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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY CAOIMHE NI CHUINNEAGAIN FOR JUDICIAL REVIEW

Before: McCloskey LJ, Horner LJ and Colton J

Representation

Appellant: **Mr Ronan Lavery KC and Mr Mark Bassett of counsel, instructed by Brentnall Legal**

Respondent: **Mr David Blundell KC and Mr Yaaser Vanderman, of counsel, instructed by the Crown Solicitor**

McCloskey LJ (*delivering the judgment of the court*)

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Introduction

[1] The effect of the British Nationality Act 1981 is that every person born in the territory of the United Kingdom following the commencement of that statute (1 January 1983) becomes a British citizen provided that upon birth their father or mother is a British citizen or is settled in the United Kingdom or in a qualifying territory. Caoimhe Ni Chuinneagain ("the appellant"), now aged 19, is a British citizen by virtue of this statute, having been born in the United Kingdom, specifically Northern Ireland. She objects to this on cultural and related grounds. While she is also an Irish citizen and while she has available to her a legal mechanism for renouncing her British citizenship (infra) her quest is to secure a legal status which would recognise her as an Irish citizen only. She seeks to achieve this status via these proceedings. The public authority against whom she has chosen to proceed is the Secretary of State for the Home Department (the "Home Secretary"), being the Minister of the Crown with responsibility for citizenship and immigration matters. Her application for leave to apply for judicial review was dismissed at first instance. By her appeal to this court the appellant challenges this decision.

Procedural Considerations

[2] This being a challenge to a first instance decision refusing leave to apply for judicial review there are certain material considerations of a procedural nature. We address these in para [32]ff infra.

Factual Matrix

[3] The factual matrix is both uncomplicated and uncontentious. The court gratefully adopts paras [4]–[7] of the judgment of Scoffield J. We reproduce paras [5]-[7]:

> "The applicant was born in Belfast and lives here. She is an Irish citizen and has an Irish passport, on which she has previously travelled abroad on a number of occasions. Her parents are also Irish citizens and she has a number of relatives who live in the Republic of Ireland, as well as in the border area. She lives in Belfast and attends an Irish-medium school. She has described in her affidavit evidence that she has a keen interest in Gaelic and Irish culture, and believes that she is "fully immersed in all aspects of Irish national culture." Irish is her first language and she is a player of traditional Irish music.
>
> The applicant also avers that she has never presented herself as a British citizen in any context or for any reason and says that she would not do so. She objects to the notion of 'British citizen or subject' being applied to her.

> Although the applicant accepts that it is open to her (particularly now that she has attained the age of 18) to renounce her British citizenship, she has averred that she does not wish to do so as she considers that doing so would represent an acceptance that she was born a British citizen, in addition to having to pay the administrative cost involved."

In addition to the foregoing, the appellant deposes that she has possessed an Irish passport, for some unspecified period, which she has invariably utilised for the purpose of external travel. She avers that she has "zero affinity with British identity."

[4] It is convenient to interpose here that the appellant's Irish citizenship, in common with her British citizenship, also derives from law, being a combination of constitutional provisions and primary legislation – belonging to the jurisdiction of the Republic of Ireland – and, further, is a product of where she was born, namely on the island of Ireland.

Statutory Framework

[5] The relevant provisions of the British Nationality Act 1981 (the "1981 Act") are these:

Sections 1 and 2:

> "**1.— Acquisition by birth or adoption.**
>
> (1) A person born in the United Kingdom after commencement, or in a qualifying territory on or after the appointed day, shall be a British citizen if at the time of the birth his father or mother is—
>
> (a) a British citizen; or
>
> (b) settled in the United Kingdom or that territory.
>
> …
>
> **2.— Acquisition by descent.**
>
> (1) A person born outside the United Kingdom and the qualifying territories after commencement shall be a British citizen if at the time of the birth his father or mother—
>
> (a) is a British citizen otherwise than by descent;
>
> …"

Section 3 of the 1981 Act sets out the circumstances in which a minor may apply for and be registered as a British citizen. Section 6 of the 1981 Act provides for persons of full age and capacity to apply for naturalisation as a British citizen if certain requirements are met. Section 11 of the 1981 Act applies to those born *before* 1 January 1983. It prescribes the circumstances in which citizens of the UK and Colonies would become British citizens once the 1981 Act came into force.

Section 12(1) – (4):

> "**12.— Renunciation**
>
> (1) If any British citizen of full age[1] and capacity makes in the prescribed manner a declaration of renunciation of British citizenship, then, subject to subsections (3) and (4), the Secretary of State shall cause the declaration to be registered.
>
> (2) On the registration of a declaration made in pursuance of this section the person who made it shall cease to be a British citizen.
>
> (3) A declaration made by a person in pursuance of this section shall not be registered unless the Secretary of State is satisfied that the person who made it will after the registration have or acquire some citizenship or nationality other than British citizenship; and if that person does not have any such citizenship or nationality on the date of registration and does not acquire some such citizenship or nationality within six months from that date, he shall be, and be deemed to have remained, a British citizen notwithstanding the registration.
>
> …
>
> (5) For the purposes of this section any person who has been married, or has formed a civil partnership, shall be deemed to be of full age.

[6] The 1981 Act repealed the British Nationality Act 1948, which defined British nationality by creating the status of "Citizen of the United Kingdom and Colonies" as the sole national citizenship of the United Kingdom and all of its colonies. The Act, which came into effect on 1 January 1949, was passed in the wake of the 1947 Commonwealth conference on nationality and citizenship, which had agreed that each of the Commonwealth member states would legislate for its own citizenship,

[1] i.e. they are 18 years old or, pursuant to s.12(5), have been married or formed a civil partnership.

distinct from the shared status of "Commonwealth citizen" (formerly "British subject"). This new definition of British citizenship placed Britain's colonial subjects on an equal footing with those living in the British Isles. Its ideological purpose was driven inter alia by the spectre of decolonisation. Similar legislation was also enacted in most of the other Commonwealth countries.

[7] We shall consider briefly infra the international law dimension of citizenship, or nationality. It is linked to inter alia, the doctrine of state responsibility, the rights enjoyed by every sovereign state and certain international treaties concerning the subject of statelessness. It forms part of the context within which the domestic statute falls to be considered.

The Appellant's Case

[8] The appellant's case at first instance was outlined by the judge at para [12] of his judgment, in the following terms:

> "(a) The impugned provisions are contrary to her right of effective enjoyment of citizenship of the EU, which she enjoys by virtue of her status as an Irish citizen ('**ground 1**'). The applicant contends that this is contrary to articles 12 and 13 of the agreement concluded between the United Kingdom (UK) and the European Union (EU) in relation to the UK's withdrawal from the EU in accordance with Article 50 of the Treaty of the European Union ('the Withdrawal Agreement').
>
> (b) The impugned provisions are contrary to the UK's obligations under Article 1(3) of the Ireland/Northern Ireland Protocol to the Withdrawal Agreement ('the NI Protocol'), in particular the UK's undertaking to protect the Belfast Agreement (also known as the Good Friday Agreement) in all its dimensions ('**ground 2**'). A key feature of this aspect of the applicant's argument is that the Belfast Agreement has now been rendered justiciable, in a way which it was not previously, by a combination of the NI Protocol and the European Union (Withdrawal) Act 2018, as amended, which implements the Withdrawal Agreement in domestic law through section 7A.
>
> (c) The impugned provisions are contrary to the UK's obligations under Article 2(1) of the NI Protocol,

that is to say that there should be no diminution of rights, safeguards or equality of opportunity resulting from the UK's withdrawal from the EU ('**ground 3**').

(d) The impugned provisions are contrary to her right to respect for her private life under Article 8 ECHR ('**ground 4**').

(e) The impugned provisions represent unlawful discrimination in violation of Article 14 ECHR (taken together with Article 8), in that they treat Irish citizens born in the jurisdiction of Northern Ireland in a less favourable manner than British citizens born there or Irish citizens born elsewhere but now resident in Northern Ireland (by requiring them to renounce a citizenship of which they do not wish to avail) ('**ground 5**')."

[9] The contours of the appellant's case on appeal to this court have altered somewhat. They are not readily discernible from the somewhat diffuse terms of the Order 53 Statement (as amended) or the Notice of Appeal, which is devoid of particularity. They have, however, emerged through a combination of counsel's skeleton argument and responses made to certain case management orders of this court. In this way it is clear that the sole relief pursued by the appellant is a declaration that section 1(1) and section 12 of the 1981 Act are incompatible with her rights under article 8 European Convention on Human Rights (ECHR) in contravention of the Human Rights Act 1998. There is no longer an article 14 ECHR challenge. Nor is there any challenge based on EU citizenship laws.

[10] The appellant's case has a second element. This is that section 1(1) of the 1981 Act is incompatible with the Belfast Agreement. The question of whether – and, if so, to what extent – there is any interplay between this element and the article 8 challenge grounds is one which the court will address infra. At this juncture it suffices to record the two main contentions advanced on behalf of the appellant in this discrete respect. First, she seeks to derive from both the Belfast Agreement and the British-Irish Agreement a right to identify herself and be accepted as an Irish citizen exclusively. Second, this provides fortification for her article 8 ECHR challenge.

[11] Under the scheme of the Human Rights Act 1998 ("HRA 1998") article 8 ECHR is one of the protected Convention rights and is, hence, actionable in domestic United Kingdom law. It provides:

"**Right to respect for private and family life**

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The appellant's case invokes only the private life dimension of article 8. The primary relief pursued by the appellant is a declaration of incompatibility under section 4 of the HRA 1998. The precise formulation is: a declaration that section 1(1) and section 12 of the British Nationality Act 1981 are incompatible with the appellant's right to respect for private life under article 8 ECHR.

[12] Via the sources noted in para [9] above, the formulation of the appellant's case has been presented in the following terms. It is convenient to rehearse these in subparagraphs:

(i) Article 8 ECHR confers upon her a right to respect for her status as an Irish citizen only.

(ii) By the automatic conferral of British citizenship on the appellant at birth, section 1(1) of the 1981 Act has interfered with her right to respect for private life in a disproportionate way, contrary to article 8.

(iii) Section 12 of the 1981 Act interferes with the appellant's right to respect for private life, contrary to article 8, by requiring her [a] to recognise and accept the status of British nationality to which she objects and [b] to pay a fee of £371 to renounce her British citizenship.

[13] The headline submission in the appellant's article 8 ECHR case is that the Strasbourg jurisprudence protects citizenship as an aspect of a person's "personhood" within the compass of article 8. This submission entails the contention that, in article 8 terms, citizenship is as important an element of personhood as ethnicity, sexual orientation, religious belief, marital status or parental status, which have been recognised by the European Court of Human Rights (ECtHR) as qualifying for the protection of article 8.

[14] The next step in counsels' argument draws attention to the practice of the ECtHR of interpreting the Convention in accordance with public international law as adopted by the respondent contracting state, international human rights law and comparative law. This is the springboard for the submission that the best interests of

the child principle derives in part from Article 3 of the United Nations Convention on the Rights of the Child ("UNCRC"). The appellant also invokes Article 8 UNCRC:

> "(1) States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawfully interference.
>
> (2) Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."

[15] At this point the focus of the appellant's argument switches to section 1(i) of the Belfast Agreement and Article 1(vi) of the British-Irish Agreement ("the 1998 international agreements"). Each of these contains an identically phrased provision whereby the parties to the agreements and the British and Irish Governments:

> "…. recognise the birth right of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland."

This provision provides the basis for the following submission: it is concerned with citizenship, rather than identity; it makes no mention of Northern Irish identity; it establishes three citizenship possibilities; and it expresses these in terms of equal stature.

[16] The recitals in the British-Irish Agreement are in these terms:

> "The British and Irish Governments:
>
> Welcoming the strong commitment to the Agreement reached on 10 April 1998 by themselves and other participants in the multi-party talks and set out in Annex 1 to this Agreement (hereinafter 'the Multi-Party Agreement');
>
> Considering that the Multi-Party Agreement offers an opportunity for a new beginning in relationships within

Northern Ireland, within the island of Ireland and between the peoples of these islands;

Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union;

Reaffirming their total commitment to the principles of democracy and non-violence which have been fundamental to the multi-party talks;

Reaffirming their commitment to the principles of partnership, equality and mutual respect and to the protection of civil, political, social, economic and cultural rights in their respective jurisdictions."

Article 2 of the British-Irish Agreement on which the Appellant also relies provides:

> "The two Governments affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement. In particular there shall be established in accordance with the provisions of the Multi-Party Agreement immediately on the entry into force of this Agreement, the following institutions:
>
> (i) a North/South Ministerial Council;
>
> (ii) the implementation bodies referred to in paragraph 9(ii) of the section entitled 'Strand Two' of the Multi-Party Agreement;
>
> (iii) a British-Irish Council;
>
> (iv) a British-Irish Intergovernmental Conference."

[17] Being international agreements the appellant argues that both must be construed in accordance with certain principles and provisions of public international law: pacta sunt servanda, ut res magis valeat quam pereat; Articles 26–27 and 31 of the Vienna Convention on the Law of Treaties; the advisory opinion of the International Court of Justice in Admission of a State to the United Nations

(1950, page 4); recognised international law texts; and the decision of the United Kingdom Supreme Court in *Al-Waheed v Ministry of Defence* [2017] 2 WLR 327, paras 322–326. Finally, on this issue, the appellant invokes Article 1 of the Hague Convention on the Conflict of Nationality Laws (1930):

> "It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality."

[18] It is at this point of the argument that the nexus between the principles and provisions of public international law invoked by the appellant and her reliance on article 8 ECHR emerges. The argument elaborated has three distinct, though inter-related, elements. First, the relevant provisions of the two 1998 international agreements confer on the appellant a right in international law to be considered Irish only; second, that the two international agreements required the United Kingdom to legislate in domestic law in a manner which recognises this right "or at least not undermine the conferral of Irish citizenship" (per counsels' skeleton argument); and, third, that the United Kingdom has failed to discharge this duty. This leads to the contention that the United Kingdom is in breach of international law.

[19] From this starting point, the appellant contends that the reach of article 8 ECHR in her particular case must be determined by reference to, or in the context of, the obligations in international law undertaken by the United Kingdom in the two 1998 agreements. By this route it is the appellant's case that article 8 ECHR confers on her, in the language of the supplementary submission provided in response to the court's direction, "a right to respect for her status as an Irish citizen only …."

[20] The appellant advances a free-standing ground of appeal relating to the judicial review leave test. We address this in para [34]ff.

The Respondent's Riposte

[21] Turning to the submissions of Mr Blundell KC and Mr Vanderman on behalf of the Secretary of State issue is joined between the parties in the following way:

(1) The appellant's case at first instance did not include the contention that her article 8 ECHR case is bolstered by the 1998 international agreements: this is a novel case;

(2) In any event, the appellant's construction of the two international agreements is erroneous; and

(3) Alternatively, if this is wrong, it makes no difference to the article 8 ECHR analysis.

[22] As to the first element of their riposte, counsel invite the court, in substance, to contrast the appellant's skeleton argument on appeal with its first instance counterpart, together with the Order 53 Statement as amended. In this respect, we have highlighted in para [9] above the refinement and reconfiguration of the appellant's case before this court.

[23] Developing the second element of their riposte, Mr Blundell and Mr Vanderman draw attention to the formulation of principle of Lord Sumption in *AL-Malki v Reyes* [2019] AC 735 at para [11]:

> "11. The primary rule of interpretation is laid down in article 31(1) of the Vienna Convention on the Law of Treaties (1969):
>
> > 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'
>
> The principle of construction according to the ordinary meaning of terms is mandatory ("shall"), but that is not to say that a treaty is to be interpreted in a spirit of pedantic literalism. The language must, as the rule itself insists, be read in its context and in the light of its object and purpose. However, the function of context and purpose in the process of interpretation is to enable the instrument to be read as the parties would have read it. It is not an alternative to the text as a source for determining the parties' intentions."

Mr Blundell and Mr Vanderman submit that there is no error in the judge's approach, which is found at paras [21]–[22] of his judgment:

> [21] There are significant issues with both aspects of this argument. First, the Agreement 'recognises' the birthright of the people of Northern Ireland to "identify themselves and be accepted" as British, as Irish, or both. I accept that, as a matter of international law, this recognises a right to identify oneself and be accepted as Irish only; and, relatedly, that it entails a right to be accepted by each Government which was a party to the agreement (including the UK Government) as British or Irish only. How precisely this right is to be given effect, however, is another matter. It plainly requires a choice (which is apparent from the words "as they may so

> choose") but does not specify how or when that choice should be made.
>
> [22] In addition, it seems to me unlikely that this commitment, even as a matter of international law, entailed any obligation on the Government of the United Kingdom to amend domestic provisions in relation to citizenship. That is because this particular portion of the Belfast Agreement does not purport to require new legislation (as several other parts of the Agreement expressly do), nor to confer any new rights. Rather, it is a 'recognition' of a pre-existing 'birthright.' In short, it is an express political acceptance that people in Northern Ireland are entitled to view themselves as British only, as Irish only, or as both, and that each choice is entirely legitimate. Insofar as this portion of the Belfast or British-Irish Agreements refers to citizenship provisions, however, it merely 'confirms' that there is a right to hold both British and Irish citizenship (which would remain unaffected in the event of future change in the status of Northern Ireland). Had the provision been intended to require any change to the UK's domestic legislation on citizenship one would have expected that to have been spelt out and to have been the subject of a clear obligation. This analysis is also entirely consistent with that of the Upper Tribunal (Immigration and Asylum Chamber) in De Souza (Good Friday Agreement: nationality) [2019] UKUT 355 (IAC) ('the De Souza case') at paragraph [39]."

[24] Next it is submitted that the judge's approach harmonises with that of the Upper Tribunal (Immigration and Asylum Chamber) in *De Souza v Secretary of State for the Home Department* [2019] UKUT 355, where it was held that the Belfast Agreement did not amend the 1981 Act. There the Upper Tribunal stated at paras [36]–[40]:

> "Even assuming that this amendment would apply only to those born in Northern Ireland, it would represent a radical departure from the existing law of British nationality. To make citizenship by birth in the United Kingdom (or any part of it) dependent on consent raises a host of difficult issues.
>
> Amongst these is the point in time at which consent would be required. It cannot rationally be contended that an infant, for example, would be expected to give consent. But, even if it were assumed that consent becomes a

prerequisite only once a person had achieved the age of majority, there remain questions as to whether, and, if so, how, such a person would be expected to signify consent. A person's nationality cannot depend in law on an undisclosed state of mind, which could change from time to time, depending on how he or she felt.

These examples of the problems inherent in a system of nationality based on consent make it plain that the omission from the 1998 Act of anything touching upon the issues of self-identification and nationality was entirely deliberate on the part of the United Kingdom Parliament. The omission cannot be explained on the basis that there was no need to amend the BNA because it could be construed compatibly with Article 1(iv)/(vi), without Parliament having to spell out the necessary amendments.

The omission also underscores the correctness of the Secretary of State's submission that, properly construed, Article 1(iv)/(vi) does not, in fact, involve giving the concept of self-identification the meaning for which the claimant argues. If the parties to the multi-party agreement and the governments of Ireland and the United Kingdom had intended the concept of self-identification necessarily to include a person's ability to reject his or her Irish or British citizenship, it is inconceivable that the provisions would not have dealt with this expressly. By the same token, it is equally inconceivable that the far-reaching consequences for British nationality law would not have been addressed by the 1998 Act.

Before leaving this particular issue, we agree with the written submissions of Mr McGleenan KC and Mr Henry that, if Article 1(iv)/(vi) needs to be construed as preventing the United Kingdom from conferring British citizenship on a person born in Northern Ireland, at the point of birth, the inescapable logic is that Ireland cannot confer Irish citizenship on such a person at that point either. The result is that a person born in Northern Ireland is born stateless. That would be a breach of both countries' international obligations to prevent statelessness. It is not conceivable that the two governments intended such a result."

[25] The third, and final, element of the submission on behalf of the Secretary of State is that even if section 1(1) of the 1981 Act interferes with the appellant's rights under article 8 ECHR there are compelling reasons why such interference is proportionate and this is in no way undermined by the international agreements.

[26] Developing this baseline submission, counsel invite this court to uphold the judge's conclusion that section 1(1) of the 1981 Act is unarguably proportionate. They commend to this court all aspects of the judge's reasoning, to which we shall now turn.

[27] The judge highlighted, firstly, the absence of evidence of any concrete detriment to the appellant in consequence of the impugned statutory provision. He said this at para [32]:

> "No evidence has been presented … of any material prejudice or practical instance of detriment which has arisen for this applicant by virtue of her current British citizenship …. these seem to be minimal, with the real life impacts of the applicant having British citizenship being negligible. She is effectively free to ignore it."

Next, the judge noted the appellant's acceptance that many will consider the automatic conferral of British citizenship a benefit rather than a detriment. Third, the judge drew attention to the appellant's ability to renounce her British citizenship (under section 12 of the 1981 Act) having attained her majority. Fourth, he reasoned that section 1(1) performs the important function of avoiding statelessness.

[28] The judge then adopted two specific aspects of the reasoning of the Upper Tribunal in *De Souza*, namely (a) the practical unworkability of a newly born or very young child signifying their consent to any particular citizenship and (b) if it is unlawful for the United Kingdom to confer citizenship in the absence of an election by the individual, it must be correspondingly unlawful for the Irish Government to do so in a similar way. He specifically espoused paras [52] – [54] and [57] of that decision. To the foregoing he added (in substance) that there is nothing remotely disproportionate about a section 12 applicant pursuing renunciation of British citizenship having to tick a box on a pro-forma stating that the citizenship being renounced is a British one. To like effect the judge considered the statutory fee of £372 to be compatible with the aim of having a robust and administratively efficient self-funding scheme and not lacking in proportionality, whether considered in isolation or in tandem with the other factors advanced by the appellant.

[29] There is one further dimension of the equation which must be highlighted. Under the scheme of the Northern Ireland Act 1998 nationality and citizenship constitute an excepted matter: see section 4 and paragraph 8 of Schedule 2. Accordingly, the responsibility for legislating in this discrete field lies on the United

Kingdom Government. The judge observed, at para [34], that this entailed a margin of discretion.

[30] Finally, Mr Blundell submits, there is compelling force in the view adopted by the Secretary of State that given the importance and far-reaching nature of a renunciation of British citizenship it would not be in the best interests of children to make available this facility. Thus, the age of majority requirement enshrined in section 12 of the 1981 Act is manifestly proportionate on this basis alone.

The Issues

[31] What are the core issues to be determined? Before the hearing, the court invited the parties' responses to the following formulation:

(i) Whether the test applied by the judge in refusing leave to apply for judicial review was erroneous.

(ii) Whether section 1(1) of the 1981 Act is incompatible with the appellant's rights under article 8 ECHR.

(iii) Whether section 12 of the 1981 Act is incompatible with the appellant's rights under article 8 ECHR.

The respondent accepted this formulation. The appellant ultimately demurred from the formulation of issue (i): see para [44] infra. There was no quibble with the terms of issues (ii) and (iii). The appellant suggested that the following issue also arises:

> "As a matter of international law, is the UK in breach of its obligations under Article 1(vi) of the British-Irish Agreement by maintaining sections 1 and 12 of the 1981 Act?"

Procedural Issues

[32] We shall consider firstly the procedural options available to this court. They are the following:

(a) If we conclude that the judge correctly decided that leave to apply for judicial review should be refused, the appeal will be dismissed and his decision affirmed.

(b) Alternatively, it would be open to this court to conclude that leave to apply for judicial review should be granted without more. This would entail allowing the appeal to this extent, reversing the decision of the judge and remitting the case to proceed to a substantive hearing at first instance.

(c) The third alternative would be to grant leave to apply for judicial review under Order 53, Rule 3, then determining the application substantively under rule 5(8) by dismissing it.

(d) The fourth, and final, alternative would be to grant leave to apply for judicial review under Order 53, rule 3 of the Rules of the Court of Judicature (NI) 1980 ("the 1980 Rules") and then determine the application substantively under rule 5(8) in the appellant's favour. In this event it would be necessary for the court to further decide, in the exercise of its discretion, whether any remedy should be awarded and, if so, what.

This is illustrated by the decisions of this court in *Re Bignell* [1997] NI 36 and *Re Farrell* [2009] NICA 35 para [32]. The key to the third and fourth options being available is that the procedural course adopted by the appellant in the wake of the decision at first instance has been not to renew her application for leave to apply for judicial review to this court under Order 59, rule 14(3) of the 1980 Rules, rather to appeal. The practice of this court in recent years highlights the desirability of appealing, rather than renewing. In particular, the mechanism of simply appealing will frequently have the virtues of saving costs and reducing delay.

[33] We would add that in the present case this court is as fully equipped as the first instance court to decide all of the issues. This follows from the following combination of factors: these are judicial review proceedings; the first instance decision has entailed no element of considering oral evidence or adjudicating on disputed factual issues; the evidence both at first instance and before this court is identical; and the material facts are few and undisputed.

The Judicial Review Leave Test

[34] The test for granting leave to apply for judicial review, which is common both to this jurisdiction and that of England and Wales, is a judicially devised one. With the passage of time it has been expressed in various ways. Has an arguable case been established? Does the applicant's case have a realistic prospect of success? (Combining the first and second) has an arguable case with a realistic prospect of success been established? Is the case one that is fit for further consideration at a substantive hearing? Is there a real or sensible prospect of success for the applicant? We consider that for the most part these linguistic variations do not involve any differences of substance, subject to the analysis which follows. They are reflections of the richness of the English language and the linguistic preferences of individual judges.

[35] In *Re Omagh District Council's Application* [2004] NICA 10 this court stated at para [5]:

> "… the court will refuse permission to claim judicial review unless satisfied that there is an arguable ground

> for judicial review on which there is a realistic prospect of success (see Fordham's Judicial Review Handbook, 3rd Edition, at paragraph 21.26)."

See also para [43]. In *Re Donaldson's Application* [2009] 25 this court formulated the test in the following way, at para [32]:

> "The test to be applied in an application for leave to bring judicial review proceedings is whether there is an arguable case having a realistic prospect of success and one which is not subject to a discretionary bar such as delay or an alternative remedy …"

[36] These formulations of the test chime with the decision of the Privy Council in *Sharma v Antoine* [2007] 1 WLR 780, where it was described as the "ordinary rule." To the same effect is *Maharaj v Petroleum Company of Trinidad and Tobago* [2019] UKPC 21 at para [3]. We consider that there is no inconsistency between this formulation of the test and the statement of the Privy Council in *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 (PC) that leave to apply for judicial review should be refused where the case appears to be "manifestly untenable." Any case which is untenable, whether manifestly or less obviously so, cannot be considered either arguable or arguable having a reasonable prospect of success.

[37] In refusing leave to apply for judicial review the judge stated at para [30]:

> "I am prepared to accept that it is arguable that the conferral of citizenship against their wishes upon a person who enjoys citizenship of another State may be an interference with their rights under Article 8 ECHR. I do so because it is arguable that citizenship can have an important impact upon a person's social identity … [and this] … is more likely to give rise to an interference since (as a matter of law) a status is assigned to them against their wishes …
>
> However, I cannot accept that there is any realistic prospect of the applicant succeeding on this ground when it is properly analysed."

Founding on these passages it is submitted on behalf of the appellant that the judge applied an erroneous test. This is formulated as a freestanding ground of appeal.

[38] We consider the riposte to this contention to be twofold. First, as demonstrated in paras [35]–[36] above, the judge committed no error. On the contrary, his approach was entirely orthodox. Second, a reading of the judgment as a whole, and in particular para [30] in conjunction with what follows in paras [31]–

[33], discloses clearly, in our view, that the judge's reasoning was that while the threshold of establishing an arguable case of an interference under article 8(1) ECHR had been overcome, examination of article 8(2) ECHR impelled to the conclusion that the appellant had no realistic prospect of succeeding at an inter-partes hearing. In short, the judge considered article 8 ECHR in its totality. Had he considered only article 8(1) ECHR and not article 8(2) ECHR this would have been erroneous. He did not, however, fall into this error. For these reasons we conclude that this ground of appeal has no merit.

[39] There is one particular aspect of the first instance judgment to be highlighted. It is specifically contended on behalf of the appellant that the judge's error took the form of applying "an elevated threshold" rather than "the ordinary test for leave." This is clearly linked to what the judge said at para [15] of his judgment:

> "For my part, I consider that this somewhat enhanced test – rather than a threshold of simple arguability – is likely to be appropriate in many cases in this jurisdiction …. [and] … am satisfied that the present case is an appropriate case in which the enhanced threshold ought to apply …"

The judge's assessment was that the decisions in *Re Omagh DC* and *Sharma* – see para [36]–[37] above – espoused what he described as "this somewhat enhanced test."

[40] This court considers the correct analysis to be the following. By virtue of practice arrangements and developments there has been some detectible evolution, in both this jurisdiction and that of England and Wales, in the test to be applied in determining whether leave (permission) to apply for judicial review should be granted. In *IRC v National Federation of Self Employed and Small Businesses Limited* [1982] AC 617 Lord Diplock stated at 643h – 644b:

> "The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought in the exercise of a judicial discretion to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

This formulation of the test belongs to the era in which it was pronounced. It is a reflection of the ex parte practice then prevailing and the absence of any input from the proposed respondent in terms of evidence or argument, either substantial or at all. It was also a reflection of the then more dominant principle of expedition, namely that the judicial review process was designed to provide swift resolution. Other authoritative formulations of the applicable test comparable to that of Lord Diplock can be readily found.

[41] The simple exercise of juxtaposing what Lord Diplock stated in *IRC* and the pronouncements of this court in *Re Omagh DC* and *Re Donaldson* and of the Privy Council in *Sharma* and *Maharaj* confirms the evolution in practice which had unfolded during the intervening decades (this is reflected in the summary in Auburn, Moffett and Sharland, *Judicial Review: Principles and Procedure* (2013), para 26.08). In consequence of procedural changes judicial review became progressively an inter-partes process and in England and Wales detailed procedural prescription was made for the involvement of the proposed respondent at the leave stage. While the jurisdiction of Northern Ireland gradually followed a similar path it did so in a less prescriptive way without the adoption of a detailed procedural rules code and, most recently, via the practice direction mechanism. With the advent of these procedural developments a leave threshold of bare arguability was no longer appropriate in either jurisdiction.

[42] While practitioners occasionally cite before the High Court formulations of the leave test suggestive of a bare arguability threshold they normally invoke certain first instance decisions in doing so. This practice is to be avoided. Since at the latest 2004, when *Re Omagh DC* was decided, the threshold has been that of an arguable case having a realistic prospect of success. This court takes the opportunity to make this clear beyond peradventure.

[43] Of course, the quality of elasticity in this test is unmistakable. Thus, its application will be intensely case sensitive and the notional "bar" will be determined by the judge seized of the individual case. This characteristic of elasticity, or flexibility, also means that two or more judges might not necessarily make the same conclusion. In the application of the test there is scope for differing respectable and reasonable judicial assessments. This is a familiar feature of the judicial function in multiple litigious contexts. This flexibility also caters for differing procedural contexts, ranging from the most urgent cases to those belonging to the opposite end of the processing spectrum.

[44] The initial written incarnation of this ground of appeal and the terms in which it was ultimately formulated differed. We have dealt fully with the written version above. At the hearing the main focus of the appellant's case switched to the application of the leave test formulated by the judge. This is inextricably bound up with the appellant's challenge to the judge's resolution of the central issue, namely the article 8 ECHR challenge, against her.

The Article 8 ECHR Challenge

[45] As already highlighted, the right which the appellant asserts under the banner of article 8 ECHR is a right to respect for her status as an Irish citizen only. Both parties agreed with the court's formulation of the correct analytical approach, which is a staged one:

(i) Is the right which the appellant asserts protected by article 8(1) ECHR? If "no", the article 8 ECHR analysis ends.

(ii) If "yes", the next question is whether section 1 and/or section 12 of the 1981 Act interfere/interferes with the appellant's enjoyment of this right. If the answer to this question is "no", the article 8 ECHR analysis ends.

(iii) If the answer to the first and second questions is "yes" a further question arises, namely whether the interference, in the language of article 8(2) ECHR, is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society.

[46] It is common case that there is no judicial decision, domestic or European, establishing that article 8 ECHR protects inter alia an individual's personal identity to the extent of recognising a right to choose one particular citizenship or reject another and to require any State to formally confer the status thus asserted. Nor is there any decision recognising the specific right asserted by the appellant. If this protection belongs to the realm of article 8 ECHR, it will then be necessary to determine whether an interference with the right has been established. It is only if both protection and interference have been established that it will be appropriate to turn to article 8(2) ECHR. If this stage of the analysis is reached, on behalf of the appellant it is accepted that the requirement of "in accordance with the law" is satisfied by section 1(1) of the 1981 Act. It is further accepted that there is an identifiable legitimate aim, namely the protection of the rights of others. Thus, analysed, the appellant's article 8 ECHR case resolves to the threefold contention that (i) article 8(1) ECHR protects the right which she asserts, (ii) there is/has been an interference with this right and (iii) such interference is not necessary in a democratic society viz is disproportionate.

[47] There being no decision of the ECtHR or any domestic court providing direct support for the appellant's case, can indirect support be derived from any decided case, whether emanating from either of these judicial sources or otherwise, or any discernible settled principles? Arguing by analogy by reference to decisions of the ECtHR deciding other article 8 ECHR issues, the written submissions of Mr Lavery and Mr Bassett, which we reproduce, draw attention to a series of "private life" decisions in the jurisprudence of the ECtHR and develop their argument in the following way:

"(i) The concept of "private life" in Convention jurisprudence is a broad term not susceptible to exhaustive definition - *Pretty v UK* (2002) 35 EHRR 1, para 61.

(ii) Article 8 secures to individuals a sphere within which they can freely pursue the development and fulfilment of their personality - *A.-M.V. v. Finland* (2017) ECHR 273, para 76

(iii) Article 8 ECHR concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community. It protects a right to personal development and autonomy. This right can include a positive obligation on the state to afford official recognition of:

- a person's gender identity as occurred in *Hamalainen v Finland* (2014) 1 FCR 379, para 67-68; *Christine Goodwin v UK* (2002) 35 EHRR 77-79;

- ethnic identity as occurred in C*iubotaru v Moldova* (2010) 4 WLUK 411; *Tasev v North Macedonia* (2019) ECHR 346, para 32-33

- marital status as occurred in *Dadouch v Malta* (2014) 59 EHRR 34, para 47-50

- parental status as occurred in *Rasmussen v Denmark* App 8777/79 of 28 November 1984; *Kruskovic v Croatia* App 4618/08 of 21 June 2011, para 20; *Ahrens v Germany* (2012) 2 FLR 483, para 60

- Individuals must be able to establish details of their identity should as the legal parent-child relationship in *Mennesson v France* (2014) ECHR 664, para 96

- Right to discover one's origins in *Gaskin v UK* (1990) 12 EHRR 36

(iv) This reasoning extends to citizenship. The right to citizenship comes within scope of article 8 ECHR as it amounts to an element of a person's identity. The Strasbourg court has recognised the issue as coming within scope in, at least, the instances listed below. There is, therefore, a clear and consistent line of authority on this point:

- *Genovese v Malta* (2014) 58 EHRR 25, para 30
- *Karassev v Finland* (1999) ECHR 200
- *Slivenko v Latvia* (2003) ECHR 498
- *Ramadan v Malta* (2017) 65 EHRR 32, para 85
- *K2 v United Kingdom* (2019) 64 EHRR SE 18, para 49
- *Usmanov v Russia* (2020) ECHR 923, para 53
- *Ghoumid & others v France* App 52273/16, para 43-44
- *Ahmadov v Azerbaijan* (2020) ECHR 96, para 42-44
- *Hoti v Croatia* (2018) ECHR 373, para 119–124"

[48] The specific right recognised in the Strasbourg jurisprudence upon which the appellant relies is found in statements such as that in *AMV v Finland* (supra) where one finds the language of freely pursuing the development and fulfilment of one's personality. The argument developed, having highlighted the other kinds of identity and status which have been recognised by the Strasbourg court, is that article 8 ECHR protects a person's *right to citizenship*. We shall examine some of the leading ECtHR decisions in which citizenship issues have been considered infra. Before doing so we shall draw on one of the leading United Kingdom decisions belonging to the article 8 ECHR field.

[49] Article 8 ECHR has been variously described as elusive and amorphous. It is, as Stanley Burnton J memorably remarked, "the least defined and most **unruly**" of the Convention rights in *R (Wright) v Secretary of State for Health* [2006] EWHC 2886 (Admin); [2007] 1 All ER 825 (para [60]). In *R (on the application of Countryside Alliance and others and others v Her Majesty's Attorney General and another* [2007] UKHL 52 at paras [91] – [94], Lord Rodger provided a valuable resume of the jurisprudential evolution of Article 8 ECHR:

"Undoubtedly, the early decisions of the European Court on "private life" in article 8(1) tended to concern sexual and emotional relationships within an intimate circle - for which people want privacy. Article 8(1) guarantees a prima facie right to such privacy. If someone complains of a violation of that right, the essential touchstone may well be whether the person in question had a reasonable expectation of privacy: *Campbell v MGN Ltd* [2004] 2 AC 457, 466, para 21, per Lord Nicholls of Birkenhead.

But the European Human Rights Commission long ago rejected any Anglo-Saxon notion that the right to respect for private life was to be equated with the right to privacy. In *X v Iceland* (1976) 5 DR 86 the applicant complained that a law prohibiting the keeping of dogs in Reykjavik violated his article 8(1) rights. The European Court held that the right to respect for private life did not end at a right to privacy, but comprised also, to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one's own personality. Sadly, it did not extend to developing relationships with dogs and so the Commission rejected his application as inadmissible.

It soon became clear that article 8 was not concerned merely to protect relationships in a narrow domestic field. In *Niemietz v Germany* (1992) 16 EHRR 97, 111, para 29, the Court held:

> 'it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.'

So article 8(1) had been violated by a search of the office where the applicant pursued his profession as a lawyer, since "it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world."

> In *Pretty v United Kingdom* (2002) 35 EHRR 1, 35, para 61, the European Court pointed out that "private life" in article 8(1) is "a broad term." The court also said that the notion of "personal autonomy" is an important principle underlying the interpretation of the various guarantees, including the right to "personal development", in that aspect of article 8(1)."

Moving closer to the territory of the present appeal lord Roger added at para [95]:

> "In *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, 383, para 9, commenting on the reference in *Pretty* to the right to 'personal development' and to establish relationships, my noble and learned friend, Lord Bingham of Cornhill, spoke of "private life" in article 8 'extending to those features which are integral to a person's identity or ability to function socially as a person.'"

At para [98] Lord Roger employed the language of "features which are integral to a person's identity, of ways in which people give expression to their individuality …"

[50] What enlightenment is to be found in the Strasbourg jurisprudence? To the forefront of the appellant's case belong the following three cases. First, in *Ramadan v Malta* [2017] 65 EHRR 32 the applicant, an Egyptian national by birth who later acquired Maltese citizenship, was the subject of an order depriving him of his Maltese citizenship on the basis that he had obtained this by fraud. He complained that this interfered with his right to private and family life under article 8 ECHR. At para [84] the ECtHR said the following of the evolution in its approach to loss of citizenship cases:

> "The court observes that old cases concerning loss of citizenship, whether already acquired or born into, were consistently rejected by the Convention organs as incompatible *ratione materiae* with the provisions of the Convention, in the absence of such a right being guaranteed by the Convention (see, for example, *X v Austria*, no. 5212/71, Commission decision of 5 October 1972, Collection of Decisions 43, p.69). However, as noted above, in recent years the court has held that although the right to citizenship is not as such guaranteed by the Convention or its Protocols, it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the

> Convention because of the impact of such a denial on the private life of the individual (see references mentioned at paragraph 62 above)."

It continued, at para [85]:

> "85. Indeed, most of the cases concerning citizenship brought before the court since the above-mentioned development in the case-law have concerned applicants claiming the right to acquire citizenship and the denial of recognition of such citizenship (see, for example, *Karassev*, cited above), as opposed to a loss of citizenship already acquired or born into. Nevertheless, the court considers that the loss of citizenship already acquired or born into can have the same (and possibly a bigger) impact on a person's private and family life. It follows that there is no reason to distinguish between the two situations and the same test should therefore apply. Thus, an arbitrary revocation of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of its impact on the private life of the individual. Therefore, in the present case it is necessary to examine whether the decisions of the Maltese authorities disclose such arbitrariness and have such consequences as might raise issues under Article 8 of the Convention."

The appellant places particular reliance on this latter passage.

[51] In *Hoti v Croatia* [2018] ECHR 373 the applicant, who had been born in Kosovo and had been living and working in Croatia for some 13 years, from the age of 17, had his application for Croatian citizenship refused on the ground that he was unable to satisfy the statutory citizenship requirement of having a registered residence in Croatia for an uninterrupted period of five years. The applicant subsequently made an application for a permanent residence permit which was also refused on the ground that he did not satisfy the relevant statutory requirements. Although he was later granted temporary residence on humanitarian grounds for a period of some two years a decision was made refusing to extend this. This was followed by two separate extensions each of one year's duration. All of this unfolded in what the court described as "a complex and very specific factual and legal situation related to the regularisation of the status of aliens residing in Croatia following the breakup of the former [Yugoslavia]", at para [109]. The complaint formulated by the applicant was that he had been unlawfully erased from the register of residence in Croatia making it impossible for him to regularise his residence status, thereby rendering him stateless and interfering with his right to respect for private life under article 8 ECHR. The ECtHR determined that its adjudication would be based upon the following:

> "… its case law related to the complaints of aliens who, irrespective of many years of actual residence in a host country, were not able to regularise their residence status and/or their regularisation of the residence status was unjustifiably protracted … [in breach of the State's] … positive obligation under Article 8 of the Convention to ensure an effective enjoyment of an applicant's private and/or family life …."
> See para [118].

[52] At paras [119]–[123] the court reviewed its case law, formulating the following general principles:

> "[119] At the outset, the Court reiterates that Article 8 protects, inter alia, the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity. Thus, the totality of social ties between a migrant and the community in which he or she lives constitutes part of the concept of private life under Article 8 (see, *mutatis mutandis*, *Maslov v. Austria* [GC], no. 1638/03, § 63, ECHR 2008, and *Abuhmaid*, cited above, § 102).
>
> [123] … (see *Abuhmaid*, noted above, para 118)."

By this route the court formulated the principal question to be determined, at para [124]:

> "Accordingly, in view of the nature of the applicant's complaint and the fact that it is primarily for the domestic authorities to ensure compliance with the relevant Convention obligation, the court considers that the principal question to be examined in the present case is whether, having regard to the circumstances as a whole, the Croatian authorities, pursuant to Article 8, provided an effective and accessible procedure or a combination of procedures enabling the applicant to have the issues of his further stay and status in Croatia determined with due regard to his private-life interests (see, *mutatis mutandis*, *Kurić and Others*, cited above, §§ 357-59; *Jeunesse*, cited above, § 105, and *Abuhmaid*, cited above, § 119).."

The court concluded that the respondent state had not complied with its positive obligation to provide "an effective and accessible procedure or a combination of

procedures enabling the applicant to have the issues of his further stay and status in Croatia determined with due regard to his private life interests under Article 8 …" See para [141].

[53] In *Usmanov v Russia* [2021] 72 EHRR 33 the applicant, a national of Tajikistan, moved to Russia where he was subsequently granted Russian citizenship. Some nine years later he was the subject of a decision in substance depriving him of this citizenship and subjecting him to a 35 year ban on entry into Russia on national security and public order grounds. The ECtHR held that both measures violated his right to respect for private and family life under article 8 ECHR. The general principles formulated by the court in making this conclusion are rehearsed at paras [53]–[56]:

> "In the case of *Ramadan v Malta*, (no. 76136/12, § 84, 21 June 2016) the court held that although the right to citizenship is not as such guaranteed by the Convention or its Protocols, it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual. To establish whether "an issue" arose under Article 8 of the Convention the court assessed whether the revocation of the citizenship was "arbitrary" and the "consequences" of revocation for the applicant (see §§ 85, 90 and 91 ibid). In the case of *K2 v. the United Kingdom* ((dec.), no. 42387/13, §§ 52-64 7 February 2017), which followed, the court accepted that the revocation of citizenship amounted to an interference and applied the two-steps test to determine whether there has been a breach of Article 8 of the Convention. Subsequently, in the case of *Alpeyeva and Dzhalagoniya* (cited above, §§ 110-27) the court firstly applied the "consequences" criteria to determine if there had been an interference with the applicant's rights and then used the "arbitrariness" test to determine if there had been a breach of Article 8 of the Convention. That approach was confirmed in the case of *Ahmadov v Azerbaijan* (no.32538/10, §§ 46-55, 30 January 2020). In the case of *Ghoumid and Others v. France* (no. 52273/16 and 4 others, §§ 43-44, 25 June 2020) the court held that nationality is an element of a person's identity. To establish whether there had been a violation of Article 8 of the Convention the court examined as to whether the revocation of the applicant's nationality had been arbitrary. Then, it assessed the consequences of that measure for the applicant.

In determining arbitrariness, the court should examine whether the impugned measure was in accordance with the law; whether it was accompanied by the necessary procedural safeguards, including whether the person deprived of citizenship was allowed the opportunity to challenge the decision before courts affording the relevant guarantees; and whether the authorities acted diligently and swiftly (see *Ramadan,* cited above, §§86-89; *K2*, cited above, §50; *Alpeyeva and Dzhalagoniya*, cited above, §109; and *Ahmadov*, cited above, § 44).

The court also reiterates that the States are entitled to control the entry and residence of aliens on their territories (see among many other authorities, *Abdulaziz, Cabales and Balkandali v the United Kingdom*, §67, 28 May 1985, Series A no.94, and *Boujlifa v France*, 21 October 1997, §42, *Reports of Judgments and Decisions* 1997-VI). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel, for example, an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law, pursue the legitimate aim and be necessary in a democratic society (see *Slivenko v Latvia* [GC], no.48321/99, §113, ECHR 2003-X; *Üner v the Netherlands* [GC], no.46410/99, §54, ECHR 2006-XII; *De Souza Ribeiro v France* [GC], no.22689/07, § 77, ECHR 2012; *Mehemi v France*, 26 September 1997, §34, *Reports* 1997-VI; *Dalia v France*, 19 February 1998, §52, *Reports* 1998-I; and *Boultif v Switzerland*, no.54273/00, §46, ECHR 2001-IX).

Where immigration is concerned, Article 8 cannot be considered as imposing a general obligation on a State to respect the choice of married couples of the country of their matrimonial residence and to authorise family reunion on its territory (see *Gül v Switzerland*, 19 February 1996, §38, *Reports* 1996-I). However, the removal of a person from a country where close family members are living may amount to an infringement of the right to respect for family life, as guaranteed by Article 8 §1 of the Convention (see *Boultif*, cited above, §39). Where children are involved, their best interests must be taken into account and national decision-making bodies have a duty to assess evidence in respect of the practicality, feasibility

> and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."

[54] Summarising, a survey of these decisions of the ECtHR demonstrates that while the ECHR does not guarantee the right to citizenship, certain cases raising citizenship issues have been held to lie within the reach of what is protected by article 8 ECHR. These include the arbitrary denial of citizenship; the denial or revocation of citizenship with particularly harsh consequences for the person or family members concerned; and cases where there have been inordinate delays, sometimes accompanied by multiple bureaucratic obstacles, in determining a person's quest for citizenship or challenge to its revocation.

[55] The absorption of nationality issues within article 8 ECHR by the ECtHR has been notably restrained and highly fact specific. Assertions of a right to citizenship have occasionally been recognised as falling within the embrace of respect for private life (as in *Genovese v. Malta* [2014] 58 EHRR 25). Although the right to acquire a particular nationality is not guaranteed as such by the Convention (see, for example, *S.-H. v. Poland* [2021] ECHR 381), at para [65] as concerns children born through surrogacy), the court has found that an arbitrary refusal of citizenship may, in certain circumstances, raise an issue under article 8 ECHR by impacting on private life (*Karassev v. Finland* [1999] ECHR 200); *Slivenko and Others* v. *Latvia* [2003] ECHR 498.) The loss of citizenship that has already been acquired may entail similar – if not greater – interference with the person's right to respect for his or her private and family life, as illustrated in *Ramadan v. Malta* [2017] 65 EHRR 32, at para [85] (above). Consistent with its rejection of a right to citizenship being protected by article 8 ECHR, the ECtHR has held that article 8 ECHR cannot be construed as guaranteeing, as such, the right to a particular type of residence permit; the choice of permit is in principle a matter for the domestic authorities alone (*Kaftailova v Latvia* [2007] ECHR 1071 at para [51]).

[56] Arguably the clearest and most consistent theme arising out of this stream of jurisprudence is the ECtHR's recognition that nationality is an element of a person's identity. This was stated unambiguously in *Ghoumid v France* [Application No 52273/16] at paras [43]–[44]:

> "43. Nevertheless, even though the Convention and the Protocols thereto do not guarantee a right to a given nationality as such, any arbitrary deprivation of nationality might in certain circumstances raise an issue under Article 8 of the Convention because of its impact on the private life of the individual (see *Ramadan v Malta*, no.76136/12, §85, 21 June 2016, see also *K2 v the United Kingdom* (dec.), no.42387/13, §45, 7 February 2017). In this connection the court reiterates that nationality is an

> element of personal identity (see, among other authorities, *Mennesson v France*, no.65192/11, §97, ECHR 2014 (extracts).
>
> 44. The court will therefore examine the measures taken against the applicants in the light of their right to respect for their private life. Its supervision will concern two points (see *Ramadan*, §§86-93, cited above, and *K2*, §§50-63, decision cited above). Firstly, it will ascertain whether the measures were arbitrary; it will thus establish whether they were lawful, whether the applicants enjoyed procedural safeguards, and in particular whether they had access to appropriate judicial review, and whether the authorities acted diligently and promptly. Secondly, it will consider the impact of the deprivation of nationality on the applicants' private life."

We consider the latter passage to be of particular importance in the context of this appeal.

[57] Certain themes are readily identifiable in the Strasbourg decisions considered above. First, the scope of what is protected by article 8 ECHR in cases raising citizenship issues has developed on a case by case basis. Second, related to the first, fact sensitivity is one of the hallmarks of each case belonging to this discrete compartment of the Strasbourg jurisprudence and, indeed, to the Strasbourg jurisprudence generally. (See Lord Bingham's observation in *Procurator Fiscal v Brown* – paras [87] – [88] infra). Third, the article 8 ECHR jurisprudence has evolved incrementally, on a case by case basis. Fourth, the two criteria which have emerged with some dominance are those of adverse impact on the individual and whether the impugned measure is arbitrary.

Article 8 ECHR and the Belfast and British-Irish Agreements

[58] The appellant's quest to establish that the right which she asserts is protected by article 8 ECHR is based on the Strasbourg decisions considered immediately above. It has the following further dimension. The appellant seeks to rely on those provisions of the two international agreements reproduced in para [15] above, coupled with the relevant Vienna Convention provisions and principles of international law noted in paras [14]–[19]. The question to be addressed is whether these fortify her case that (a) article 8(1) ECHR protects the right which she asserts, (b) sections 1(1) and 12 of the 1981 Act interfere with this right and (c) they do so disproportionately.

[59] It is correct that in its determination of individual cases the ECtHR has a longstanding practice of identifying relevant provisions of international law. It does so for the purpose of ascertaining whether such provisions illuminate the court's

decision-making task in the individual case. This practice may be said to be a corollary of certain indelible features of the ECHR. First, it is an international convention. Second, it has been characterised by the ECtHR a "living instrument." Third, the ECtHR does not operate a doctrine, or practice, of precedent. Fourth, the ECtHR has conventionally been liberal in its approach to the materials to be considered in its determination of the individual case.

[60] While, in this way, the judgments of the ECtHR typically refer to international conventions protecting individual rights, the UNCRC being a paradigm example, the jurisprudence of that court has not developed any principle, or practice, which would preclude it from considering the two international agreements which the appellant invokes. However, as highlighted by Mr Blundell, the hallmark of these instruments is that they have the status of multilateral treaties/conventions. These incontestably form part of the corpus of international law in a way which differs from a bilateral treaty. They cannot be equated fully with a bilateral treaty such as the British-Irish Agreement. Thus, it is one thing to suggest that the construction of the provision of the ECHR and/or its application in an individual case may be informed by recourse to multilateral rights protection conventions comparable to the ECHR. It is quite another thing to suggest that a bilateral treaty such as the British-Irish Agreement, notwithstanding that in part it enshrines certain rights of the individual, is a proper point of reference for the same purpose. Unsurprisingly, perhaps, the submissions on behalf of the appellant did not identify any decision of the ECtHR supporting their discrete contention.

[61] Thus, in our view there are substantial difficulties confronting this aspect of the appellant's case. Notwithstanding, for the purposes of determining this appeal only we are prepared to assume that the two international agreements invoked by the appellant provide a legitimate point of reference – or are a legitimate aid – in determining whether the right asserted by her is protected by article 8 ECHR.

[62] Giving effect to the foregoing approach, the first step for the court must be to construe those provisions of the two international agreements upon which the appellant relies. These are set forth at paras [15] and [16] above. The court accepts the appellant's argument that these are to be construed in accordance with the principles and provisions of public international law rehearsed at para [17] above. Article 26 of the Vienna Convention provides that every treaty "… is binding upon the parties to it and must be performed by them in good faith", is at best neutral in the present context. Article 27, which provides "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty …", is of no direct application to the present context as this court is not adjudicating on the question of whether the United Kingdom government has performed its relevant obligations under the 1998 Agreements or any justification proffered for its failure to do so – and, we would add, is not competent to do so. We shall elaborate on this infra.

[63] Article 31 of the Vienna Convention provides:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context: 12 (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

We consider the application of these several provisions to be uncomplicated in the present context. First, the words under scrutiny in the two international agreements are to be given their ordinary meaning. Second, we shall take into account the preambles/recitals of both international agreements. Third, we shall consider the two international agreements together. Fourth, we shall have regard to the overarching purposes of the two agreements (which were not a matter of controversy in the arguments of the parties). Finally, we shall not accord any "special meaning" to the words under scrutiny (and none was advanced by either party).

[64] We consider the task of interpreting the words under scrutiny to be straightforward. In brief compass, the British Government has made a commitment to recognise the birthright of all of the people of Northern Ireland to identify themselves and be accepted as (a) Irish or (b) British or (c) Irish and British, according to the choice of the individual. This is what the provisions under scrutiny positively and unambiguously state. However, the limitations of section 1(i) of the Belfast Agreement and Article 1(vi) of the British-Irish Agreement must be recognised. While the acceptance ("recognise") by both governments of the right of everyone in Northern Ireland to identify themselves and be accepted as Irish or British, or both, is unambiguous the terms in which this is phrased are non-

prescriptive and open-textured. Neither the right nor the qualifying words "as they may so choose" are the subject of any prescription, specification or regulation of how or when this right may be asserted and vindicated. Furthermore, we endorse the reasoning of the judge at para [22]:

> "… This particular portion of the Belfast Agreement does not purport to require new legislation (as several other parts of the Agreement expressly do) ….
>
> Had the provision been intended to require any change to the UK's domestic legislation on citizenship one would have expected that to have been spelt out and to have been the subject of a clear obligation."

[65] This court considers that there is nothing in the text of the relevant provisions of the two international agreements to warrant the assessment that section 1(1) and section 12 of the 1981 Act, either individually or together, is/ are in conflict with their provisions. Section 12 provides a mechanism for the exercise of choice by the individual. It enables the appellant and likeminded persons to be "… **accepted as Irish** …" **only.** Furthermore, neither section 1(1) nor section 12, individually or in combination, infringes the right of the appellant and likeminded persons to "… **identify themselves … as Irish**" **only**.

[66] Bearing in mind the Vienna Convention "ordinary meaning" rule, a person's right to be "accepted as Irish" only must be construed as being directed to officialdom, i.e. the British Government in all of its emanations and all manner of public authorities. It is highly unlikely that this right extends to non-governmental private spheres – such as, for example, activities of a sporting, recreational or parochial kind. The relevant interface must surely be that of the citizen and government. Thus, the "acceptance" right cannot be unlimited. This is to be contrasted with the "identification" right. While this issue does not arise for determination in the present case, this discrete right is clearly more extensive in nature.

[67] At this juncture it is necessary to progress from the abstract to the particular. This exercise requires an intense focus on the evidence before the court and such inferences there from as may reasonably be made. Fundamentally, we consider that the appellant is the beneficiary of both "acceptance" and "identification." The evidence which she has placed before the court does not incorporate any suggestion of frustration of either the "acceptance" or "identification" rights enshrined in the international agreements, as we have construed these. Quite the contrary. The picture depicted in the appellant's affidavit is one of uninhibited acceptance of her professed Irish identity coupled with unrestrained self-identification as an Irish national only. De facto there is no obstruction. This assessment is subject only to the de jure factor, namely the question of whether section 1(1) and/or section 12 of the 1981 Act in some way operate/s as an impediment to the appellant's enjoyment of

either of these discrete international law rights. This we shall address infra in our consideration of the article 8 ECHR jurisprudential concepts of detrimental impact and arbitrariness.

[68] Finally, on this issue, insofar as the appellant's reliance on the 1998 international agreements is a thinly veiled attempt to give effect to these unincorporated treaties in domestic law it is doomed to fail. Abundant citation of authority for this fundamental proposition is unnecessary. As the judge noted, this "legal orthodoxy" featured most recently in the decision of the Supreme Court in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at paras [76]–[78].

Article 8(2) ECHR: [1] Protection and [2] Interference

[69] At this juncture we remind ourselves of the key features of the appellant's case. At birth, by operation of law, she automatically became a British citizen; similarly, she became an Irish citizen from birth, having been entitled to Irish citizenship from birth under Irish citizenship law and doing an act that only an Irish citizen could do namely acquiring an Irish passport; as she grew older she progressively gravitated towards Irish culture and the Irish language, in effect all things Irish, simultaneously distancing herself from her Britishness. Having attained her majority she made a decision to bring these proceedings in the hope of securing a remedy which will vindicate her assertion of a right to respect for her status as Irish citizen only. She has made a conscious decision not to invoke her statutory right to formally renounce her British citizenship under section 12 of the 1981 Act. The first question for this court is whether this specific factual matrix gives rise to a right protected by article 8 ECHR.

[70] The judge, as already noted, accepted that "… it is arguable that the conferral of citizenship, against their wishes, upon a person who enjoys citizenship of another State may be an interference with their rights under Article 8 ECHR." The key word in this passage is "rights", begging the question which right (or rights)? The answer would appear to lie in an earlier passage of the judgment, at para [27], where the judge adverted to:

> "…. The right for which she contends, namely a right not to have renounceable British citizenship conferred upon her."

As appears particularly from para [18] above, this court was not satisfied that the right asserted by the appellant under article 8 ECHR had been formulated with clarity. This gave rise to a pre-hearing direction and the ensuing formulation set forth in paras [12] and [19] above. From this it follows that the terms of the article 8 ECHR right canvassed before this court differ from those which featured at first instance. In furtherance of the overriding objective and bearing in mind the public law character of these proceedings this court is disposed to permit this reconfiguration of the appellant's case.

[71] It is uncontroversial that British citizenship confers enjoyment of, and the right to exercise, the full panoply of civic and political privileges possessed by every member of the British political body. The status of British citizenship provides the explanation and illumination of many things which British citizens might take for granted: in the benefits, advantages and facilities associated with social security payments; indeed, all things state funded medical care, education, policing, the defence of national security, voting and diplomatic protection abroad: an inexhaustive list.

[72] Furthermore, the importance of the status conferred by the legislation under challenge in this appeal, namely British citizenship, has been fully endorsed at the highest judicial level. This has unfolded in the context of challenges to the deprivation of a person's citizenship and applications for registration as British citizens. In the first of the two decisions in question, *Pham v Secretary of State for the Home Department* [2015] UKSC 19, the complexity of the legal issues which can materialise in deprivation of citizenship cases and the interaction between domestic nationality laws and international statelessness rules are two of the main themes.

[73] In the second case, *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, Lord Hodge, with whom all members of the court agreed, made the following noteworthy statements about the importance of British citizenship, at paras [26]–[27]:

> "There is no dispute as to the importance to an individual of the possession of British citizenship. It gives a right of abode in the UK which is not subject to the qualifications that apply to a non-citizen, including even someone who has indefinite leave to remain. It gives a right to acquire a British passport and thereby a right to come and go without let or hindrance. It can contribute to one's sense of identity and belonging, assisting people, and not least young people in their sensitive teenage years, to feel part of the wider community. It allows a person to participate in the political life of the local community and the country at large. As the Secretary of State has stated in a guidance document, "Becoming a British citizen is a significant life event. Apart from allowing you to apply for a British Citizen passport, British citizenship gives you the opportunity to participate more fully in the life of your local community." - Guide T, *Registration as a British citizen - a guide for those born in the UK on or after 1 January 1983 who have lived in the UK up to the age of ten* (March 2019), Introduction, p 3.

> The rights conferred by British citizenship are rights conferred by a process laid down by statute and subordinate legislation and not by the common law. The 1981 Act reformed the basis on which people acquire British citizenship. Entitlement to citizenship by registration arises under the 1981 Act as a result of a connection with the UK as laid down in that Act and compliance with the statutory procedures and conditions. The question raised in this appeal is one of statutory interpretation. The question in short is whether Parliament has authorised in primary legislation the imposition by subordinate legislation of the fees which the appellants challenge."

[74] The importance of citizenship (or nationality) is also recognised emphatically in the EU legal regime. The right of every national of a Member State to be a citizen of the Union was conferred by the Maastricht Treaty in 1993 i.e. at the highest of the EU law-making levels and is a right which lies at the core of that community of states, being described as "the fundamental status of nationals of the Member States" (see for example the *Micheletti* case [1992] ECR I-4239 at para [42].)

[75] At this juncture it is instructive to reflect on the essence of nationality – or citizenship – in its international law context. Every State's nationality laws are an aspect of state responsibility, a venerable doctrine of international law. Equally, the right of every sovereign state to devise its own legal rules regulating nationality has long been recognised in international law. It is the concomitant of another ancient right of sovereign states namely the right to control their borders. Recognition of this right is found in the treaty provisions establishing the League of Nations in 1937. Article 1 of the European Convention on Nationality 1997 (an unincorporated treaty) defines nationality as "the legal bond between a person and a State" without elaboration. Article 3(1) recognises the right of every State to determine under its own laws who are its nationals, reflecting earlier provisions in the Hague Convention (1930).

[76] The importance of nationality in international law is reflected in the limitations on its deprivation. Article 15(2) of the Universal Declaration of Human Rights prohibited the arbitrary deprivation of a person's nationality, two of the recognised touchstones being whether the deprivation has a basis in law or produces statelessness. This interface between domestic nationality laws and statelessness is another aspect of the international law dimension and one which specifically arises in this appeal, having regard to the terms of section 12(3) of the 1981 Act. The need to regulate statelessness by international convention was recognised as compelling inter alia as a result of the deprivation of vast numbers of people of their nationality on racial or political grounds by totalitarian states like Nazi Germany. This was linked to the unprecedented refugee crisis caused by the Second World War. Statelessness conventions followed. Their overarching philosophy was to prevent

the status of statelessness as far as possible and to regulate it fairly and coherently when it occurs, subjecting individual States to specific obligations.

[77] In *Nottebohm (Liechtenstein v Guatemala)* ICJ Reports 1955 P4 the International Court of Justice made one of its most important pronouncements on this subject, at P23:

> "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national."

The principle of *real and effective link* has long been recognised in international law and reflected in the practice of many States. The two main principles on which nationality has traditionally been based are descent from a national (jus sanguinis) and birth within a state's territory (jus soli). These are the typical mechanisms whereby the real and effective link is established. (Brownlee's Principles of Public International Law, 9th Edition, page 497ff). Notably, each is purely objective.

[78] The conferral of nationality on specified persons or groups carries with it state responsibility, creating important protections for the individual. Fundamentally, a state must admit its nationals to its territory – for example, if expelled from the territory of another state – and, further, has a duty not to expel its nationals. While a state is not precluded from extinguishing the nationality of one of its citizens, in international law there must be compelling grounds for doing so. Many of the foregoing principles of international law are reflected in the UN Convention on the Reduction of Statelessness (1961, 989 UNTS 175).

[79] One further reflection is apposite. It is a recognised fact that around 98% of the world's population have acquired the nationality – or citizenship – which they possess via either the citizenship of one or both of their parents or by acquiring the citizenship of the state in which they were born. In consequence of the lottery of life, a person born in (for example) Sweden has a life expectancy of 78 with high quality cradle to grave care in a stable and prosperous state, whereas a person born in Liberia, a society racked by intense civil conflict, is unlikely to live beyond 48. The

plight of those on British territory who have no stable status, in particular those whose stability hangs by the thread of the grant of limited leave to remain and those awaiting the determination of their applications for asylum, is reflected in the realities of the domestic laws to which they are subjected. Fundamentally, the rights which they enjoy are minimal when compared with those of British citizens. In addition to this exclusion from the essential benefits and advantages of British citizenship their lives are devoid of the security and stability which such citizenship would confer.

[80] Two conclusions may be drawn. First, section 1(1) of the British Nationality Act 1981 reflects the law and practice of many states and is harmonious with international law. Second, the absence of a provision such as section 1(1) from the UK domestic legal order would bring the United Kingdom Government into conflict with international law on account of its statelessness consequences.

[81] These two general conclusions lead to a more specific one in the present case, namely that the appellant cannot complain in law about the automatic conferral of British citizenship on her at birth. In this way the prism becomes refined and focussed. The same law whereby this automatic conferral of British citizenship on the appellant was effected makes explicit provision for its renunciation. This caters for, inter alia, those cases where the individual concerned finds this unwelcome or undesirable, for whatever reason. Section 12 of the statute (the 1981 Act) in substance creates *a right* to renounce one's British citizenship.

[82] It is incontestable that the appellant is free to exercise this right. As this analysis develops, the contours of the central question of law to be determined by the court become ever more refined. The focus switches to the conditions for the exercise of this right. There are two: (a) the need to make an application by completing a pro-forma in which she ticks a box specifying that she seeks to renounce her British nationality and (b) the requirement to pay an administrative fee of £371. The enquiry for this court therefore resolves to the question of whether these two conditions infringe any legal right of the appellant. Irrespective of how her case has been formulated in pleading and in argument, it must resolve to the contention that the requirement to observe these two conditions infringes the right to respect for her private life conferred on her by article 8(1) ECHR.

[83] The right asserted by the appellant which she seeks to fit within the framework of article 8(1) ECHR is formulated as "a right to respect for her status as an Irish citizen only" and "the right to be recognised as an Irish citizen only." On the assumption that the appellant can lay claim to such a right under article 8(1) ECHR, section 12 of the 1981 Act provides the mechanism for vindicating this right. The activation of the section 12 mechanism would result in the extinguishment of the appellant's British nationality and the preservation of her Irish nationality exclusively. If the right which she asserts exists, its exercise is not frustrated or impeded by any aspect of section 1 or section 12 of the 1981 Act. Analysed in this way, two consequences follow. First, the real question becomes that of whether the

two aforementioned administrative requirements unlawfully interfere with the exercise of the right asserted. Second, the real mischief lies not in the impugned statutory provisions, with the result the appellant's quest to secure a declaration of incompatibility is defeated on this ground alone.

[84] We return to the particular, developing our analysis in the following way. As demonstrated above, in article 8 ECHR cases involving citizenship issues the ECtHR has focused particularly on the *consequences* and *arbitrariness* of the impugned decision or measure. It has not done so in any particular sequence. We shall address firstly the issue of consequences. In the assessment which follows we include, without repeating, para [66] above.

[85] In determining this first question we take into account certain uncontested, or incontestable, features of the appellant's life situation: the target of her central complaint, namely the automatic conferral of British citizenship upon her at birth, has not subjected her to any appreciable detriment or disadvantage; no aspect of her everyday life requires her to identify herself as a British citizen; she suffers from no inhibition in identifying herself as Irish and asserting her Irish citizenship exclusively; a British passport was not thrust upon her at any stage of her life and she has no obligation to possess one; the impugned measure has no impact on the beliefs or identity which she espouses or their development; and she has been free to reject all aspects of her British citizenship from the age when she first choose to do so. As the judge stated, the appellant is "effectively free" to ignore her British citizenship.

[86] We turn to consider the issue of arbitrariness. It is of obvious significance that the target of the appellant's challenge consists of two provisions of a measure of primary legislation enacted by a democratically elected parliament legislating in what is universally recognised to be one of the most important areas for every self-governing state, namely nationality and citizenship. This legislation is now of some 40 years' vintage and it had certain comparable antecedents. Furthermore, the impugned measures are in conformity with all of the ECtHR touchstones, summarised in *Ghoumid v France* (see para [56] above): they are in accordance with the law (reposing in primary legislation), access to appropriate judicial review is provided by these proceedings, and there is no suggestion that any relevant authority has failed to act acted diligently and promptly. Finally, it forms no part of the appellant's case that any particular procedural protections are required and are lacking.

[87] Mr Lavery KC advanced the submission that the impugned statutory provisions have a subtle, or imperceptible, detrimental impact on the appellant's dignity and her right to respect for her espousal of Irish citizen exclusively. In the context of there being no evidence that payment of the statutory fee of £371 for a section 12 renunciation application would be a disproportionate financial burden for the appellant, Mr Lavery's submission was that a detriment was incurred by the fact of having to pay this fee.

[88] These are subtle impacts indeed. They bring to mind one of the memorable pronouncements in the early Human Rights Act jurisprudence on the House of Lords:

> "The Convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. **It does not, as is sometimes mistakenly thought, offer relief from 'the heartache and the thousand natural shocks that flesh is air to.'**"

(*Procurator Fiscal v Brown* [2003] 1 AC 681, per Lord Bingham of Cornhill, p 703. quoting from Shakespeare's Hamlet.) We further take into account that article 8 ECHR is not a panacea, available to be invoked in the support and protection of the preferences and priorities espoused by every person regarding the conduct and development of every aspect of their private lives.

[89] There are other passages in *Procurator Fiscal v Brown* which resonate in this appeal. First, again per Lord Bingham, at p 703:

> "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as a supra – national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgement accorded to those bodies …."

This was to become a recurring theme of the subsequent jurisprudence of the House of Lords and Supreme Court. Lord Bingham continued:

> "In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus, particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention. The language of the Convention is for the most part so general that some implication of terms is necessary and the case law of the European Court shows that the court has been

willing to imply terms into the Convention when it was judged necessary or plainly right to do so. **But the process of implication is one to be carried out with caution,** if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument, the Convention is to be seen as a 'living tree capable of growth and expansion within its natural limits' …. ***but those limits will often call for very careful consideration.***"
[Emphasis added.]

[90] The following contribution from Lord Steyn, at pp 707 - 708 is also striking:

> "The framers of the Convention recognised that it was not only morally right to promote the observance of human rights but that it was also the best way of achieving pluralistic and just societies in which all can peaceably go about their lives. The second aim was to foster effective political democracy. This aim necessarily involves the creation of conditions of stability and order under the rule of law, not for its own sake, but as the best way to ensuring the well-being of the inhabitants of the European countries. After all, democratic government has only one raison d'être, namely to serve the interests of all the people. The inspirers of the European Convention, among whom Winston Churchill played an important role, and the framers of the European Convention, ably assisted by English draftsmen, realised that from time to time the fundamental right of one individual may conflict with the human right of another. Thus, the principles of free speech and privacy may collide. They also realised only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights. The direct lineage of this ancient idea is clear: the European Convention (1950) is the descendant of the Universal Declaration of Human Rights (1948) which in article 29 expressly recognised the duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others. It is

> also noteworthy that article 17 of the European Convention prohibits, among others, individuals from abusing their rights to the detriment of others. Thus, notwithstanding the danger of intolerance towards ideas, the Convention system draws a line which does not accord the protection of free speech to those who propagate racial hatred against minorities: article 10; *Jersild v Denmark* (1994) 19 EHRR 1, 26, para 31. This is to be contrasted with the categorical language of the First Amendment to the United States Constitution which provides that "Congress shall make no law … abridging the freedom of speech." The European Convention requires that where difficult questions arise a balance must be struck. Subject to a limited number of absolute guarantees, the scheme and structure of the Convention reflects this balanced approach. It differs in material respects from other constitutional systems but as a European nation it represents our Bill of Rights. We must be guided by it. And it is a basic premise of the Convention system that only an entirely neutral, impartial, and independent judiciary can carry out the primary task of securing and enforcing Convention rights. This contextual scene is not only directly relevant to the issues arising on the present appeal but may be a matrix in which many challenges under the Human Rights Act 1998 should be considered."

Resort to this basic dogma in the speeches of Lord Bingham and Lord Steyn illuminates the path to be pursued by the court in determining this appeal.

[91] Since her birth the appellant has, by virtue of her automatic British citizenship, enjoyed a broad range of rights and benefits. Her state funded education provides one illustration. Availing of state funded medical and dental care – there being no suggestion that she has not done so – is another. Indeed, an even more striking illustration is the medical care which she received upon her visit to "mainland Britain" (per her affidavit), on the assumption that this too was state funded. In addition, her right to vote in this jurisdiction since she attained her majority around one year ago can be founded on either British or Irish citizenship. So too the facility of diplomatic protection in the context of overseas travel which has been available to her since birth.

[92] Finally, we remind ourselves that the primary purpose, the essential object, of article 8 ECHR is to protect against arbitrary interferences with private and family life, home, and correspondence by a public authority (*Libert v. France*, at paras [40]-[42]). In the notional balance sheet, the benefits conferred on the appellant by her British citizenship from birth comprehensively outweigh the subtle, imperceptible

detriment which she asserts. Of course, the resolution of the appellant's article 8 ECHR challenge does not entail a box ticking or arithmetical exercise. Rather it behoves the court, having identified the main facts and considerations, to stand back and form an overall evaluative judgement. We have mapped in some detail the path to our conclusion on this discrete issue. A balancing exercise is required. In our judgement this impels inexorably to the conclusion that whether viewed through the lens of a negative or positive right the right asserted by the appellant is not protected by article 8 ECHR. Specifically, the appellant's case fails to identify any consequences of the operation of the impugned statutory provisions which would warrant a different conclusion or any element of arbitrariness in those provisions.

[93] Given the immediately preceding conclusion the question of whether the impugned measure constitutes an *interference with* the article 8 ECHR right asserted by the appellant does not arise. If our conclusion that the right which she asserts is not protected by article 8 ECHR is erroneous, our alternative conclusion is that, on the same basis and for the same reasons, no interference is established.

Article 8(2) ECHR: Proportionality

[94] Given these alternative conclusions, no question of justification under article 8(2) ECHR arises. However, on the premise that each of our alternative conclusions is erroneous, we shall examine this issue. As already noted, the appellant accepts that the impugned measure pursues a legitimate aim, namely the protection of the rights and freedoms of others, and is "in accordance with the law." Accordingly, the sole issue under article 8(2) ECHR is that of proportionality, namely whether it is "necessary in a democratic society."

[95] We remind ourselves of the contours of the doctrine of proportionality. We do so mindful of the distinction between the doctrine of proportionality in its ECHR context and EU context. This was highlighted by the Supreme Court in *R (Lumsdon) v Legal Services Board* [2015] UKSC 41. In domestic human rights law the approach to ECHR proportionality has evolved somewhat. It is unnecessary in the present context to trace this evolution, which dates from *De Freitas* [1999] 1 AC 69 at 80 per Lord Clyde. It suffices, rather, to draw attention to the leading decision of the Supreme Court, *Bank Mellat v HM Treasury* [2013] UKSC 39. There the entire court was agreed upon the following criteria, at para [74]:

> "(1) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to

> its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in De Freitas, and the fourth reflects the additional observation made in Huang. I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

[96] We embark upon the proportionality analysis required in the present case in the following way. Section 1(1) of the 1981 Act enacts a general rule applying to all members of the affected class. Its general impact is not per se disproportionate and the contrary was not suggested. Moreover, it is common case that many members of the class will positively welcome its impact.

[97] Various aspects of the proportionality equation have featured in our consideration of article 8 ECHR protection and interference above. We take into account also the following. First, in the sphere of nationality and citizenship general rules are clearly appropriate in furtherance of coherence, stability, predictability and a workable regime. Second, the impugned statutory provisions promote certainty, predictability and coherence. Third, they perform the important function of avoiding the mischief of statelessness. Fourth, in so doing they achieve conformity with the international legal rules on statelessness and are harmonious with the principle of the common law that parliament is presumed to legislate in a manner compliant with the government's international legal obligations. Fifth, the conferral of British citizenship on a person at birth does not abrade with that person's wishes or preferences. It is only at a later stage of development and maturity that a considered, properly informed preference about this matter can be formed. The distinction between neonates and children (on the one hand) and mature teenagers (on the other) seems to us incontestable.

[98] The statutory regime under scrutiny includes the renunciation mechanism of section 12 of the 1981 Act which a person can invoke upon attaining their 18th birthday. This too operates as a general rule. However, it cannot be considered disproportionate on this account per se. The age of 18 is the legal age of majority for every British citizen and it operates as a trigger in various fields and contexts: the legal age of majority for every British citizen is 18, having been reduced from 21 by the Family Law Reform Act 1969 (section 1). Upon attaining 18 everyone is considered to be an adult, thereby acquiring the legal capacity to inter alia enter into legally binding contracts (thus to hold a credit card and take out a loan), to vote in elections, to buy tobacco and cigarettes and have a tattoo. This statutory arrangement is manifestly compatible with the protection of the best interests of children, from neonates to 17 year olds.

[99] Next, in common with the judge, and given the foregoing considerations, we consider that there is nothing disproportionate about a renunciation applicant having to tick a box on a pro-forma indicating that British citizenship is what the person wishes to renounce. Were it otherwise the renunciation scheme would not be workable. We thus conclude having called for the document in question. It is Form RN04/2019. This pro-forma is a typical feature of the procedures and arrangements which enable government to tick on a daily basis, to the benefit of the population as a whole. The reason why the appellant, were she to avail of this mechanism, would have to tick a box stating "I wish to renounce …… British citizenship" is that the form has been devised in a way which encompasses the renunciation of other types of statutory citizenship, of which there are four in total. In the real world, it is difficult to conceive of an administrative mechanism whereby a "conscientious objector" to British citizenship could exercise their right to renounce this status without stating that this is the status which they wish to renounce. Lord Bingham's statement that the ECHR "is dealing with the realities of life", noted in para [87] above, resonates with particular force here. So too does the common law principle of de minimis.

[100] Separately, the appellant complains about having to pay a fee for making a section 12 application. It is common case that the amount payable is £371 under Article 3 of the Immigration and Nationality (Fees) Order 2016 and regulation 10 of, and Schedule 8 to, the Immigration and Nationality (Fees) Regulations 2018. The requirement to pay a fee for various purposes in the immigration and nationality field is of long standing. It is also a well-established common place in many other spheres affecting the lives of citizens: for example court proceedings, planning applications, civil marriages, burials and multiple local government purposes. Self-evidently, the main purpose of paying a fee is to fund the administrative arrangements necessary for the provision of the service concerned.

[101] A comparable issue arose in *R (Williams) v Secretary of State for the Home Department* [2017] EWCA Civ 98, where a 10 year old boy from a destitute family challenged the requirement to pay a fee of £673 to apply for registration as a British citizen on the basis of ten years continuous residence under section 1(4) of the 1981 Act. The challenge was dismissed. The reasoning of the court is expressed in the main in para [45]:

> "What is at root wrong with the argument in the present case is, in my view, this. There is no "fundamental" or "constitutional" right to citizenship registration for persons in the position of the claimant at all. The right is one which Parliament has chosen by statute to create and bestow, in certain specified circumstances. Those circumstances include, as one requirement, an application: which is then required to be accompanied by a fee if it is to be valid. There is nothing in the requirement of a fee to defeat the statutory purpose and intent. On the contrary,

> it is *part* of the statutory purpose and intent. Mr Knafler's argument, with respect, in effect simply subordinates the requirement for a fee-paid application to the other conditions required to be fulfilled if citizenship under section 1(4) of the 1981 Act is to be granted. I can see no sufficient justification for that, having regard to the terms of the statutory scheme."

[102] There are, by analogy, parallels with high level judicial decisions in both this jurisdiction and that of England and Wales. Illustrations are found in *Re Bell* [2017] NICA 69 at paras [41]–[43] especially (per Gillen LJ) and *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898 at 906D-F. Decisions such as these give powerful expression to the principle that judgements about the amount to be paid by the citizen for any such service belong to the domain of administrators. Where a court is invited to consider the amount levied the judicial role will inevitably by a restrained one. Judges are not economists or accountants. While they will not flinch from performing their duty in any given case they will do so mindful of these well-established limitations.

[103] Section 12(3) of the 1981 Act is plainly designed to ensure that the facility of renunciation provided by subsections (1) and (2) does not result in the person concerned becoming stateless. Statelessness is universally regarded as a mischief to be avoided if possible. It gives rise to difficult issues, both legal and social. It attracts the application of a series of norms and principles of public international law. Furthermore, if the appellant were to invoke the statutory renunciation mechanism, given that she is an Irish citizen it seems inconceivable that section 12(3) of the 1981 Act would operate so as to defeat her application. The contrary was not suggested.

[104] The further ingredients in the proportionality equation are the following. First, there is no suggestion that by reason of destitution or impecuniosity the fee of £371 poses an insurmountable barrier for the appellant. Second, there is no suggestion, much less indication, that this fee is artificially elevated or arbitrary. Finally, assessing the statutory scheme as a whole, there is nothing in the evidence before the court indicative of an alternative workable scheme which would vindicate for the appellant the right she is asserting.

[105] Pausing, everything outlined in paras [96]–[104] above belongs to one side of the notional scales, pointing firmly towards the conclusion that section 1(1) of the 1981 Act constitutes a proportionate means of achieving the legitimate aim in play. On the other side of the scales there is in reality very little indeed. In truth, apart from the appellant's personal preferences and aspirations, coupled with the subtle adverse impacts which belong in the main to the imaginative submissions of counsel, to be contrasted with the rock of supporting evidence, there is nothing of any substance. The conclusion that the impugned statutory provision is proportionate follows inexorably.

Our Conclusions

[106] While Mr Lavery drew to the attention of the court certain changes in the Immigration Rules of benefit to Ms De Souza and doubtless others, no compelling or structured argument that this in some way reinforces this appellant's case was developed. The two contexts are demonstrably different. Standing back, this court has been unable to discern any cogent or coherent nexus between the family membership/dependent relative amendments of the Immigration Rules and the asserted right at the heart of the appellant's case.

[107] In our rejection of the appellant's arguments we have been mindful of the precise terminology of article 8(1) ECHR. This provision of the Convention protects neither a right to family life nor a right to private life. Rather, it guarantees a right to "respect for" both. It might be said that this rather important distinction is sometimes blurred in the now extensive article 8 ECHR jurisprudence, both European and domestic. It may be timely to reflect on this, taking into account not least the analysis of Lord Bingham in *Brown* at para [88] above. We would highlight also, yet again, the terms in which the right asserted by this appellant were ultimately formulated, namely a right to <u>respect for</u> her status as an Irish citizen only: to be contrasted with a right to her status as an Irish citizen only. We would add that if it had been incumbent upon this court to decide this appeal on the basis of an asserted *right to ...* in contrast with a right to respect for … basis, our decision would be unchanged.

[108] We draw together our conclusions in the following way:

(i) The right asserted by the appellant, namely a right to respect for her status as an Irish citizen only, is not protected by article 8 ECHR.

(ii) In the alternative to (i), neither section 1(1) nor section 12 of the British Nationality Act 1981 interferes with this right.

(iii) In the alternative to (i) and (ii), any interference with the appellant's enjoyment of this right pursues a legitimate aim, is in accordance with the law and is proportionate.

(iv) Section 1(1) of the British Nationality Act 1981, whether on its own or in conjunction with section 12, is harmonious with the rights enshrined in section 1(i) of the Belfast Agreement and Article 1(vi) of the British-Irish Agreement.

[109] For the reasons given, the appeal is dismissed and the order of Scoffield J refusing leave to apply for judicial review is affirmed.