphs from the judgment in that case at paragraphs 26 and 27:

"26. *The importance of citizenship was reflected on by O'Donnell J. speaking in the case of AP v. Minister for Justice [2019] 3 I.R. 317; [2019] 2 I.L.R.M. 377*

*at para.2 of his judgment on the issue of the discretion of the Minister to grant a certificate of naturalisation where he observed as follows (at pp.345/401):*

*“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.”*

36. The case of *Damache* involved the loss of citizenship. Given the importance of citizenship for the individual, it goes without saying that the circumstances in which a person may acquire Irish citizenship must be the subject of careful consideration. Citizenship can be acquired in a number of ways, and this case is concerned with the acquisition of citizenship by birth. In this case, it is contended by the appellant that the consideration of the facts and circumstances herein by the Minister was in error when it was decided that the appellant was not entitled to be issued with an Irish passport. In order to decide whether that contention is correct, it is necessary to consider the complex maze of interlocking statutory provisions, and the arguments of the parties as

to the interpretation of those provisions. It would also be helpful to look at some of the provisions of the Constitution concerning citizenship.

**37.** Article 9.1.2° of the Constitution provides:

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

**38.** Article 9.2 is also of importance, and relevance to this case. It provides at Article 9.2.1°:

*“Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law.”*

**39.** Article 9.2.2°:

*“This section shall not apply to persons born before the date of the enactment of this section.”*

**40.** Article 9 of the Constitution was amended in 2004, as a result of a previous amendment to Article 2 in 1998 that provides:

*“It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation....”*

**41.** This led to a form of citizenship tourism, as described in Kelly: *The Irish Constitution* (5th edn., Bloomsbury Professional 2018) where the authors observed that, following from the 19<sup>th</sup> Amendment to the Constitution in 1998, at para. [3.3.02]:

*“By the early 2000s, this state of affairs was seen to be ultimately unsustainable. Ireland was the only EU Member State which had retained the entitlement to citizenship jus soli and the large rise of persons travelling to Ireland for the obvious purpose of ensuring citizenship for children subsequently born here prompted a re-assessment of the desirability of maintaining the rule. A new Article 9.2.1° was accordingly inserted by the Twenty-seventh Amendment of the Constitution Act 2004 and the pre-existing Article 9.2.1° was re-numbered as the present Article 9.3. The effect of the new provision is to preserve the jus soli for persons with at least one parent who is an Irish citizen or who is entitled to Irish citizenship at the time of their birth, while providing that in other cases Irish citizenship may be conferred by law on persons born here.”*

42. Thus, as can be seen, Article 9.2 was designed to modify the provisions of Article 2 so as to stop the practice that had emerged of persons travelling to Ireland to give birth for the purpose of acquiring citizenship. This, in turn, led to a number of statutory amendments, as referred to in para. [3.3.02], set out above, in relation to the acquisition of citizenship by birth.

### **Acquisition of Citizenship by Birth**

43. Most of the relevant statutory provisions have been set out above, and I do not propose to set them out again, save where necessary. Section 6(1) of the 1956 Act contains a general provision to the effect that every person born in the island of Ireland is entitled to be an Irish citizen. The entitlement to be an Irish citizen is, however, not open-ended. It is subject to the provisions of s.6A of the 1956 Act, which limit the entitlement to citizenship of a child of non-citizen parents to a child who had a parent who, for the period of four years immediately preceding the birth, was resident in the island of Ireland for the requisite period of not less than three years.

44. This begs the question as to what is meant by the word “*residence*” in s.6A, and that is clarified to some extent in s.6B of the 1956 Act. It defines “*residence*” for the purpose of s.6A. The relevant provision is s.6B(4)(a) for the purpose of these proceedings. Very simply, it provides that a period of residence shall not be reckonable under s.6A if “*it is in contravention of section 5(1) of the Act of 2004*”.

45. Therefore, as can be seen from this brief outline, a person can acquire citizenship if born of a parent who has been resident in the island of Ireland for three out of four years preceding the birth, providing that the period of residence has not been in breach of s.5(1) of the Act of 2004. Section 5(1), in its terms, provides that a non-national may not be in the State other than in accordance with the terms of a permission given to him or her by the Minister. Section 5(2) goes on to provide that a person who is in the State in contravention of s.5(1) is “*for all purposes unlawfully present in the State*” (my emphasis).

46. The requirements and provisions of s.5 of the Act of 2004 are expressly stated not to apply to, *inter alia*, a refugee who is the holder of a declaration which is in force (the reference to a declaration is, of course, a declaration of refugee status). This raises a question as to the interpretation of the words “*in force*”, in the context of this case. In short, the question that has to be determined on this appeal is whether the appellant’s



father, MM, was the holder of a declaration of refugee status “*which is in force*” for the relevant period. If the answer to that question is in the affirmative, then MM was not unlawfully present in the State, and was not in contravention of s.5(1) of the Act of 2004.

**47.** For completeness, I should refer again to the way in which the issues in this case have arisen. MM, the appellant’s father, arrived in this country in 2005. He applied for refugee status, and in doing so he lied about where he had been prior to his arrival in the State, and he lied about the fact that he had previously sought and been refused asylum in the United Kingdom. After he arrived here, he was granted a declaration of refugee status, and was granted Stamp 4 permission to remain in the State, which permission was renewed from time to time. His permission lapsed in 2012, while he was out of the country in Afghanistan. This is when issues arose in relation to his status. While issues in relation to his status were being determined, his permission to remain in the State was temporarily renewed from time to time. On the 10<sup>th</sup> June 2013, he was informed of the Minister for Justice’s intention to revoke the declaration of refugee status, (from a given date), on a number of grounds. This is provided for in s.21 of the Act of 1996. Two grounds were relied on, first, under s.21(a), which arises when a person “*has voluntarily re-availed himself ... of the protection of the country of ... nationality*”, and, secondly, under s.21(h), being a person who obtained a declaration on the basis of information “*which was false or misleading in a material particular*”.

**48.** Section 21(1) of the 1996 Act is of significance to the determination of this case. A critical question arises from the interpretation of s.21(1). As can be seen from the provisions of s.21(1), s.21(1)(h) gives rise to revocation by reference to misleading information provided at the time of applying for asylum. Most of the other reasons for revocation arise at a later stage, so, for example, s.21(d) can be utilised when a person has voluntarily “*re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution*”. There is no doubt that a person who has left their country owing to a fear of persecution and has voluntarily returned to reside there, perhaps because of a change of the political regime or an improvement to the human rights protection available in the country, is no longer in need of protection, and is no longer a person who is a refugee. For that reason, such a change in the circumstances of that person does not mean that they were never a refugee, and that they were not entitled to the declaration of refugee status when it was

given to them. As such, a revocation of a declaration of refugee status on that basis could only have effect from the time of the events giving rise to the change of circumstances. In other words, the revocation of refugee status in such a case would have prospective effect. There was some debate in the course of the argument before the Court as to precisely when the revocation in such a case would take effect, but, as I see it, the declaration is of effect until such time as it is revoked. As a matter of practicality, such a revocation could not take place until the person in question has, in fact, re-established themselves in their country of origin, and logically, therefore, it seems to me that the revocation of a declaration in those circumstances would date from the date on which the Minister for Justice formally revokes the declaration. Revocation is not something that would take place automatically as soon as a person returned to the country which they had remained outside of because of a fear of persecution. After all, even though there might be an outward appearance of change, it may not be until such time as a person goes back to the country from which they fled that it becomes apparent as to whether or not it is actually safe to return. Hence, in my view, it would be inappropriate to suggest that such a person's status is revoked with effect from the date of return to that country. Therefore, it seems to me that such revocation could only take effect from the date when the Minister actually makes a formal decision to revoke the declaration.

**49.** The same consideration, it seems to me, applies to the other grounds for revocation set out in s.21(1)(a) to (f) inclusive, but not necessarily in respect of s.21(1)(g). Section 21(1)(g) involves revocation in respect of a person whose presence in the State poses a threat to national security or public policy. Such a revocation could take place because of facts and circumstances not known to the Minister when granting a declaration of refugee status, which facts and circumstances could have arisen prior to the person arriving in the State. It is difficult in that instance to be definitive of the time when such a revocation would take effect. But, having regard to the need for certainty in relation to these matters, again, on balance, how could revocation date from any period other than the date of formal revocation of the declaration of refugee status. After all, the Minister is given the power "*if he or she considers it appropriate to do so*" to revoke the declaration. If, for whatever reason, no revocation has taken place, it is difficult to see how these specific categories could be said to have been revoked prior to a formal decision by the Minister to do so.

50. That brings me to the provisions of s.21(1)(h), and the question of when such a revocation takes effect. It should be borne in mind that this is a case in which there has been no challenge to the decision of the Minister for Justice to revoke the declaration of refugee status of MM. The fact that he misled the authorities in this country about his whereabouts in the years immediately preceding his arrival in this State, and that he did not disclose the fact that he had previously applied for and had been refused asylum in the UK, cannot be disputed. The issue to be considered is when the revocation took effect. Did it date back to the date of grant of refugee status, or the date nominated by the Minister for the decision to take effect? The answer to this will determine whether the appellant was entitled to Irish citizenship, notwithstanding the revocation of his father's declaration of refugee status.

51. In considering the issues arising in this case, two dates should be borne in mind. The first is the 1<sup>st</sup> June 2013, the date of birth of the appellant, and the 13<sup>th</sup> June 2013, the date of the letter from the Minister for Justice notifying MM of the intention to revoke the declaration of refugee status, with effect from the 31<sup>st</sup> August 2013. But for the revocation of the declaration, there is no doubt that the appellant, UM, would have been entitled to be an Irish citizen, based on the residence of his father in the State for the requisite period of time preceding his birth.

### **The Main Issue**

52. The main issue to be considered is the effect of revocation of MM's declaration of status on UM. In the first place, counsel on behalf of UM argues that the revocation of MM's declaration of refugee status under s.21(1)(h) had prospective effect only. In making that argument, they relied on the terms of the letter of the 10<sup>th</sup> June 2013, which expressly stated that the declaration would be revoked "*with effect from 31/08/2013*". The position of the Minister has now altered since that letter was written, and it is now contended that the revocation had retrospective effect, given that, as the Court of Appeal said at para. 79 of its judgment, "*the effect of revocation is a matter of law*". Counsel for the *amicus curiae* also contends that the Court of Appeal erred in concluding that the revocation has retrospective effect.

53. In order to consider this issue, it seems to me that it would be of assistance to look in some more detail at the judgment of the Court of Appeal. In its judgment, the Court of Appeal considered at length the meaning of "*residence*" as used in s.6A(1) of the 1956 Act. Reference was made to a number of decisions, including that of this Court

in the case of *The State (Goertz) v. Minister for Justice* [1948] IR 45. That was a case which considered the term “ordinary residence” as it appeared in s.5(5)(c) of the Aliens Act, 1935, which provided that an alien who was resident in the jurisdiction for 5 years was entitled to three months’ notice of deportation. As was noted in the judgment of Maguire C.J., at page 53, Mr. Goertz was a native of Lübeck, Germany. He served in the German Air Force in the First World War, and again in the Second World War. “*He landed by parachute in an out-of-the-way part of the country on the 5<sup>th</sup> May, 1940. We are not told what his purpose was in coming here, nor are we told how he was engaged during the period which elapsed between his landing here and his arrest on the 22<sup>nd</sup> November, 1941, when he was arrested by the Garda Síochána by order of the Minister for Justice. He was interned in Arbour Hill Detention Barracks.*” He remained in the detention of the State until the month of September, 1946 approximately. On the 26<sup>th</sup> August, 1946 a deportation order was made in respect of Mr. Goertz, and was served on him on the 29<sup>th</sup> August, 1946. There was no dispute between the parties that Mr. Goertz was an alien, and that an order could be made deporting him from the country. The only question at issue in the case was whether he was “ordinarily resident” within the country, and thereby entitled to 3 months’ notice of his deportation, in accordance with the provisions of the Act of 1935. Maguire C.J. concluded at page 56:

*“In my view the provision that an alien who is ordinarily resident here for five years and who fulfils the other requirements of the section, should be given a breathing space before being compelled to leave, is designed to help an alien who has come to the country legally and is taking part in the normal life of the community, as a business man or in the practice of a profession, and upon whom, accordingly, it would be an undue hardship to be forced, summarily, to uproot himself and break business or professional ties. It cannot be said in this case that the appellant was resident here in that sense. The argument for the appellant seems to me to come down to this, that the mere physical presence of an alien here for the requisite period constitutes ordinary residence. In my view, so to construe the words, “ordinarily resident”, would produce an absurd result, of which the present case, if it were to be successful, would afford an illustration”.*

54. Murnaghan J., in the same case, commented at page 57 as follows:

*“The appellant has argued that an alien person who has been present, physically, in this country for the required period of five years, is protected. In my opinion that is not the meaning of “ordinarily resident,” as it appears in the sub-section. A person who came here and who remained in hiding, or who lived here under various disguises, could not reasonably be held to be ordinarily resident, although physically in this country. The phrase should, I think, refer to the character, as well as to the duration, of the residence.”*

55. The Court of Appeal, at para. 44 of its judgment, commented on that case as follows:

*“Goertz has been consistently interpreted in the context of immigration legislation as demanding the conclusion that ‘residence’ or ‘ordinary residence’ when used in that legislation refers exclusively to residence obtained lawfully, with (in particular) residence that has been procured by fraud or misrepresentation excluded from that calculation. That is, in my view, the inevitable consequence of the majority decision in the case.”*

56. Consideration was then given to the case of *Roberston v. The Governor of the Dochas Centre*. In that case, the issue that arose was, once again, the meaning of the phrase “ordinary residence” for the purposes of the Immigration Act, 1999. The applicant in that case was a South African national who arrived in Ireland in 2000 under an alias. Using that false name, she made an unsuccessful application for asylum. An order was then ultimately made for her deportation. She left the State before she could be deported and was thus classed as an evader. She subsequently returned to Ireland under her true name in August 2004. She registered with the GNIB in November 2004, and was given a student visa which was renewed thereafter until November 2010. She lawfully worked during that period as a child minder and participated in a course of studies. Subsequently, she married a Latvian national in November 2009. The relevant application form contained a question asking whether she had ever been the subject of a deportation in Ireland and requesting details if that were so. She gave an incorrect answer to the question by stating that she had never been the subject of such an order, notwithstanding that such an order had been made in relation to her, albeit in respect of a false name given by her. The question that came before the High Court in that case was whether Ms. Roberston was “ordinarily resident” in the State for the purposes of s.3(9)(b) of the Immigration Act, 1999, such that the Minister would have been required

to give 3 months' notice stipulated in that Act, prior to deportation. As was noted by Hogan J., there was no question but that she had been physically in the State since 2004, and, but for the fact that she had been the subject of a previous deportation order, would have been entitled to the requisite period of notice. In the course of his judgment, Hogan J. had regard to the decision of the Supreme Court in the case of *Goertz*. In considering whether Ms. Robertson was lawfully in the State from August 2004, Hogan J. had this to say:

*“18. It is true that Ms. Robertson (sic) was given permission by the Minister to reside in the State for the purposes of s. 5 of the Immigration Act 2004. Of course, that permission is ostensibly valid and it has not been set aside or quashed in judicial review proceedings. I further agree that, generally speaking, an applicant who was the beneficiary of such a permission could be said to be ordinarily resident in the State.*

*19. That, I fear, cannot, however, be said of Ms. Robertson (sic). She had engaged in a fundamental deceit by applying under an alias for asylum. When that application was rejected and she (sic) made the subject of a deportation order, she evaded deportation by not presenting as required by law at Henry Street Garda Station in Limerick in November 2002. She then entered the State in her own name in August 2004 without disclosing the critical fact that she was the subject of a deportation order, albeit in the name of an alias which she had deceitfully provided.*

*20. Her failure to make such a disclosure is tantamount to entering the State through deception and disguise. As Murnaghan (sic) J. pointed out in *Goertz*, the concept of “ordinary residence” also involves an assessment of the character of that residence. Moreover, as Black J. noted in that case, the presumption against surplusage means that the word “ordinarily” was “intended to have, and must be given, some effective meaning.” To my mind, in this statutory context, the phrase “ordinary residence” connotes a residency which is lawful, regular and bona fide. As *Goertz* itself illustrates, mere physical residence in the State is not in itself enough, since a residence which is irregular, covert or unlawful is not an “ordinary residence” in this sense.*

*21. It should also be recalled that legislation must be understood and interpreted by reference to certain well-understood general principles of law,*

*one of which is that a person cannot be allowed to profit by their own wrong. If Ms. Roberston's contention were to be accepted, it would mean that this court would have to avert its eyes to this acknowledged deception and deceit and that she would thereby be allowed to claim the benefit of a statutory entitlement to which she is not justly entitled."*

57. Thus, Hogan J. rejected the contention that Ms. Roberston was ordinarily resident for the purposes of the 1999 Act. He went on to add that "*her residence was anything but ordinary, since, as we have just seen, it was grounded on a fundamental deceit.*" Reference was also made to the case of *Rodis v. Minister for Justice, Equality and Law Reform* [2016] IEHC 360, in which Humphreys J. had to consider whether the presence of a member of staff of a diplomatic mission constituted "*residence*" for the purposes of s.15(1)(c) of the Act of 1956. Murray J., at para. 52 of the judgment of the Court of Appeal observed as follows:

*"In deciding that it did, Humphreys J. expressed the view that having regard to the introduction of s.16A of the 1956 Act, decisions construing 'residence' prior to that were of limited relevance. There, the respondents had relied upon the decisions in Sofroni, Roberts and Muresan and Simion, to contend, by analogy, that the presence in the State of a member of the staff of a diplomatic mission was for a limited and specific purpose and thus outside the scope of 'residence'. Rejecting this argument Humphreys J. said (at para. 50) '[b]y expressly setting out types of persons in the State to which the concept of 'residence' does not apply, the Oireachtas has essentially superseded the jurisprudence on what does and does not count as such residence'. Nonetheless, Goertz was clearly viewed by the Court as relevant to an understanding of the essential features of 'residence' as that term is used in the 1956 Act, and it was referred to in analysing the essential features of such a presence. Rodis was not appealed by the respondents and in my view it presents a clear and convincing consideration of the relevant provisions".*

58. In this context, it may be of assistance to refer to the express terms of the judgment of Humphreys J. in *Rodis*. At para. 48 he stated as follows:

*"48. By expressly setting out the types of persons in the State to which the concept of 'residence' does not apply the Oireachtas has essentially superseded the jurisprudence on what does and does not count as such residence.*

49. *But in any event, the situation of an asylum seeker is completed (sic) different to that of the applicants. The asylum-seeker simply presents himself or herself at the frontier of the State and makes an application for admission. The whole process of asylum is essentially a long-drawn-out examination of whether the asylum-seeker should be admitted to the State. In figurative terms, the asylum-seeker does not legally advance past the frontier of the State unless and until his or her claim for refugee status is accepted.*

50. *A person who is granted permission to come to the State, has some other legal entitlement to be here without permission or even who comes unlawfully but lives openly for a significant period, is in a different situation. The line of authority on which the State relies in this case is not pertinent to the situation of the applicants.”*

59. Humphreys J. then proceeded to distinguish the case before him from the decision in *Goertz*, referred to previously. He went on to conclude, at para. 59, as follows:

*“For all of the foregoing reasons, it is clear to me that it is simply not possible for the court to conclude that it was not intended by the Oireachtas that staff of a diplomatic mission would be deemed not to be resident in the State for the purposes of s. 15 of the 1956 Act. In terms of the ordinary meaning of language, these applicants are so resident. There is no basis to depart from that whether under s. 5 of the Interpretation Act 2005, or otherwise. To apply nationality law to these applicants is not an absurdity within the meaning of s. 5, particularly as some aspects of Irish nationality law have relatively recently been expressly applied to children of staff of foreign missions. Nor can it be said that to regard these applicants as resident (sic) would fail to reflect the plain intention of the Oireachtas. On the contrary, insofar as it is possible to ascertain that intention, I would be of the view that the Oireachtas did not intend to exclude such persons, particularly given how straightforward it would have been to make that provision. In addition I must have regard to the existence of an express provision in relation to birth and particular forms of residence, and the corresponding omission of a provision that would disqualify these applicants, as well as to the complex issues that would arise if such a policy decision had been intended across the whole range of nationality law. The optional protocol*



*provided the ideal vehicle for the State to adopt a position on the subject, but not only was that opportunity not taken, but in addition the State did not consider it appropriate to enact any legislation implementing the provisions of the optional protocol as far as residence is concerned.”*

**60.** It is interesting to observe the comments made by Murray J. in respect of *Rodis*, and the *maxim expressio unius exclusio alterius*. He observed, at paras. 53 to 56, as follows:

*“53. The analysis in Rodis is important in addressing the first question that seems to me to arise in construing s.6A(1). If the approach adopted by Hogan J. in Robertson (sic) is applied to that provision in the manner suggested by the respondents and, on one view, accepted by the trial Judge, it is unnecessary to examine whether MM acted in contravention of s.5(1) of the 2004 Act or indeed to address whether the declaration of refugee status granted to him was ‘in force’. Instead, the issue can be resolved by simply positing that MM’s residence was obtained by misrepresentation and therefore outside the definition of ‘residence’ in the first place.*

*54. I do not believe that, so stated, this approach to the provisions can be correct. The legislature has put in place a specific statutory structure addressing the circumstances in which residence can and cannot be taken into account for the purposes of the calculation of the relevant period. These include presence in the jurisdiction other than in accordance with a permission obtained under s.5 of the 2004 Act. The Oireachtas having thus defined the zone within which physical presence characterised by illegality should operate to preclude reckonable residence from accruing, I do not see how it can be said to have, at the same time, left room for the implication of any other exclusion on the ground of illegality. Were the provision to be construed so that there was a residual category of excluded presence arising where presence in the State was unlawful, s.6B(4)(a) would be surplusage, as all presence in breach of s.5 of the Immigration Act 2004 is itself unlawful. If the only ‘residence’ referred to in s.6A(1) was a residence that was bona fide, lawful and regular, there would have been no need to exclude from reckoning a residence in contravention of s.5(1) of the 2004 Act, as it is none of these. The Courts must*

*strive to avoid an interpretation of legislation that renders provisions of the Act in question otiose (see Cork County Council v. Whillock [1993] 1 IR 231); ‘every word or phrase, if possible, should be given effect to’ (Dunnes Stores v. Revenue Commissioners [2019] IESC 50 at para. 66).*

55. *The usual application of the maxim expressio unius would support this conclusion. In Rodis Humphreys J. said (at para. 30) :*

*‘It is clear that these applicants were not present in the State in contravention of the 2004 Act because that Act does not apply to them (see s. 2(1) of the 2004 Act). Neither were they present in the State for the purposes of education or study or while awaiting a refugee decision. Thus it is entirely clear that they fell outside of the terms of s. 16A, which is the express statement by the Oireachtas of the types of presence in the State which do not constitute ‘residence’ for the purposes of s. 15. The principle of expressio unius clearly has a significant relevance here.’*

56. *Applying the same analysis, it appears to me that the proposition that there is now a general and implicit requirement that presence be ‘lawful’ overhanging the definition of ‘residence’ in s.6A(1) cannot be sustained having regard to the decision of the Oireachtas to expressly enumerate periods which will be excluded from reckoning for that purpose and, in particular, to include within that exclusion a specific category of unlawful presence.”*

**61.** I agree with this analysis in relation to the meaning of “*residence*”, and the fact that there is no general requirement that presence be “*lawful*” in respect of the definition of “*residence*” in s.6A(1). The question, therefore, is, as Murray J. observed, whether MM’s physical presence in the State can be excluded from consideration for the purposes of s.6A(1) on the basis that it is “*in contravention*” of s.5(1) of the 2004 Act. Murray J. then raised two further questions that had to be considered in order to decide if the presence of MM in the State was in contravention of s.5(1). The first of these was whether a “*permission*” to remain in the State, obtained on the basis of false information, is a permission within the meaning of s.5(1), and, second, whether a declaration of refugee status which has been revoked on the same basis was “*in force*” in the period prior to revocation?

**62.** Another way of teasing out these questions would be to ask if the effect of revocation of the declaration of refugee status on the basis of false information having

been provided in order to obtain the declaration, is such as to render the declaration of refugee status void *ab initio* for all purposes and in all respects?

**63.** Murray J., in considering the interpretation of the words “*permission*” and “*in force*”, as used in s.5(1), had regard to the principles of interpretation as recently reiterated by McKechnie J. in the case of *Dunnes Stores v. Revenue Commissioners* [2020] 3 IR 480 (at para. 59 of his judgment), saying:

“59. *In approaching this exercise in interpretation of those words as they are used in the statute, the principles are clear. They have been summarised recently by McKechnie J. in Dunnes Stores v. Revenue Commissioners as follows (at para. 63) :*

*‘... the focus of all interpretative exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. “The words themselves alone do in such cases best declare the intention of the law maker” (Craies on Statutory Interpretation (7th Ed.) Sweet & Maxwell, 1971 at pg. 71). In conducting this approach “...it is natural to inquire what is the subject matter with respect to which they are used and the object in view” Direct United States Cable Company v. Anglo – American Telegraph Company [1877] 2 App. Cs. 394. Such will inform the meaning of the words, phrases or provisions in question. McCann Limited v. Ó Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.’”*

**64.** As did Murray J., I accept that this is a useful summary of the principles of statutory interpretation.

**65.** The approach to the interpretation of the provisions by Murray J. can, perhaps, be summed up by reference to paras. 60 to 63 inclusive of his judgment. He referred to the contentions of UM in regard to the interpretation of “*permission*” and noted the

anomaly that could arise thereby. In this regard, he observed at para. 62 of his judgment as follows:

*“When the fact that s.6B(4) and s.16A are identically worded is taken into account, the position becomes even more anomalous. These sections must mean the same thing. It must follow that if the applicant is correct in the construction urged of the former provision, it means that MM could seek naturalisation (as in fact he initially sought to do) on the basis of residence even though that residence had been obtained by the provision of false and misleading information. If he can do this, it means that the Oireachtas has not merely removed the pre-existing requirement that residence not be obtained by fraud or deception, it has decided to enable a person to rely upon their own wrongdoing to ground the entitlement to apply for a benefit. ...”*

66. Murray J. then continued, at para. 63, as follows:

*“If the word ‘permission’ and phrase ‘in force’ inevitably have in their natural and ordinary sense the meaning contended for by UM, and if that meaning is not displaced by the context in which they appear, then clearly effect must be given to them. However, in resolving both of these questions, account must be taken of the consequences to which I have referred, and the resulting issue of whether it can be plausibly said that the Oireachtas intended in the language it used, to bring them about.”*

67. While the Court of Appeal in its judgment may be correct in identifying the possible anomalies that could arise having regard to the interpretations of s.5(1), the fact that, on the interpretation urged by UM, anomalies may arise, does not, in truth, answer the question as to what is the correct interpretation of s.5(1).

68. As we have seen, s.5(1) makes it clear that a non-national may not be in the State other than in accordance with a permission given by, or on behalf of, the Minister for Justice & Equality. Section 5(3)(b) goes on to provide that s.5 does not apply to “a refugee who is the holder of a declaration (within the meaning of that Act) which is in force”. This requires a consideration of the meaning of the words “in force”. To consider the meaning of the words “in force”, it is necessary to consider the meaning and effect of revocation, as that word is used in the legislation.

### **Revocation**

69. The appellant in his submissions reiterated the fact that the original intention of the Minister, as appears from the documents and, in particular, the letter of the 10<sup>th</sup> June 2013, spoke of the Minister's decision to revoke "*with effect from 31/08/2013*". Whatever may be the correct understanding of the effect of revocation, what does appear to be clear is that the Minister intended at that stage that the revocation in this case would have prospective effect only. However, as we know, the Minister has now resiled from that position, and in the verifying affidavit in these proceedings, Mr. Chris Carroll, on behalf of the Minister, said that "*the reference in that letter to the decision taking effect on the 13<sup>th</sup> August, 2013 (sic) is mistaken and wrong as a matter of law and that the Next Friend's declaration of refugee status was void ab initio*". That, of course, is the question that arises in these proceedings, and it has to be decided whether the effect of revocation in this case means that the declaration was void *ab initio* in respect of MM, such that it precludes UM from relying on that residence for the purpose of obtaining naturalisation.

70. Counsel on behalf of UM has placed considerable emphasis on the UNHCR *Note on the Cancellation of Refugee Status*, which identifies three different categories, namely, cancellation, revocation and cessation. It describes "*cancellation*", as follows:

*"a decision to invalidate a refugee status recognition which should not have been granted in the first place. Cancellation affects determinations that have become final, that is, they are no longer subject to appeal or review. It has the effect of rendering refugee status null and void from the date of the initial determination (ab initio, or ex tunc – from the start or from then)."*

71. It is said on behalf of UM that the use of the word "*revocation*" in the legislation is important. Given that the legislation does not use the word "*cancellation*", it was argued that the Minister had no statutory power to cancel, and that revocation as used in the statute cannot be anything other than prospective in its effect. It should be noted that the word "*revocation*" is described in the UNHCR note as:

*"withdrawal of refugee status in situations where a person engages in conduct which comes within the scope of Article 1F(a) or 1F(c) of the 1951 Convention after having been recognised as a refugee. This has effect for the future (ex nunc – from now)".*

72. By contrast, the respondents in argument on this point contend that, insofar as the declaration of refugee status had been revoked, what happened here was

“cancellation” as explained in the UNHCR note. It was said that a revocation based on s.21(1)(h) is the equivalent of a cancellation and has the effect of being operative from the date of the grant of the declaration in the first place. In support of this view, reliance was placed on the decision in *Adegbuyi v. Minister for Justice and Law Reform*, in which Clark J. said, at para. 37:

*“Sections 21(1)(a) to (g) of the Refugee Act, commonly known as cessation and exclusion clauses, have their roots in Articles 1C and 1F of the 1951 Refugee Convention. Their operation depends for the most part on a change of circumstances after the grant of refugee status which renders the international protection provided by refugee status redundant. In contrast, s.21(1) (h) of the Refugee Act and its sister provisions Regulation 11(2) (b) of the Protection Regulations (SI No. 518 of 2006) and Article 14(3) (b) of the Qualification Directive (Directive 2004/83/EC), have no equivalent in the 1951 Convention. They operate where evidence emerges which invalidates a declaration of refugee status. In other words, it becomes apparent that the person should never have been granted such a declaration and in those circumstances, the declaration becomes void *ad initio* (sic). The validity of the operation of such “cancellation” clauses has been acknowledged by the UNHCR in its Handbook at paragraph 117:-*

*“Article 1 C [of the Refugee Convention] does not deal with the cancellation of refugee status. Circumstances may, however, come to light that indicate that a person should never have been recognized as a refugee in the first place; e.g. if it subsequently appears that refugee status was obtained by a misrepresentation of material facts [...]. In such cases, the decision by which he was determined to be a refugee will normally be cancelled.”* (Emphasis in original)

73. The *amicus curiae* in its submissions noted that UNHCR is not part of Irish law and cannot be relied on to dislodge the plain and literal meaning of the words chosen by the Oireachtas in s.21. Nevertheless, they highlight the note to be found at para. 39 of the UNHCR which states that cancellation consequent upon fraud is often discretionary, and that it operates to invalidate an incorrect refugee status determination, with effect *ab initio*.

74. This brings me to a further point raised on behalf of the appellant, namely, that s.21 confers a discretion on the Minister. Emphasis is placed on the words used in s.21(1) where, having outlined the circumstances in which revocation can take place, the section continues by providing that “*the Minister may, if he or she considers it appropriate to do so, revoke the declaration*”. Two aspects of that wording are relied on by UM. First, the use of the word “*may*”, and, secondly, the use of the phrase “*if he or she considers it appropriate to do so*”.

75. On the face of it, it is difficult to argue with the contention that the manner in which the section is phrased confers a discretion on the Minister as to revocation. This may be illustrated by taking a closer look at the section. For example, s.21(1)(b), which allows for revocation when a person, having lost his or her nationality, has voluntarily reacquired it. In such a case, it is clear, and it is not in dispute, that the effect of revocation would be prospective. How could it be otherwise? Until such time as the person had reacquired his or her nationality, there would be no basis for revocation, and, equally, it would not be possible, or indeed logical, to suggest that the revocation would date back to a period prior to the date when the nationality was reacquired. There may be a question as to when the revocation would take effect, as to whether it would be when the nationality was reacquired, or when the Minister made the decision to revoke. It seems to me, as mentioned previously, although, strictly speaking, it is not necessary to decide this for the purpose of this case, that any such revocation could only date from the date of revocation by the Minister. I am fortified in this view by the fact that the Minister has a discretion under the section as to whether or not to revoke. He or she may revoke, but only if he or she considers it appropriate to do so. Presumably, if the Minister did not consider it appropriate to do so, for whatever reason, then no revocation would take place.

76. I should say at this point that I agree with Murray J. that the use of the word “*revoke*” in s.21(1) cannot be understood as being used in the precise sense in which it is used in the UNHCR note. He pointed out that the Oireachtas was entitled to use one word to describe the process, as opposed to the three words used (cancellation, revocation and cessation) in the UNHCR note. He added “*that the use of a single word was permissible to describe one act (withdrawal) with different effects (ex tunc or ex nunc) as it is with the view that it was using a single word to enable one act with the same effects*” (see para. 73 of his judgment).

77. Murray J. then proceeded to deal with an argument on behalf of UM to the effect that the arguments on behalf of the Minister as to the meaning of the word “*revoke*” had the effect that the same word had different meanings in different sub-parts of the same section. Having set out UM’s arguments in this respect, he observed, at paras. 75 to 76, as follows:

*“75. However, I think that is to conflate the description of an action, with the identification of its effect. ‘Revoke’ marks out what the Minister does with the declaration of refugee status when the various grounds identified in s.21 of the 1996 Act are established. The word itself does not mandate any particular consequence of that action. The consequence depends on the ground of revocation. Where the ground cannot reach back in time, the revocation cannot logically render the declaration void ab initio. However, that does not mean that where the ground of revocation arises at the point of grant, the use of the verb ‘revoke’ precludes invalidation from that point. Instead, whether it is intended to invalidate from grant depends on the true construction of the provision, the interpretation of which must take into account the recognised principle that a fraudulently obtained declaration is a nullity.*

*76. Thus, in summary, the objection raised by UM is not in fact to the word ‘revoke’ having different meanings within the same section of the Act, but instead to the word having one meaning with different effects within that single provision. It is not apparent to me that there is anything wrong with this. The verb refers to the act of the Minister in withdrawing the declaration: the effects are different as between the various grounds of revocation because the grounds are different.”*

78. Ultimately, he concluded, at paras. 79 to 80, as follows:

*“79. Finally, I agree with Stewart J. when she concludes that the fact that the original decision referred to the revocation ‘taking effect’ from 31 August does not affect the matter one way or another. The effect of revocation is a matter of law. The argument that this statement in some sense affects the legality of the decision either because MM might have challenged it had he known of the true position, or because the decision might have been different had the decision maker understood that the decision operated ab initio, is not relevant in this*



*case which does not present a challenge to the validity of the revocation decision.*

*80. My conclusion that revocation of a declaration of refugee status operates to invalidate that declaration ab initio, means that the declaration was not 'in force' at the relevant time. Therefore, s.5 did apply to UM (sic), and he required a 'permission' to be in the State at the relevant time. Without such a permission, his presence cannot be brought into reckoning in determining UM's asserted entitlement to citizenship."*

**79.** Whether the Court of Appeal was correct in its conclusion that the effect of revocation is a matter of law, and that it was irrelevant that the decision, as originally communicated to MM, referred to it as taking effect from a specific date, is a matter of some difficulty. The decision of the Court of Appeal focused on its view that the revocation of the declaration of refugee status in this case rendered the declaration void *ab initio*. It may well be that the declaration is void *ab initio*, but there may be a limit to the consequences of such a conclusion.

**80.** I find it difficult to disagree with the general proposition that a declaration of refugee status obtained on the basis of false or misleading information means that the declaration would never have been granted but for the false or misleading information. Does that mean that the declaration is a nullity from the day it was granted, or that it remains effective until such time as the declaration is revoked? The fact that s.21(1), having set out the grounds upon which a declaration can be revoked, speaks of the power of the Minister to revoke in terms that he/she may revoke the declaration, if he/she considers it appropriate to do so, is a complicating factor. No one appears to disagree with the contention that s.21(1)(a) to (g) can only be revoked with prospective effect. The only circumstance which would appear to give rise to a retrospective revocation is that arising under s.21(1)(h), (although there may be some doubt as to the position in respect of s.21(1)(g) and whether that could be said to be wholly prospective in effect). Either way, what is clear from s.21(1), as a whole, is that no distinction is made between s.21(1)(a) to (g), and s.21(1)(h), as to the discretion of the Minister to revoke. It is true that the timing of the event giving rise to revocation is different, in that the event giving rise to revocation in the case of s.21(1)(h) relates back to the time when information was provided to the Commissioner or the Tribunal when seeking the declaration, whereas the triggering events relating to the other grounds for revocation

(with the possible exception of s.21(1)(g)), will of necessity have occurred after the declaration of refugee status has been granted. Therefore, it would appear at first glance that the Minister has a discretion not to revoke in the case of a revocation based on s.21(1)(h). Yet, according to the Court of Appeal, insofar as s.21(1)(h) is concerned, revocation occurs as a matter of law, and once revoked, the revocation takes effect *ab initio*. That being so, it would appear from the interpretation relied on by the Court of Appeal that the Minister has no choice but to revoke (although it must be arguable that the Minister retained a discretion as to whether or not to do so) and has no discretion in relation to the timing of the effect of revocation, that is, it renders the declaration void *ab initio*. That the Minister would have been entitled to revoke the declaration in this case is beyond doubt. The difficult question is whether, despite the wording of s.21(1), the revocation in this case had to be regarded as taking effect *ab initio*, as now contended for by the Minister. The approach of the Court of Appeal is best explained at para. 90 of the judgment, where the following is stated:

*“Seventh, and finally, the starting point must be that a fraudulently obtained permission is a nullity. It confers no rights or entitlements of any kind. Fraud, as it is often said, ‘unravels all’ (Takhar v. Gracefield Developments [2019] UKSC 13, [2019] 2 W.L.R. 984 at para. 43 and following). Fraud ‘vitiates judgments, contracts and all transactions whatsoever’: Lazarus Estates Ltd v. Beasley [1956] 1 All ER 341 at 345, [1956] 1 QB 702 at 712. There are many examples of this in the general law, amongst them court orders (‘an order obtained by fraud is a nullity’ (Walsh v. Minister for Justice [2019] IESC 34 at para. 3)), marriages (M.K.F.S v. The Minister for Justice and Equality [2018] IEHC 103 (at para. 16): ‘[w]here it is determined that the applicants’ relationship is based on fraud, no ‘rights’ can arise from such a relationship’) and in the United Kingdom, leave granted to a non-national to enter the jurisdiction (R. v. Home Secretary ex parte Zamir [1980] AC 930, ‘an apparent leave to enter which has been obtained by deception is vitiated as not being ‘leave [given] in accordance with this Act’).”*

**81.** Nevertheless, and despite the view of the Court of Appeal as to the status of a fraudulently obtained permission, it is pointed out on behalf of the appellant that s.5(3)(b) of the 2004 Act is clear in excluding a refugee who is the holder of a declaration “*which is in force*” from the application of s.5. Accordingly, it is said that

there is no way in which such a person's residence in the State can be in contravention of s.5(1). The language of s.5(3)(b) is clear and unambiguous and covers the appellant's father's situation during the relevant period. However, the respondents argue that the view of the Court of Appeal set out at para. 80 of its judgment which is set out above at para. 78 to the effect that a declaration obtained by fraud is void *ab initio* and, thus, could not be "in force" as contended for by the appellant.

**82.** At this point, it would be helpful to make some observations on the role of a permission. Murray J. considered in detail the concept of permission and identified seven elements of the statutory provisions which he considered to be of relevance (see paras. 84 to 90 of the judgment). I have referred to para. 90 of the judgment above and it would be helpful to note some of the other features identified in those paragraphs. First of all, it was observed at para. 85, quoting from O'Donnell J. in *Sulaimon v. Minister for Justice, Equality & Law Reform*, at para. 4, that the period of residence required under s.6A is "*a concept of lawful residence*". This was described by Murray J. as a broad concept of legality, rather than a narrow interpretation of permission. He then observed "*I have already held that having regard to s.6B(4)(a) that the term 'residence' in s.6A(1) cannot be subject to a blanket qualification of residence as a presence that is lawful, bona fide and regular. However, when construing the words used in s.6B(4) itself, it is appropriate to seek to give effect to this evident parliamentary intent*". Crucially, he stated at para. 88 as follows:

*"Fifth, such a permission is, and therefore its terms are, necessarily conditioned by any representations made to the authority issuing it. This follows not merely as a matter of common-sense, but also from the terms of s.4(10), which specifically mandate the officer granting a permission under that provision to have regard to 'all of the circumstances of the non-national concerned ... represented to the officer by him or her'."*

**83.** Murray J. then referred to the proposition that a person may not profit from his own wrongdoing, citing the case of *Roberston*, and the judgment of Hogan J. therein, referred to above. He then made reference in para. 90, which I have already set out, to the concept that "*fraud unravels everything*".

**84.** Before considering further the concept relied on by the Court of Appeal, to the effect that "*fraud unravels everything*", I think it would be of some assistance to consider in more detail the nature of the permission at issue in these proceedings. In

this context, it will be necessary to refer to some correspondence from the parties following the hearing in relation to the form of permission that had been given to MM. It should be observed that, at the conclusion of the hearing of the case, the Court requested the parties to provide a written form of the Stamp 4 permission that had been provided to MM. In this context, it may be useful to consider the letter sent to MM on the 14<sup>th</sup> July 2006, by which he was notified his application for refugee status was successful. That letter enclosed “*the Minister’s declaration to this effect*”. The letter went on to tell MM that he should go to the GNIB. “*On completion of the necessary formalities you will be presented with a registration card, which is evidence that you have been declared a refugee. That card is an important document and care should be taken to ensure that you retain it in your safe keeping*”. It would appear that the registration card is the document on which a Stamp 4 permission appears. In his book, *Immigration & Citizenship Law* (Roundhall 2017) John Stanley sets out in Appendix E of the book, at page 999, a helpful table setting out the various types of immigration stamp. It was noted therein that the Department of Justice & Equality, and the GNIB, affix “*immigration stamps to the passports and registration certificates (GNIB cards) of non-nationals in the State*”. He then went on to give a description on the various categories of Stamp. In the table referred to, he stated that a permission given under Stamp 4 means “*the person is permitted to remain in the State until a specified date.*” He then gives a list of those to whom a Stamp 4 permission can apply, and they include, for example, a refugee, a programme refugee, a non-EEA person granted family reunification under the International Protection Act, 2015. Thus, it seems that this is the basis upon which MM had both a declaration of refugee status, and a registration card with a stamp for permission. It may seem curious that there is a requirement to have both a declaration of refugee status and a Stamp 4 permission, as appears to be the case. It should be recalled, for example, that s.3 of the Refugee Act, 1996 sets out the rights of refugees and includes, at s.3(2)(iii)(I), an entitlement to reside in the State. There is a provision in s.4(2) of the Act which relates to travel documents and contains a power on the part of the Minister to refuse to issue a travel document. That particular provision has no relevance in the context of this particular case.

**85.** Bearing this in mind, it is relevant to consider again the precise terms of s.5 of the Act of 2004. I appreciate that this has been set out before, but it may be of assistance to consider the exact provisions once more. Thus, it is provided at s.5(1) as follows:

*“No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission ... after such passing, by or on behalf of the Minister”.*

**86.** Section 5(2) goes on to provide:

*“A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State”.*

**87.** So far, the effect and intention of those two provisions would appear to be clear. One then has to consider the terms of s.5(3) of the Act of 2004, which provides as follows:

*“This section does not apply to -*

*...*

*(b) a refugee who is the holder of a declaration (within the meaning of that Act) which is in force”.*

**88.** On the face of it, it would therefore appear that while a declaration is in force, the person concerned, being the holder of a declaration, is entitled to be in the State. It is, therefore, somewhat difficult to understand why it is necessary for the holder of a declaration of refugee status to have a Stamp 4 permission although one can understand the practicality of such a permission from an administrative point of view.

**89.** A further provision of the Act of 2004 is of some interest, and that is in relation to the obligations of non-nationals to register. Section 9(1)(a) provides as follows:

*“A register of non-nationals who have permission to be in the State shall be established and maintained by registration officers in such manner as the Minister may direct”.*

**90.** It does appear that, notwithstanding the wording of s.5(3)(b) of the Act of 2004, having regard to the provisions of s.9(1), a holder of a declaration of refugee status, being a non-national, does have to register in the State. Interestingly, the letter advising MM of the grant of the declaration of refugee status also stated, in its concluding paragraph, as follows:

*“Please note that this letter is not in itself evidence of permission to remain in the State and should not be used for any purpose other than to present yourself to your local registration office”.*

**91.** Subsequent to the hearing, as mentioned above, the parties sought to assist the Court in relation to the nature of a Stamp 4 permission. In this context, the appellant

submitted that their understanding of a Stamp 4 permission is that it is an administrative instrument which indicates that the holder is permitted to take up employment without a work permit, set up a business, and access State funds, as determined by government departments or agencies. It is of a particular temporal duration, and application can be made for its renewal on an administrative basis. It is further suggested that a Stamp can issue by exercise of executive action, or following the exercise of a statutory power, for example, the granting of permission to enter the State pursuant to s.4 of the Immigration Act, 2004, or leave to remain in the State pursuant to s.3 of the Immigration Act, 1999. Further, it was stated that the appellant's understanding was that the granting of Stamp 4 permission to the appellant's father throughout the years 2006 to 2013 was, on each occasion, an administrative action, consistent with the administrative scheme of various "Stamps". The Stamp 4 permissions that issued to the appellant's father were never revoked or declared null or void. On the contrary, the appellant's father's Stamp 4 permission was renewed on the 12<sup>th</sup> June 2013, (two days after the letter stating that his refugee status was revoked with effect from 31<sup>st</sup> August 2013), valid until the 15<sup>th</sup> September 2013. In their submissions, it was noted on behalf of the respondents that a Stamp 4 permission will indicate that the holder has permission to reside and work in the State and does not need an employment permit or business permit to work here. Again, it was accepted that the holder of a Stamp 4 permission may also access state funds, as determined by the relevant government department or agency. It was further noted that the decision to grant such a permission is made initially by the Minister for Justice, and will be for a particular period, which is normally for one year. The respondents go on to note that, in the case of a person who obtains a declaration of refugee status, the Stamp 4 permission automatically resulted, at the time, by virtue of that status, having regard to the terms of s.3 of the Refugee Act, 1996, and did not find its legal basis in the context of the exercise of a statutory or non-statutory discretion. It is stated that whilst the nomenclature of a Stamp 4 in this regard has an administrative origin, a person holding a declaration of refugee status which is in force automatically benefited from the statutory entitlements resulting from that status under s.3 of the Refugee Act, 1996, and, therefore, whilst of administrative convenience, derives its legal basis exclusively from that provision. The fact that the term "Stamp 4" in this context echoes the term used separately for a Stamp 4 permission granted following the exercise of discretion in another context for another non-national, does not take away

from the legal basis of the Stamp 4 in the refugee context. The legal basis is that of s.3 of the 1996 Act. The respondents then referred to the letter of the 14<sup>th</sup> July 2006, and to the passage referred to previously. It was submitted that the registration card which issued on foot of the letter and declaration of refugee status did not, in itself, as a matter of law, constitute the appellant's father's permission to be in the State, but merely evidenced his permission to be in the State as the holder of a declaration of refugee status, and the fact that he had registered with GNIB. His permission to be in the State derived from s.3 of the Refugee Act, 1996, as amended. The permission to be in the State, therefore, pre-existed the application for registration, and indeed the registration itself. Accordingly, it is contended that the declaration of refugee status was the legal basis of MM's permission to be in the State. Therefore, it is the respondents' position that the legal basis for a Stamp 4 permission, or any Stamp in a given case, must be linked back to the original decision, and the basis for same as set out in that decision. Accordingly, it is contended that the Stamp 4 permission granted to MM, and its legal basis, is inextricably derived from the grant of the declaration of refugee status in July, 2006. The submission from the respondents goes on to state that it is their position that registration under s.9 of the 2004 Act is for non-nationals with permission to be in the State, and such registration is not confined only to those granted permission specifically under s.5(1) of the 2004 Act. It was specifically noted that there was no exclusion of the holders of declarations of refugee status that are in force from s.9(1), having regard to the terms of s.9(6) of that Act.

**92.** The submissions of the parties on this issue have been of some assistance in clarifying the situation in relation to the Stamp 4 permission. It does seem to me to be correct that the permission for someone in the position of MM flows from the provisions of s.3 of the 1996 Act, and the fact that he was the holder of a declaration of refugee status, and that he had duly registered with GNIB. As was contended by the respondents, the legal basis of MM's Stamp 4 permission "*is inextricably derived from the grant of the declaration of refugee status in July 2006, i.e. once the declaration is granted and is 'in force'*". Crucially, the position of the respondents is that in the case of a person with a declaration of refugee status, the Stamp 4 permission automatically resulted by virtue of that status bearing in mind the terms of s.3 of the Refugee Act, 1996. There is no other basis suggested for such permission to be granted. Thus, the position of the State clearly would be that, if the Stamp 4 permission automatically

results from the declaration of refugee status, the revocation of that status would likewise, presumably, result in the loss of the permission. I am conscious of the fact that subsequent permissions were granted to MM, but the basis of those permissions is not clear to me, and, in any event, subsequent permissions are not of assistance in determining whether MM had the requisite period of residence in the State for the purpose of enabling the appellant in this case to obtain an Irish passport.

93. It does appear that the legislative provisions relating to the declaration of refugee status, coupled with the requirement for registration as a non-national, and the grant of permission as has been described above, is somewhat confusing. Nevertheless, given that it does seem to follow that if a declaration of refugee status is given, then in order to decide the issues in this case it is necessary to decide whether the effect of revocation on the basis of s.21(1)(h) of the Act of 1996 is such that the revocation must be regarded as having a retrospective effect, such that the declaration could be described as being void *ab initio*, and that the permission granted as a result of the declaration must likewise be regarded as never having been “*in force*” by reason of the false and misleading information given by MM in first seeking a declaration of refugee status. That brings me to a consideration of the concept that “*fraud unravels everything*”.

### **Fraud Unravels Everything**

94. I have referred previously to para. 90 of the judgment of the Court of Appeal, which is set out above, in which reference was made to a number of authorities to support the argument that fraud unravels everything. All of the authorities relied on, with one exception, (which I will consider later), are cases which arose in a private law context. I have no difficulty with the general proposition set out in that paragraph. Thus, I have no issue with the concept that “*an order obtained by fraud is a mere nullity*”, as stated in *Walsh v. Minister for Justice & Others* [2019] IESC 54, at para. 2.3. That was a case in which the appellant, having been unsuccessful in his appeal to this Court, sought to have the judgment and order of this Court set aside on the basis that there were “*factual errors in the judgment*”. At para. 2.3 of the judgment of the court, the following was stated:

*“However, this Court has exceptionally recognised a jurisdiction to set aside judgments. It has always been recognised that a judgment obtained by fraud may be set aside, see Tassan Din v. Banco Ambrosiano S.P.A. [1991] 1 I.R. 569. As was observed by Murphy J. in the course of his judgment in that case, in*



*relation to what is now Article 34.5.6°, the acceptance that a decision of this Court can be set aside for fraud "does not truly represent an exception to this constitutional provision. An order obtained by fraud is a mere nullity" - or, as it was colourfully described in an earlier case, fabula non iudicium."*

95. This Court went on in the course of that judgment to refer to the fact that even a final decision of the Court could be set aside having regard to the line of authorities, commencing with *In re Greendale Developments Ltd. (No. 3)* [2000] 2 IR 514, a jurisdiction which was explained by Denham J. at 544 to 545 of her judgment, where she stated as follows:

*"The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights."*

96. Obviously, that case was concerned with an issue as to whether it was necessary to set aside a judgment of this Court on the basis of an issue of constitutional justice said to have arisen in that case. The general observation in relation to an order obtained by fraud being a mere nullity is not a controversial proposition. Indeed, this is made clear in De Smith's *Judicial Review of Administrative Action* (4<sup>th</sup> Edn, Stevens & Sons 1980), in which it is observed at page 408 as follows:

*"The superior courts have an inherent jurisdiction to set aside orders and convictions made by inferior tribunals if they have been procured by fraud or collusion – a jurisdiction that is now exercised by the issue of certiorari to quash. Where fraud is alleged, the court will decline to quash unless it is satisfied that the fraud was clear and manifest and was instrumental in procuring the order impugned. In most of the reported cases in which the application has succeeded, perjured evidence had been given either by the party in whose favour or at whose instance the order had been made or by one of his witnesses acting in collusion with him, and the guilty party had been convicted*

*of, or had confessed to, perjury before the application of certiorari was lodged; and it has been doubted whether the court would allow any application founded only upon the giving of false evidence by one of the applicant's own witnesses. It is thought, however, that it is open to a court to quash a conviction or order whenever the tribunal has been materially misled by fraudulent assertions. Where it is alleged that the parties have acted in collusion to mislead the tribunal as to the true facts, an application for certiorari to quash may be brought by the Attorney General, who would also be the appropriate applicant if the tribunal had itself acted in collusion with parties to defeat the ends of justice."*

97. While that is a description of the position in the neighbouring jurisdiction, it is a useful observation as to the effect of fraud on an order.

98. Reference was also made in para. 90 of the judgment of the Court of Appeal to the decision of the High Court in the case of *M.K.F.S v. The Minister for Justice and Equality* [2018] IEHC 103 (at para. 16), where it was stated by Humphreys J. as follows:

*"As regards the contention that the rights of the parties were disregarded, any ministerial or administrative decision-making process is not a safe haven for fraudulent applicants. Where it is determined that the applicants' relationship is based on fraud, no 'rights' can arise from such a relationship; and an absolutely necessary consequence is that no obligation arises under the Constitution, the ECHR or EU law to consider any such 'rights' ..."*

99. That case concerned the question of a marriage which was considered to be a marriage of convenience. On appeal to this Court, McKechnie J. made a number of observations which are of interest. In particular, he considered the concept of nullity of marriages. At para. 77 of the judgment, he noted as follows:

*"It should be noted that a marriage may be void or voidable. The grounds upon which a nullity order can be sought are not contained in legislation but rather have been developed by case law. A marriage may be void (i) on the ground of lack of capacity (for example, where one or both of the parties is within the prohibited degree of relationships, or is already married, or is under the age of 18 without consent of the court) or (ii) as a result of the non-observance of the appropriate formalities (for example, non-compliance with the notice requirement); or (iii) due to the absence of the full, free and informed consent*

*of one or both of the parties to the marriage (e.g. as a result of duress). A marriage may be voidable if either party has not the mental capacity to marry or is impotent. A decree of nullity may also be granted as a result of the inability of one of the spouses to enter into and sustain a normal marital relationship, for example as a result of a psychological impediment. A void marriage is considered as never having had legal effect (void ab initio), whereas a voidable marriage is regarded as valid until a decree annulling it has been pronounced by the courts.”*

**100.** McKechnie J., having observed that the proceedings before the court involved a judicial review application in the deportation context, went on to make a number of observations. He noted, at para. 96, as follows:

*“The Minister, in making his finding under the 2015 Regulations that the Appellants’ marriage was one of convenience, did not purport to make any consequent decision, with far-reaching legal effects, that the marriage was therefore a nullity at law for all purposes: quite rightly so, for the 2015 Regulations do not permit him to do so. ...*

*97. In my view, these proceedings are not an appropriate vehicle for this Court to pronounce on this wider question of whether a marriage of convenience is a legal nullity for all purposes and whether such arises only from the common law or also from the 2014 Act. The established grounds for the granting of decrees of nullity have been developed judicially in the context of an application by either party to the marriage to that end. In my view, if the fact that a marriage is a marriage of convenience is to be recognised as a ground for nullity, it should arise in such a context, wherein a party to such a marriage seeks an annulment on that ground. It is clear that there are two views, or schools of thoughts, concerning this issue, with case law and policy considerations leaning either way. It will be for the parties to such an annulment application to make their legal arguments to the appropriate court. If the fact of it being a marriage of convenience is to be a ground for nullity, it will be for a court to make the underlying factual determination concerning the marriage, with all of the attendant procedures that attach to the court process.”*

**101.** He went on to conclude, in para. 98, that the Minister’s determination has relevance only in the immigration/deportation context, and that the Regulation simply enabled the Minister to disregard the marriage for such purposes. He went on to say:

*“His determination that it is a marriage of convenience cannot lead to the marriage being a nullity at law for all purposes, all the more so here where both parties to the marriage contest that very finding. However, while the Minister’s decision does not mean that the otherwise legally valid marriage is thereby a legal nullity, I do not rule out that a court, properly seised of an appropriate annulment application by a party with standing, may conclude that such a marriage is a grounds for a nullity: then again, it may not. This, however, is not the case in which to reach such a conclusion. It will suffice to say that the Minister’s finding regarding the marriage of convenience is confined to the immigration/deportation context and the sole consequence, as explained in this judgment, is that he may disregard the marriage for such purposes.”*

**102.** That decision was delivered by this Court on the 24<sup>th</sup> July, 2020, subsequent to the judgment of the Court of Appeal in this matter. Obviously, the judgment of this Court came to a somewhat different conclusion to that of the High Court, relied on by the Court of Appeal at para. 90. Therefore, the reliance placed on the decision of the High Court in that case cannot stand now in the light of the subsequent decision by this Court in relation to that matter, which makes it clear that a finding that a marriage is a marriage of convenience cannot be regarded as fraud, and thus the concept that no rights could arise from such a relationship is not a correct view of the law. It may be that what is described as a marriage of convenience can in some ways be regarded as a “fraudulent” marriage, but it will subsist as between the parties with all the rights that flow from a marriage, unless and until the marriage has been annulled. Therefore, the statement relied on from the judgment in the High Court, to the effect that where it is determined that *“the applicant’s relationship is based on fraud, no rights can arise from such a relationship”*, is clearly not a correct statement of the position.

**103.** It would also be useful to consider the case of *R v. Home Secretary ex parte Zamir* [1980] AC 930, a decision of the House of Lords. This was a case concerning an individual who was detained as an illegal entrant to the UK for the purpose of his removal. He then applied for *habeas corpus*. The background to the matter was that his father had settled in the UK in 1962. His son then applied in 1972 for leave to join his

father. Permission was granted in November 1975, having initially been refused. He then arrived in the UK on March 2<sup>nd</sup> 1976. By that time, on the 10<sup>th</sup> February 1976, he had married. Subsequently, his wife and their child applied to join him in the UK. At that stage, an issue arose as to the lawfulness of Mr. Zamir's entry into the UK in 1976. Mr. Zamir was interviewed. He accepted that he did not inform the UK authorities of his marriage, on the basis that he did not think it necessary, notwithstanding that one of the matters set out on the application form for entry referred to the possibility that a change of circumstances since the issue of the entry certificate could remove the basis of the holder's claim for admission. It was contended by the Secretary of State that the leave to enter given to Mr. Zamir was vitiated by deception. In a short paragraph on page 947 of the judgment, Lord Wilberforce stated:

*“The basis on which the Secretary of State seeks to justify the detention and removal of the appellant is that the leave to enter the United Kingdom was vitiated by deception and there is ample authority that an apparent leave to enter which had been obtained by deception is vitiated, as not being “leave [given] in accordance with this Act (section 3(1)): see (Reg v. Secretary of State for the Home Department, Ex parte Hussain [1978] 1 W.L.R. 700 (Court of Appeal), and numerous cases following.”*

**104.** The judgment in that case went on to consider the basis for judicial review, if there had been a conclusion that there had been deception. In that regard it was concluded that the decision as to whether or not to grant leave to enter could only be reviewed by the court upon the normal principles applicable to such decisions *“of which those capable of being invoked in the present case are that there was no evidence on which he could reach his decision, or that no reasonable person in this position could have reached it”*. Therefore, it was concluded that a decision to remove could only be attacked if it could be shown that there were no grounds upon which the Secretary of State, through his officers, could have acted, or that no reasonable person could have decided as he did. The House of Lords then went on to consider the question of the standard of duty owed by persons arriving in the United Kingdom seeking leave to enter. That is not germane to the facts of this case. Apart from the statement at page 947, to the effect that the leave to enter in that case was vitiated by deception, the case has nothing to say about the effects of such a decision, particularly in relation to the possible effect on other parties. Of course, in that case, the issue as to the legality of

Mr. Zamir’s leave to enter the UK arose when his wife and child sought permission to enter the UK. Clearly at that stage, if the decision to remove Mr. Zamir was lawful, that would have been the end of the matter as far as they were concerned. Leaving aside the obvious point that the statutory regime applicable in that case was different to the statutory scheme at issue in these proceedings, the statement that leave to enter was vitiated by deception is not of much assistance in resolving the issues in this case.

**105.** Counsel on behalf of the appellant herein urged on this Court that a more nuanced approach should be taken to the finding that “*fraud unravels everything*”. However, the point is made on behalf of the State that reckonable residence for citizenship purposes excludes periods that are in contravention of s.5(1) of the 2004 Act. It is pointed out that the Oireachtas did not provide for a discretion in this regard, and it is contended that there is no ambiguity in the terms used in s.6B(4). The *amicus curiae*, in its submissions, simply notes the fact that the language used in s.21 of the 1996 Act is discretionary in its terms, and that, if the concept that “*fraud unravels everything*” was to apply, the Minister would have no discretion whatsoever, and that that was not what was legislated for by the Oireachtas.

**106.** Thus, the critical question in this case is whether the revocation of the declaration of refugee status must be viewed as being retrospective in effect, and, if so, what effect, if any, does revocation have on those who, but for the revocation, would have enjoyed derivative rights by reason of the apparent refugee status of the person from whom they derived their rights, such as the appellant in this case. In this context, counsel on behalf of the appellant placed some reliance on s.19 of the Irish Nationality & Citizenship Act, 1956, in which the issue of revocation of a certificate of naturalisation is provided for. It states as follows:

*“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, ...”*

**107.** Thus, as appears from s.19(1) of the 1956 Act, the Minister has a discretion to revoke the certificate of naturalisation, just as the Minister, under s.21(1) of the Act of 1996, has a discretion to revoke a declaration of refugee status. As pointed out on behalf of the appellant, s.18 of the Act of 1956 provides, at sub-section (1), as follows:

*“Every person to whom a certificate of naturalisation is granted shall, from the date of issue and so long as the certificate remains unrevoked, be an Irish citizen”.*

**108.** Thus, it is contended that the effect of revocation in such cases is prospective only. It does not invalidate the period of citizenship which preceded it, even in the case of fraud going to the heart of the grant of the certificate of naturalisation. The language of s.3 of the 1996 Act, which sets out the rights of refugees, is not in the same precise terms as s.18 of the Act of 1956. As we have seen previously, s.3(1) of the 1996 Act provides that *“a refugee in relation to whom a declaration is in force shall be entitled to the same rights and privileges as those conferred by law on persons generally who are not Irish citizens ...”*. It was pointed out that the apparent effect of the difference in approach between the revocation of a declaration of refugee status and a revocation of a certificate of naturalisation is that an anomaly is thereby created whereby providing false information to obtain refugee status is seen as being worse than providing false information to obtain Irish citizenship through naturalisation. It was pointed out that, if the appellant’s father had through misrepresentation obtained Irish citizenship by naturalisation, and the appellant had become an Irish citizen by birth by descent pursuant to s.7(1) of the 1956 Act, the appellant would have remained a citizen even upon the discovery of the misrepresentation by the father and the revocation of the father’s citizenship. In this context, the respondents rely on the observations of the Court of Appeal at para. 101, in which it was stated as follows:

*“A number of things follow. The prospect of facts emerging after many years which negate an entitlement to citizenship assumed by a person, is built in to the legal requirement. A distinction between persons claiming citizenship through parents who are citizens and parents who are not, also flows inevitably from the provisions of the Act. For similar reasons it does not avail UM to say that he is in a worse position than a person whose parent has their certificate of naturalisation revoked: the Oireachtas has delineated different processes for these distinct situations. It follows that the position adopted by the courts in the United Kingdom in respect of vitiation of citizenship is irrelevant: here, the conclusion that citizenship cannot be predicated upon the unlawful residence of a parent has been stipulated by the Oireachtas. That policy decision has been made.”*

109. The Court of Appeal went on to say, at para. 103, as follows:

*“The respondents are, however, correct when they say that UM misconceives the character of the process leading to the revocation of MM’s declaration of refugee status and the subsequent refusal of UM’s application for a passport. Neither comprised, as UM has contended, revocation of citizenship or anything akin to it. The latter presented an inquiry as to whether UM was a citizen at all. The former revoked nothing from UM. Insofar as it is suggested that UM’s interests ought to have been considered in connection with that process, that if anything would have afforded only a basis for challenging the revocation decision, which is not in issue in this case.”*

110. There is undoubtedly an anomaly between the position of those whose declaration of refugee status is revoked, as opposed to those whose declaration of naturalisation is revoked. The Court of Appeal has characterised this difference as a policy decision of the Oireachtas. Whether that is so or not depends on accepting the conclusion that a revocation of refugee status, pursuant to s.21(h), has retrospective effect. Whatever may be the correct view of the decision of the Oireachtas by reference to the 2004 Act, it is interesting to note the position that now pertains under the International Protection Act, 2015. Section 52 of that Act, which replaces s.21, now provides as follows:

*“(1) The Minister shall, in accordance with this section, revoke a refugee declaration given to a person if satisfied that -*

*(a) the person should have been or is excluded from being a refugee under section 10,*

*(b) the person has, in accordance with section 9, ceased to be a refugee, or*

*(c) misrepresentation or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person a refugee declaration”.* (Emphasis added)

111. Thus, as can be seen, the Minister no longer has a discretion in the matter. Further, it appears that the effect of refugee status is provided for in s.52(10) of the 2015 Act, which provides:

*“(10) A decision to revoke a declaration shall take effect -*



- (a) *where no appeal to the Circuit Court is brought against the decision of the Minister, on the date on which the period specified in subsection (8) for making such an appeal expires, or*
- (b) *where an appeal to the Circuit Court is brought against the decision of the Minister -*
  - (i) *from the date on which the Circuit Court, under subsection (9)(a), affirms the decision, or*
  - (ii) *from the date on which the appeal is withdrawn.”*

**112.** Thus, it appears that revocation of refugee status will have prospective effect only. Accordingly, in that regard, so far as the Act of 2015 is concerned, it seems that the clear intention of the Oireachtas is that revocation will not be retrospective. The fact that anomalies appear to exist between the effect of a revocation of a declaration of refugee status, and revocation of a declaration of citizenship, highlights the unfortunate position of those who claim derivative rights based on the status of the person whose declaration has been revoked and who, but for the revocation, would undoubtedly have derivative rights. These difficulties have been highlighted in the UK in the case of *R (Kaziu, Bakijasi and Hysaj) v. Home Secretary* [2018] 1 WLR 221. The respondents relied on the decision of the High Court in that case ([2015] 1 WLR 945) (Ouseley J.), in their submissions before the High Court. Subsequently, the matter came before the Supreme Court in that jurisdiction. Unusually, in that case, the respondent consented to the appeals being allowed. The background to the matter is very complicated and has reference to the specific terms of British legislation, and the interpretation of that legislation. Nonetheless, the decision is of some interest. In that case, the claimants had sought judicial review of decisions of the Secretary of State made in 2013, that their British citizenship should be treated as nullities. The grounds of claim in each case were that each fell to be considered as a British citizen who had obtained that status by means of fraud, and who was, therefore, liable to be deprived of that status under s.40 of the British Nationality Act, 1981, as amended. In the High Court, Ouseley J. dismissed the claims on the basis that he was bound by previous Court of Appeal authorities. The claimants appealed. In circumstances where the Secretary of State consented to the appeals being allowed, the Supreme Court expressed the view that it could not make the orders allowing the appeals, and setting aside the orders in the courts below, without explaining the reasons for doing so. Judgment was given for that purpose. The question

before the court was whether the misrepresentations made by the appellants in their applications for UK citizenship made the grant of that citizenship a nullity, rather than rendering them liable to be deprived of their citizenship under the provisions of the British Nationality Act, 1981. The Supreme Court, in the course of its judgment, outlined the case law which had been relied upon by Ouseley J. in coming to his conclusion. At para. 55 of his judgment in the High Court, Ouseley J. had stated as follows:

*“There is a problematic area over the effect of the nullification of a person's nationality on those who have acquired nationality, whether knowing of the deceit or not, deriving from their relationship to that person. The parties' agreed position distinguishes the effect of nullification on the children of Bakijasi, by registration and by birth, and the effect on citizens by descent not requiring registration. There appears to be from Ex p Parvaz Akhtar [1981] QB 46 , Ex p Naheed Ejaz [1994] QB 496 and Bibi v Entry Clearance Officer, Dhaka [2008] INLR 683 a clear recognition that nullification should not be extended readily to nullifying derivative citizenship. But there is no clear and logical dividing line. The decisions more obviously seek a pragmatic limit to the logical effects of the nullification of citizenship on dependants. Such a pragmatic approach befits giving limited scope to nullification and a wide right of appeal in respect of deprivation. If nullification survives, as I hold it does, this case by case pragmatism leads to uncertainty in application of the concept and is unsatisfactory. Either nullification of one citizenship should nullify the citizenship of those whose citizenship had depended on its validity, or it should go no further than the impersonator's citizenship. Half-way pragmatism, which may or may not apply to a given case, simply illustrates the difficulty of the concept.”*

**113.** Ultimately, the Supreme Court in its decision took the view that the cases of *Akhtar* and *Bibi*, referred to by Ouseley J. were wrongly decided, but that the decision in the case of *Ejaz* was rightly decided. At para. 12, the judgment of the Supreme Court described *Ejaz* in the following terms:

*“X applied for citizenship in her real name under section 6(2) of the 1981 Act, which provides for the naturalisation of a person who is married to a British citizen. Later, it turned out that X's husband was not, and never had been, a*

*British citizen, having been granted a British passport in a false identity. The Court of Appeal declined to hold that the grant of citizenship was a nullity, pointing to the uncertainty and injustice which could be caused by holding that a person had never been a citizen, which could have effects upon third parties such as children, and was highly undesirable in matters of status. Deprivation of citizenship, on the other hand, did not have such retrospective effect”.*

**114.** Having considered the position of the Secretary of State in that case, the Supreme Court commented, at para. 18, as follows:

*“Those cases, and the Court of Appeal’s decision in this case, were based on the principle that there is a category of fraud as to identity which is so serious that a purported grant of citizenship is of no effect. But, argues the Secretary of State, the courts have not articulated any clear or principled definition of the types of fraud which will be so serious as to have this consequence. In the current cases, for example, neither appellant pretended to be someone he was not. Mr Hysaj used his real name but put forward a false date of birth, nationality and place of birth in gaining his ILR and gained citizenship on the basis of the ILR that he himself had obtained. Mr Bakijasi used a false name in gaining his ILR but otherwise gained citizenship in the same way. Ouseley J held that the key characteristics of identity for this purpose were the name, date of birth, and nationality or the country and place of birth, because this was the information on the certificate. But he also held that there had to be fraud - innocent mistakes or misunderstandings were not enough: paras 46, 47. Such uncertainty means that the law is difficult to apply in practice.*

*19. It also has a number of illogical and unsatisfactory consequences. Thus it is not clear when the use of a false identity to obtain citizenship by one person will lead to the nullification of the grant of citizenship to those making a derivative claim, whether as a spouse or child. It is not easy to reconcile Akhtar, Ejaz and Bibi. Logically, as Ouseley J pointed out in this case (para 55) either all derivative citizenship should be of no effect if the citizenship from which it is derived is of no effect, or the nullity should be confined to the person who obtained citizenship using the false identity. As Ouseley J also pointed out (para 69) the logic of the position then adopted by the Secretary of State would also nullify the grant of ILR, but the Secretary of State has never contended for this.”*

**115.** In those circumstances, the court agreed with the approach now put forward by the Secretary of State, and overruled the decisions of the Court of Appeal in *Akhtar* and *Bibi*.

**116.** While a direct comparison cannot be made between the facts of those cases, and the facts of this case, what is of interest is the recognition of the difficulty that flows from situations where there was a finding of nullity resulting in a deprivation of citizenship of those claiming a derivative right to citizenship. As was noted at para. 12 of the judgment of the Supreme Court, referred to above, deprivation of citizenship did not have retrospective effect, unlike a finding of nullity.

**117.** The finding that the declaration of refugee status granted to MM was void *ab initio* would appear to lead inexorably to the view that UM could not rely on his father's presence in this country for the purpose of obtaining citizenship. It seems, however, that, if MM had obtained a declaration of naturalisation, then, even if that declaration was revoked, given that the revocation would not have retrospective effect, UM would have been entitled to citizenship. One wonders what would have been the position for UM had he applied for a passport on the date of his birth, and prior to the revocation of his father's declaration of refugee status? Would the Minister in those circumstances have been entitled to hold that UM was not an Irish citizen? Presumably not, given that, at that time, the declaration of refugee status was in place. Would the Minister have been entitled subsequently to withdraw or revoke UM's citizenship on the basis that his father's declaration of refugee status had been revoked? It would appear from the decision of the Court of Appeal that the answer to that question must be yes.

**118.** That leads me to another question. Assuming for the sake of argument that the Minister decided to deport MM on the basis that he had provided false and misleading information in his application, could he have been deported without the revocation of the declaration? That question arose in the course of the hearing, and it was accepted on behalf of the respondents that, absent the formal revocation of the declaration of refugee status, the holder of such a declaration could not be deported on the basis of having provided false or misleading information. One could also consider some of the other consequences that might flow from the conclusion that the revocation has retrospective effect. For example, when one considers the entitlements of the holder of a declaration of refugee status, as set out in s.3 of the 1996 Act, would the holder of such a declaration of refugee status, whose declaration was subsequently revoked, be

obliged to repay social welfare benefits that had been paid on foot of the declaration, to give one example. In this case, we know that UM's mother came to this State on foot of an application for family reunification. She (and UM) have since obtained refugee status in their own right but could they have been deported prior to that because of MM's situation? These are difficult questions, but perhaps the most difficult of all relates to those who, but for revocation, would have enjoyed derivative rights.

**119.** The use of terms such as void, voidable, void *ab initio*, and nullity, may be of assistance in clarifying the position after a finding that a particular position is not a valid one. Those who are familiar with the law of nullity in respect of marriage will be familiar with the concept of void and voidable marriages, as explained by McKechnie J. in the case of *M.K.F.S.*, referred to above. The use of the phrase void *ab initio* was considered in *Administrative Law in Ireland* (5<sup>th</sup> Edition, Round Hall 2019) at para. 11-22 onwards, in the context of decisions struck down as being unlawful. As the authors say, at 11-22:

*“The starting point is that once a decision is declared to be unlawful by a competent court, the decision is void ab initio and can have no continuing effect. However, cases such as Shelley and Glavin would appear to represent the high-watermark of the classic doctrine of invalidity, as the rule that ultra vires decisions are a nullity is (in either its constitutional or common law form) subject to considerable qualification. As Costello J. remarked pregnantly in O’Keeffe v. An Bord Pleanála:*

*“It is usual to say that an ultra vires decision is void and a nullity, but it is clear that it is wrong to conclude that such decisions are completely devoid of legal consequences”.*”

**120.** At 11-23, the authors said:

*“Most prominently, the Irish courts have been anxious to ensure that third parties should not benefit automatically from declarations of invalidity issued in unrelated proceedings. In order to avoid such “piggy backing”, the full retrospective benefit of declarations of invalidity has been limited to deserving third parties who, for instance, had extant appeals at the time the declarations issued.*

*11-24 More generally, with the rare exception of a flagrantly invalid decision, invalidity can only be established in legal proceedings. Thus, until a court sets*

*aside an impugned decision, the decision will enjoy a presumption of validity and the decision will be regarded as binding.*

*11-25 Moreover, even if invalidity is established in the appropriate, subsequent proceedings, the court may, as has often happened, refuse to grant relief on public policy or discretionary grounds. Thus, a legally defective decision may continue to be legally effective if the defects are not raised in a timely manner before an appropriate body. As O’Neill J. put it in *Q v Mental Health Commission*:*

*“The principle that a legal or statutory provision which is subsequently found to be invalid may be sheltered from nullification and thus accorded the continuance of legal force and effect, where its invalidity is not asserted at the appropriate time, and where those affected by it and concerned with it, in good faith, have treated it as valid and acted accordingly, is now well established in our jurisprudence”.*

*11-26 In addition, there are sometimes statutory provisions which specifically address the consequences of invalidation, or which prescribe a limitation period which serves to preclude judicial review once that time limit has expired. Apart from express words, the statutory context may be such that, as Costello J. said in *O’Keeffe*, the court must give legal efficacy to an *ultra vires* decision “if the construction of the statute so requires”.*

**121.** While I appreciate that the comments made by the authors in the passages just referred to concern cases in relation to decisions that are found to be *ultra vires*, it seems to me that there are some observations that may be made. Indeed, the final observation made at para. 11-27 is worth observing:

*“Invalidity is a relative concept and the courts have refrained from pushing that concept to extremes.”*

**122.** In the course of a footnote, the authors referred to a quotation from O’Donnell J., as he then was, in the case of *Cullen v. Wicklow County Manager* [2010] IESC 49, at para. 19, [2011] 1 IR 152, at 161, where he observed that:

*“Invalidity is a relative and not an absolute concept, and is furthermore dependent upon court determination – something which is by definition not available to a County Manager when he or she receives a s.4 motion ... The position has now been reached where it may be said that an invalid act is an act*

*which a Court will declare to be invalid. As Professor Wade observed “... the truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances”.*

**123.** To that the authors added the phrase “*and, it might be added, at the right time*”. This commentary merely highlights the fact that what is, or is not, invalid may depend upon particular circumstances. In the particular circumstances of this case, one can see that, if the Minister had chosen not to revoke the declaration of refugee status, notwithstanding that he was entitled to do so, the position would be that, far from being a declaration of refugee status which was void *ab initio*, the declaration would remain in being to all intents and purposes. To paraphrase what was said by the authors in the passages referred to above, until a declaration is set aside, it enjoys a presumption of validity, and will be regarded as binding. Indeed, another observation made by the authors is of assistance. At para. 11-26, as set out above, they highlighted the statutory provisions and their relevance to answering the issues that arise in any particular situation in relation to the consequences of invalidation.

**124.** That brings me back to a consideration of the legislation in this case. Two aspects of the legislation are of particular relevance, it seems to me. First of all, no distinction is made in s.21(1) of the Act of 1996 in relation to the various grounds upon which the Minister can revoke a declaration as to whether the effect of revocation would be prospective or retrospective. I accept, as a matter of practicality, that a consideration of the specific grounds will show that in certain instances revocation could only take effect as a result of events that occurred after the grant of the declaration, but nonetheless no distinction is drawn within the section as to the effect of revocation, and whether it is intended to be retrospective or prospective. Secondly, the language used in s.21 is discretionary. Thus, it is clear, it seems to me, that, even if the Minister is of the view that a declaration of refugee status was made on the basis of information furnished by the applicant which was false or misleading, the Minister is not obliged to revoke the declaration. As the statute says, “*the Minister may*” revoke the declaration, and there is a further qualification, that is, that the Minister may revoke “*if he or she considers it appropriate to do so*”. Thus, even in circumstances such as those which exist in this particular case, the Minister had a choice as to whether or not to revoke the declaration. As set out previously, the legislation now dealing with the revocation of a

declaration expressly makes it clear that the Minister has no choice in the matter, and further that the effect of revocation is prospective as opposed to retrospective.

**125.** That brings me to an observation as to the language used in s.5(3)(b) of the Act of 2004, and the reference in that section to a refugee who is the holder of a declaration which is in force. The use of the phrase “*in force*” leads me to the view that, while a declaration is in force, it is valid and remains so unless and until revoked. That reflects the acknowledgement by the respondents of the position that while the declaration remained unrevoked, it could not be treated as being of no effect. Thus, as has been accepted, MM could not have been deported until such time as a formal decision to revoke had been made. During the course of time when the declaration was unrevoked, UM’s mother was allowed to enter the State on foot of an application for family reunification. Was the decision to grant family reunification a void decision? Presumably, the answer to that question should be yes. I find it hard to accept such a hard and fast approach to the difficult issues in this case. The references above to void marriages and to decisions made *ultra vires* demonstrate the difficulty in taking the position that the decision to revoke in this case meant that the declaration was void *ab initio* with all the apparent difficulties that flow from such a conclusion. As O’Donnell J. said in the passage cited above in the *Cullen* case, invalidity is a relative and not an absolute concept. To all intents and purposes, the declaration of refugee status was valid and effective for all purposes while it remained unrevoked. If the Minister had decided not to revoke, as it appears could have been the case having regard to the discretion given to the Minister in s. 21 (1), then, that would have meant that the declaration would have remained in force notwithstanding the circumstances in which it was obtained. Given the status of the declaration until such time as it was revoked I find it difficult to conclude that in holding the declaration was void *ab initio*, as was found by the Court of Appeal. It was valid, binding and of effect until revoked.

### **Conclusion**

**126.** On the face of it, it is difficult to argue with the conclusion of the Court of Appeal that a declaration of refugee status which is revoked in circumstances where the revocation took place because the applicant had provided false and misleading information would appear at first instance to give rise to a view that the declaration, being based on a false premise, was void *ab initio*. However, it seems to me that, in order to reach that conclusion, it is necessary to ignore the fact that the Minister has a



discretion as to whether or not to revoke and is only required to do so when it is considered appropriate to do so. The giving of such a discretion to the Minister would have enabled the Minister in an appropriate case to consider the effect of a decision to revoke on those who would appear to have obtained derivative rights prior to revocation. Taking that language into consideration, together with the language used in s.5 of the 2004 Act, it seems to me that, while a declaration is in force, and until such time as it is revoked, it must be regarded as being valid. I simply cannot accept the view that the effect of revocation in such circumstances is to render the declaration void *ab initio*. In those circumstances, I would allow the appeal.