



THE HIGH COURT

Record No.: 2021/4174 P

Between:

ROBERT DOE, JANE DOE, ALAN DOE (A MINOR SUING BY HIS NEXT FRIEND JANE DOE), BRENDAN DOE (A MINOR SUING BY HIS NEXT FRIEND JANE DOE), CIARA DOE (A MINOR SUING BY HER NEXT FRIEND JANE DOE) AND DARREN DOE (A MINOR SUING BY HIS NEXT FRIEND JANE DOE)

Plaintiffs

-AND-

THE COMMISSIONER OF AN GARDA SIOCHÁNA, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

Defendants

JUDGMENT of Mr Justice Rory Mulcahy delivered on 29 February 2024

Introduction.

1. These proceedings concern a family currently residing outside the State as part of the State's witness security program ("WSP"). The WSP is administered by the first defendant in circumstances which are described below. Each of the plaintiffs has been given a new identity as part of their participation in the WSP.

2. In light of the security implications for the plaintiffs, steps have been taken to prevent their new identities from being disclosed. On 14 June 2021, the High Court (McDonald J) made an order directing that the proceedings be heard otherwise than in public, that the proceedings be taken under assumed names, and that the publication or broadcast of any matter relating to the proceedings which would be likely to identify the plaintiffs be prohibited. In light of that order, the proceedings have been taken in anonymised names, the proceedings were heard *in camera*, and the parties have taken significant steps to ensure that the identities of the plaintiffs and of witnesses in the proceedings are not disclosed. The plaintiffs attended the hearing remotely, as did the expert witnesses, and none of them appeared on camera. It is only fair to acknowledge that the requirement for security necessarily hampered the plaintiffs and their legal team in their preparation of the case. Although this judgment is being delivered in public, care has been taken to ensure that nothing in the judgment undermines the steps taken to protect the plaintiffs' identities. The description of the factual circumstances giving rise to the claim has been significantly abbreviated in order to avoid providing any information which might tend to identify the plaintiffs. In addition, this judgment was provided to the parties in draft to enable them to identify any changes which might be required to further disguise the identities of the parties. This judgment incorporates some suggested changes.

3. The first and second plaintiffs are parents of the third to sixth plaintiffs. In the Plenary Summons and Statement of Claim, the plaintiffs claim relief under three broad headings, only one of which they pursued at the hearing of the action. First, they claim specific performance of an alleged agreement to provide each of them with new birth certificates in their new names, and a new marriage certificate in the new names of the first and second plaintiffs. Second, they claim specific performance of an agreement to establish a suitably secure and independent dispute resolution mechanism for disputes arising from their participation in the WSP. Third, they claim that failure to provide them with new birth and marriage certificates is in breach of their constitutional rights and a breach of the State's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "**Convention**") and the EU Charter of Fundamental Rights. For convenience, I will refer to these claims as the constitutional claim. Only the constitutional claim is being pursued by the plaintiffs.

4. The plaintiffs accept, with some reluctance, that the Civil Registration Act 2004 (as amended) does not permit the defendants to provide the plaintiffs with new birth or marriage certificates in their new names. They argue, therefore, that there is a lacuna in the law which leads to a violation of their constitutional rights under Articles 40.1, 40.3.1° and/or 40.3.2°, and/or 41 and/or 42A of the Constitution. They also claim that the defendants' failure to provide them with new certificates represents a breach of the State's obligations under Articles 2 and/or 3 and/or 8 and/or 12 and 14 of the Convention and is in breach of numerous provisions of the Charter of Fundamental Rights of the European Union ("**the Charter**"). They ask the court to make declarations to this effect.

5. The principal factual dispute between the parties concerned the existence of an alleged agreement to provide them with new birth certificates and a marriage certificate and an alleged agreement to provide a dispute resolution mechanism. Much of the discovery documentation exchanged and most of the witness statements were addressed to these disputed matters, which no longer required to be resolved. In describing the factual background to these proceedings, it will however be necessary to refer to certain aspects of the disputed matters.

Factual background

6. Prior to the birth of their first child, the third plaintiff, the first and second plaintiffs provided information to An Garda Síochána regarding the activities of a criminal gang. Sometime thereafter, the plaintiffs began to suffer intimidation and harassment by that criminal gang. Steps were taken by the defendants to protect the plaintiffs, who were required to relocate within Ireland on a number of occasions. Ultimately, however, the plaintiffs were invited to attend a meeting with representatives of the first defendant for the purpose of assessing their suitability for relocating to another jurisdiction as part of the State's witness security programme owing to the continuing threats to their safety.

7. For various reasons, the process by which the plaintiffs were assessed for suitability and then entered the witness security programme was very protracted. The fourth, fifth and sixth plaintiffs were born during this period. Each child's birth was registered in the usual way. However, by the time the sixth plaintiff was born, the rest of the family had changed their names to the new names which they would use in the jurisdiction to which

they were being relocated. The sixth plaintiff, therefore, has a birth certificate in the name which he is using in the new jurisdiction. None of the other plaintiffs have birth certificates in their new names.

8. I should pause for a moment to discuss terminology. The pleadings, witness statements and submissions are replete with references to “assumed” names or identities and “false” documents. These seem to me to be somewhat value-laden terms. It is appropriate to use more neutral terms in the course of this judgment. I therefore propose to describe the plaintiffs’ birth names as their original names, and the names to which their names were changed as their new names, and to refer to their claim to be entitled to birth and marriage certificates in those new names as a claim for new birth and marriage certificates, or simply new certificates.

9. As noted above, a significant portion of the witness statements are directed to what was agreed between the parties as being the terms upon which the plaintiffs would enter the witness security programme. There is no dispute but that it was agreed that the defendants would provide support to the plaintiffs to enable them to establish themselves in the new or host jurisdiction on a similar or like-for-like basis to the life they had in Ireland. Assistance would be provided by what was described as the host agency or host coordinator in the new jurisdiction. It is also agreed that the intention was that the plaintiffs would become self-sufficient in their new country such that they no longer needed assistance from the defendants or the host agency. What precisely self-sufficiency meant is a significant point of dispute.

10. There is a significant conflict of evidence regarding the documentation which the defendants undertook to provide the plaintiffs for use in the new jurisdiction. When the plaintiffs moved to the new jurisdiction, they were provided with identity documents in their new names. It appears that they have, at least, passports, PPS numbers and, in the case of the first and second plaintiffs, driving licences in their new names. However, the plaintiffs claim that they were told repeatedly that they would be provided with all the documentation necessary to establish themselves in the host country, and that they understood that this would include new certificates in their new names. This is emphatically denied by the defendants, who argue that it would have been unlawful for them to provide such documents.

11. The plaintiffs' participation in the witness security programme has, broadly speaking, been a success. The plaintiffs are established in the host jurisdiction and no longer require financial assistance from the defendants. Nor do they require any day-to-day assistance from the host agency. However, the plaintiffs, and the third, fourth and fifth plaintiffs in particular, have experienced certain difficulties in the host jurisdiction owing to the lack of birth certificates in their new names. In particular, they have had difficulty registering in schools. The plaintiffs have had to rely on the assistance of the host agency to overcome these difficulties.

12. It is those difficulties which have led the plaintiffs to issue the within proceedings. Their strong desire is to be fully independent and not to have to rely on the assistance of the host agency at all. They anticipate that the absence of birth and marriage certificates in their new names will continue to create problems for them, which will require the intercession of the host agency to resolve, possibly for the rest of all their lives. Thus, they argue, they will never be entirely independent in the host country, contrary to what they understood was the intention of the program.

The Statutory Regime

13. The system for registration of births and marriages in Ireland is regulated by the Civil Registration Act 2004, as amended ("**the 2004 Act**"). Section 13 of the Act provides as follows:

(1) There shall be established, where appropriate, and maintained by an tArd-Chláraitheoir—

(a) a register of all births occurring in the State or to which section 26 or 27 applies (which shall be known, and is referred to in this Act, as the register of births),

... ..

(e) a register of all marriages taking place in the State (which shall be known, and is referred to in this Act, as the register of marriages) ...

14. Section 13(4) provides for, *inter alia*, birth and marriage certificates as evidence of the contents of the registers of births and marriages:

(4) Evidence of an entry in a register, other than the register of gender recognition, and of the facts stated therein may be given by the production of a document purporting to be a legible copy of the entry and to be certified to be a true copy by an tArd-Chláraitheoir, a person authorised in that behalf by an tArd-Chláraitheoir, a Superintendent Registrar, an authorised officer or a registrar.

15. Section 19 of the 2004 Act imposes an obligation on parents to register the birth of any child born in the State within three months of that birth. Section 49 contains an obligation to register a marriage.

16. Sections 63 and 64 of the 2004 Act provide for corrections to the register of births. Section 63 provides for the correction of clerical errors or errors of fact by persons “*having an interest in the matter*”:

(1) An alteration shall not be made in a register maintained under paragraph (a), F230[(b), (d) or (k)] of section 13(1) otherwise than in accordance with the provisions of this Act.

(2) On the application in that behalf of a person having an interest in the matter to a Superintendent Registrar in writing, he or she may—

(a) correct in the manner specified by an tArd-Chláraitheoir a clerical error in any register maintained under section 13, or

(b) correct an error of fact in a register specified in the said paragraph (a) or (d) if the person gives to the Superintendent Registrar such evidence as he or she considers to be adequate and a statutory declaration, in a form standing approved by an tArd-Chláraitheoir, of the facts concerned made by—

(i) a person required by this Act to give to the registrar the required particulars in relation to the birth, or death, concerned, or

(ii) if such a person as aforesaid cannot be found, two credible persons having knowledge of the facts concerned.

17. Section 64 provides for corrections of errors of fact at the instance of an tArd-Chláraitheoir or a registrar. Section 49(6) provides for the making of regulations for the correction of errors in the register of marriages.

18. The system for registration of births in operation in the State, therefore, is that every birth must be entered in the register within a short period of a person's birth. That entry can only be amended or altered if it contains a clerical error or an error of fact, *i.e.*, there is no provision for amendment to reflect a *subsequent* change in circumstances. A birth certificate is a certificate confirming that it accurately reflects an entry on the register of births. Similarly, a marriage certificate is a certificate confirming it accurately reflects an entry on the register of marriages. Regulations may be made to allow for the correction of errors, but there is no enabling provision providing for amendments to reflect subsequent changes.

19. The nature of the register of births is discussed in **Foy v An An T-Ard Chláraitheoir & Ors (No. 1)** [2002] IEHC 116:

“(170) I have no hesitation in immediately coming to the conclusion that the State on behalf of society has a legitimate interest in having in place and in operating a system of registration dealing, inter alia, with births which occur within this jurisdiction. Every modern society must be entitled to have a means of obtaining and thereafter recording vital particulars which surround the birth of its citizens and all others born in its country. The resulting register is a document of historical value, being current only at the date of birth and not beyond. It is no more than that. It is not a continuum record of one's travels through life or even of the most important and most significant events of that journey. It is, it has been said "a snap shot" of matters on a particular day and does not purport to be otherwise. Its value to society is crucial in the several areas mentioned earlier in this judgment.”

20. Although the plaintiffs' Statement of Claim included a claim for specific performance of an alleged agreement to arrange for the registration of the first to fifth plaintiffs' births under their new names and the provision of new birth and marriage certificates, at the hearing of the action, the plaintiffs accepted the defendants'

contention that the 2004 Act made no provision for a fresh registration of a birth or marriage, or an amendment to the registers following a person's change of name, whether in their particular circumstances or at all. That this is so is clear from the wording of the 2004 Act and the decisions in Foy (No. 1) and Foy (No. 2). The plaintiffs argue that this reflects a lacuna in the legislation which breaches their constitutional rights.

The Constitutional Claim

21. The plaintiffs do not contend that there is a *general* right to a new certificate whenever a person changes their name from that appearing on their original birth or marriage certificate. Rather, they contend that a person has a constitutional right to a new birth (or marriage) certificate in the circumstances of their case where the following “*essential features*” are present:

- a. The person has been required to assume a name other than that recorded on their birth certificate because of a risk to life if the person uses their original name;
- b. The risk arises from the provision of assistance to the State in a matter of public interest, such as the detection of crime;
- c. The risk is indefinite;
- d. The person is coerced by that risk to live under the assumed name as part of a State-sanctioned regime for the protection of witnesses providing the assistance at (b).

22. They claim that the right is derived from Article 40.3.1° and 40.3.2° of the Constitution and, in the case of the minor plaintiffs, Article 42A. They argue that the context for the assertion of the right is crucial, that the change of names, and thus the requirement for new certificates, was done in an effort to vindicate the plaintiffs' right to life. They also assert a claim that the failure to provide a system whereby the plaintiffs can obtain new certificates is in breach of the equality guarantee in the Constitution. At the hearing, the plaintiffs placed significant emphasis on the argument that the absence of new certificates breached their right to dignity. The plaintiffs relied on recent decisions of the Court of Appeal in Caldaras v An tArd Chláiritheoir [2013] 3 IR 310 and Habte v Minister for Justice and Equality [2020] IECA 22.

23. The plaintiffs argue further that if the constitutional rights they identify are recognised by the court, then the interference with those rights is not justified. They argue that the interference fails the proportionality test identified in **Heaney v Ireland** [1994] 3 IR 593.

24. The plaintiffs' claim regarding incompatibility with the Convention largely relies on the European Court of Human Rights case law regarding the recognition of transgender persons, starting with **Goodwin v United Kingdom** (2002) 5 EHRR 18, a decision relied on by the High Court in **Foy v An An T-Ard Chláraitheoir & Ors (No. 2)** [2012] 2 IR 1; [2007] IEHC 470 when making a declaration of incompatibility of the 2004 Act with the Convention. Of course, the 2004 Act has been amended since that decision to provide for a new register, the register of gender recognition.

25. The claim pursuant to the EU Charter on Fundamental Rights is advanced by reference to the decision of the CJEU in **Case C-208/09, Sayn-Wittgenstein**, in which the Court held that it was permissible for a member state to refuse to recognise a surname containing a title of nobility where that refusal could be justified on public policy grounds and was legitimate to the aim pursued. In reaching that conclusion, the CJEU held that the refusal was, in principle, a restriction on the applicant's freedom of movement guaranteed by Article 21 of the Treaty on the Functioning of the European Union (TFEU) and Article 7 of the Charter.

26. The defendants contend that there is no constitutional (or Convention or Charter) right engaged in the plaintiffs' circumstances and, by reference to **Fleming v Ireland** [2013] 2 IR 417 and **Burke v Minister for Education** [2022] 1 ILRM 73, that the right identified by the plaintiffs is not a right of general of general application but one which has been impermissibly reverse engineered to the plaintiffs' particular circumstances. Without prejudice to their contention that there is no constitutional right engaged, they argue that if there is any right engaged, any interference is slight and proportionate to the legitimate aim of maintaining the register of births and marriages as accurate historical records.

The Witness Security Program (WSP)

27. The WSP is described in a witness statement delivered by the defendants. The WSP is a non-statutory programme operated on an administrative basis in Ireland since 1997. The WSP responds to attempts by criminals and other groups to prevent the normal functioning of the criminal justice system, including through the threat and the use of violence and systematic intimidation of witnesses. An Garda Síochána provides appropriate protection for witnesses and their families who are receiving support from the program.

28. The practice and procedures of the WSP have evolved throughout the lifetime of the program. Given the small geographical nature of Ireland, it is always deemed best practice for persons coming within the ambit of the WSP to be advised that relocation to a foreign jurisdiction must be effected in order to best protect the life of the protectee and associated persons. All persons entering the program do so in a voluntary capacity and in a fully informed manner, having been provided with the option of independent legal advice. The nature of protection of the WSP is such that conditions include restrictions essential for a person's safety and are imposed on persons in the program to safeguard their security.

29. All decisions regarding the suitability of a person's entry to the program rest with the Witness Security Programme Review Group. Financial support and expectations generally differ and are decided on a case-by-case basis grounded on the circumstances of the case, risk and required protection arrangements. Such supports are considered by ensuring that each is reasonable, justified, proportionate and necessary. Financial assistance is agreed on a 'like-for-like' basis. This means by reference to the quality of living enjoyed by the relevant persons before their entry to the program. Financial assistance should be no greater than a protectee's documented earnings or welfare entitlements before admission into the program.

30. The evidence given was that decisions as to suitability for entry to the program are supported by psychological assessments of potential protectees, and that the first and second plaintiffs had undergone such assessment.

31. Given the nature of the program, the plaintiffs were not in a position to seriously interrogate the defendants' evidence as to how it operates. The precise details of the program, its operation and the security measures available were described as being matters of tradecraft. There was, however, significant dispute regarding whether the plaintiffs were fully or adequately informed regarding how their participation in the WSP would operate once they moved to a new jurisdiction. Although the plaintiffs elected not to pursue their claims in that respect at the hearing of the action, the dispute has some relevance in explaining the context on which their remaining claims arose.

The Evidence

32. The plaintiffs delivered witness statements of the first and second plaintiffs and one from their solicitor, who had represented them throughout their dealings with the first defendant regarding participation in the WSP. They also delivered three expert witness statements, one from a lawyer practising in a jurisdiction other than the host jurisdiction, and two from lawyers practising in the host jurisdiction. In circumstances where only the constitutional claim was being pursued, only the second plaintiff and one of the expert witnesses were cross-examined on their witness statements.

33. Ms Doe's witness statement gave a detailed account of the circumstances leading to the family's entry into the witness security program and the extraordinary measures that they had to take prior to that to remain safe. Having regard to the necessity to avoid providing any information which might disclose the plaintiffs' identities, I won't detail that evidence here. It is clear from that evidence, however, that the plaintiffs suffered significant hardship in that time. She describes her interactions with representatives of the first defendant as part of the process of entering the witness security program. She refers to being required to hand over all of their identity documents to An Garda Síochána, including birth certificates, marriage certificate, PPS cards, driving licences, educational and employment records and medical records. She says that she expressed concern to the garda to whom the documents were handed over, especially in relation to her driving licence. She says that she was told that the WSP operates on a like-for-like basis and that this included documents. It should be noted that the relevant garda's witness statement states that this is a statement taken out of context and that "like for

like” never applied to documents. The second plaintiff says that the plaintiffs were repeatedly told that they would get a full set of documents to support normal living in the host country and to live independently of the program, and she says that she always understood that this would include new birth certificates and a marriage certificate.

34. Her witness statement states that it was only when the family arrived in the host country that she discovered that they wouldn’t be provided with new birth and marriage certificates. She describes herself as being devastated and says that she would not have agreed to enter the WSP had she known that these would not be provided. She also describes the problems that this has caused, including difficulties in obtaining relevant benefits and in registering some of her children in schools, problems which were only overcome on an *ad hoc* basis through the intervention of the host agency. She expresses concern that this is something which she and her children will continue to have to deal with for the rest of their lives and that, therefore, they will never truly be independent in the host country, rather they may always have to rely on the host agency intervening if and when similar issues arise.

35. In cross-examination, Mrs Doe disagreed with the proposition that the absence of birth certificates was less than ideal but that having them was not absolutely necessary. She considers them a necessity. It was also put to Mrs Doe that the first defendant’s evidence would be that, *in extremis*, if a situation arose where a birth certificate absolutely had to be produced, the plaintiffs’ birth certificates in their original names could be provided by An Garda Síochána to the host agency. Mrs Doe rejected this on the basis that the host agency had made clear that they should never see the original documentation, as this might compromise the plaintiffs’ security.

36. Mrs Doe explained that when dealing with her children’s schools, she has been required to lie about the reasons for not having birth certificates. When asked by her counsel how this made her feel, she replied, “*disgusting, absolutely disgusting*”.

37. The first plaintiff’s witness statement also states that the plaintiffs were never told that they would not be furnished with birth certificates and a marriage certificate in their new names and that, had he known this, he would not have entered the witness security program.

38. The plaintiff's solicitor confirms that he attended many of the meetings with the first defendant to discuss arrangements for the plaintiffs' entry to the program and that it was never expressly stated at any meeting he attended that the plaintiffs would not receive new certificates. The plaintiff's solicitor wrote to An tArd Chláraitheoir advising that he represented persons in the WSP who had been issued with new identities and asking whether it was possible "*according to any provision of Irish law to re-issue birth certificates in their assumed names*". The response stated that the 2004 Act made "*no provision for the issue of life event certificates in the names of aliases or assumed names*". The letter did state, however, that the General Register Office "*will operate on the measures requested by the Garda Commissioner*".

39. The plaintiff provided a witness statement from a lawyer in a jurisdiction which has placed its witness security program on a statutory basis and in which provision is made for making new entries on the register of births. Witness statements were also provided by three lawyers in the host country with expertise in administrative law, each of whom confirmed, based on their experience and understanding, that birth certificates were required in a number of situations in their host jurisdiction, including when enrolling children in school and when applying for citizenship or a passport for minors. One of those witnesses was cross-examined on her witness statement and confirmed that she had no experience with persons in a witness security program or of the interventions that representatives of the host jurisdiction had made in this case or the interventions which might be possible more generally.

40. The defendants delivered witness statements from several gardaí who had dealings with the plaintiffs prior to their relocation and from one expert witness. Only one of the garda witnesses gave evidence at the hearing. She had been involved in the operation of the witness security program and had dealt with the plaintiffs in the course of her work. It was she who provided the description of the WSP set out above. Her evidence was that she had made clear to the plaintiffs before they relocated that they would not be provided with birth certificates. Her witness statements included details of a conversation with the second plaintiff to this effect in which she says that the second plaintiff was told that, if required to prove identity, the plaintiffs could be provided with their original birth certificates, although a decision to do this would be based on risk

assessment and legitimate need. The witness statement stated that this conversation took place during a scheduled meeting prior to relocation, but the garda witness could not recall exactly when. In cross-examination, counsel for the plaintiffs suggested to the garda witness that this conversation took place *after* relocation and identified a contemporaneous memo of a similar conversation which the garda witness had had with the first plaintiff after relocation. It was suggested that the garda witness had, in effect, misremembered when and with which of the plaintiffs the conversation had taken place. The garda witness denied that she had made any error in her witness statement and said that if she said the same thing in both conversations, it was because the circumstances were the same.

41. The garda witness gave evidence about a practice which had been adopted in the WSP prior to her involvement but of which she was aware. It appears that when the WSP was first established, all state agencies were asked to cooperate in whatever way they could with its operations. On foot of this, it appears that An Garda Síochána were provided with two blank booklets of birth certificates and a blank booklet of marriage certificates by An t-Ard Chláraitheoir. The booklet of marriage certificates was never used, but the booklet of birth certificates contains a small number of certificates which were created in the new names of persons participating in the WSP. The garda witness gave evidence that these were not provided to the WSP participants but were used to show to official agencies, by An Garda Síochána, where required. She referred to them as “flash documents” and made clear that they could not be regarded as valid certificates. There was no suggestion that there was any entry on the register of births corresponding with these flash documents.

42. She was also questioned about internal garda correspondence in which she had indicated that An Garda Síochána considered that it would be “*very beneficial*” to the WSP if legislation was amended so that it became possible to provide amended birth certificates to those participating in the WSP. Reference was also made to internal correspondence, which stated that the issuance of birth certificates in new legally held names would be of “*enormous benefit*” to the operation of the WSP. That letter referred to the situation of the plaintiffs and noted that the absence of certificates might present future issues which “*while not insurmountable, would be lessened considerably if new birth certificate were available therefore providing a further mechanism to sever ties*”

with previous names.” That letter described the absence of a mechanism to issue new certificates as a “*major hurdle*” in the management and operation of the WSP. The garda witness accepted the content of the correspondence but remained of the view that the availability of new or amended certificates would be beneficial but not critical.

43. The defendants also called an expert witness, a person who is the head of the Witness Protection Unit in a small jurisdiction which also operates on a non-statutory basis. He has worked in the field for 25 years. His evidence was that, in his jurisdiction, birth certificates were not part of the “*standard package*” given to protectees and that this didn’t typically give rise to any issues. He indicated that there had been 2 or 3 cases in his 25 years where they had been provided.

Conclusions on evidence

44. In circumstances where the claim is now confined to a constitutional claim, many of the witnesses were not cross-examined on their witness statements as it was unnecessary to resolve the disputes of fact between them. In order to understand and assess the constitutional claim, it is necessary, however, to identify the factual basis upon which the plaintiffs assert that their constitutional rights are infringed.

45. The undisputed evidence is that the absence of birth certificates has created difficulties for the plaintiffs and in particular the third, fourth and fifth plaintiffs, in the host jurisdiction. It is reasonable to infer that this may present further difficulties in the future, including for those plaintiffs when they enter adult life. The expert evidence clearly suggests that birth certificates are required in a variety of circumstances in the host country.

46. However, it is also clear that, to date, difficulties have been overcome thanks to the intercession of the host agency. Again, it is reasonable to infer that any future difficulties which arise can also be overcome in this way. The fact that the plaintiffs have other identity documents for which a birth certificate would normally have been required, *e.g.* passports, seems likely to lessen the impact of not having certificates in their new names.

47. The garda witness suggested that, *in extremis*, the original birth certificates could be produced, where a risk assessment suggested that this was warranted. I accept the second plaintiff's understanding from what she has been told by the host agency has indicated that it never wants to be provided with original documentation, but it seems to me that the operation of the WSP in any jurisdiction likely requires some flexibility in how it functions in order to overcome practical and security issues. This view is consistent with the evidence of the defendants' expert witness. If the absence of a birth or marriage certificate presented some insuperable obstacle to the exercise by the plaintiffs of their rights in the host jurisdiction, *e.g.* their right to access education, then it seems to me that the solution suggested by the defendants is something which would, at least, be considered by the host agency on a case-by-case basis.

48. Insofar as future difficulties can be anticipated, it is also the case that the plaintiffs may never be able to live and operate in the host jurisdiction completely independent of the WSP, irrespective of whether they have new certificates. It is possible that circumstances will arise which may require the host agency or An Garda Síochána to provide assistance. For instance, as suggested by counsel for the defendants and accepted by the second plaintiff, they might be recognised by someone who knows them under their original names. Or, as has already occurred, one of the plaintiffs may wish to return to Ireland for some pressing reason. The plaintiffs' desire to live independently of the WSP and to avoid having to rely on any assistance from An Garda Síochána or the host agency is both understandable and to be admired, but it is, I'm afraid, unrealistic to expect that having entered the WSP in the circumstances which they did that they would ever be in a position to entirely draw a line under their participation in the program, at least while the risk to their lives remains.

49. I accept, without reservation, the evidence of the second plaintiff that she finds the absence of birth and marriage certificates deeply upsetting. It may be that this upset has been exacerbated in circumstances where she had understood that such certificates could and would be provided. In this regard, it is not necessary for me to resolve the dispute as to whether representations were made to the plaintiffs that new certificates would be provided. For completeness, I should say that it seems to me more probable than not that there was no meeting of minds on this issue. The plaintiffs may have always understood that the "full set of documents" which they would obtain would include birth

certificates and a marriage certificate, whereas the garda witnesses likely always understood that these documents wouldn't be provided. Although there was a clear difference in the evidence of the second plaintiff and the garda witness, it seemed to me that both were honest and clear in their evidence and that the differences between them are likely explained by the fallibility in human memory and the lapse of time since the conversations at issue took place. There does not appear to have been any explicit representations by the defendants that new certificates would be provided, rather there seems to have been a number of representations which were capable of being understood as such. I accept the second plaintiff's evidence that she believed that new certificates would be provided. Insofar as the garda witness who was cross-examined on her witness statement gave evidence that a conversation took place *prior* to relocation to the effect that new certificates would not be provided, it seems to me, on the balance of probabilities, that she was, as suggested by counsel for the plaintiffs, simply misremembering when that conversation took place.

50. The evidence does not support an argument that the absence of new certificates imperils the protection afforded to the plaintiffs by their participation in the WSP, and no such claim was advanced by the plaintiffs. The second plaintiff did give evidence that she had heard her family being described by one education official as "*the Irish family without the birth certificates*", but there was no suggestion that the absence of certificates in any way undermined the plaintiffs' status within the WSP.

51. The evidence regarding the use of the blank book of birth certificates in the early years of the operation of the WSP seems to have created something of a red herring in these proceedings. When the plaintiffs learned of this practice, they seemed to have understood that in the past, participants in the WSP were provided with new certificates. That being so, the plaintiffs were perhaps understandably aggrieved that they were not provided with the same facility. However, the evidence made clear that new certificates were never, in fact, provided to protectees. More fundamentally, the plaintiffs did not argue that there was any lawful basis upon which such a certificate could be provided. In those circumstances, while the plaintiffs indicated that an *ad hoc* provision of new certificates would meet their needs, there is no basis upon which the court could direct the defendants to provide documents which would, *prima facie*, be unlawful.

Detailed discussion

Are constitutional rights engaged?

52. The plaintiffs seek declarations that the Civil Registration Act 2004 is unconstitutional because it does not make provision for the issuing of new birth certificates to people in their circumstances. They rely on those cases in which the courts have recognised a duty on the State to correctly record the identity of particular persons in official documents, including birth certificates. Before considering those cases, I think it is important to put the plaintiffs' claim in context and to identify the basis for that claim.

53. The plaintiffs are voluntary participants in the witness security program. They were offered the opportunity to enter that program when the defendants became aware of threats to their lives from members of a criminal gang. Their lives were threatened because of information that the plaintiffs had volunteered to the defendants. The participation in the program was not a *quid pro quo* for the provision of that information.

54. As part of their participation in the WSP, the plaintiffs have been provided with new identities supported by new identity documents. They were required to hand over their existing identity documents, including birth and marriage certificates. They have been relocated to a new jurisdiction, where they have, with financial and other assistance from the defendants, established themselves in new lives. This has, no doubt, been traumatic for the plaintiffs, but these steps were taken by the defendants for the purpose of protecting the plaintiffs' lives. It is not necessary, for present purposes, to decide whether there was an obligation on the State to take the steps that it did in order to protect the plaintiffs' lives. The European Court of Human Rights has recognised that Article 2 of the Convention – the right to life - may impose an obligation to take positive steps to protect life where the authorities are aware of a real and immediate risk to an identified person's life (see, for instance, **Osman v United Kingdom (1998) 29 EHRR 245**). There is no suggestion that the absence of new certificates creates a real and immediate risk to the plaintiffs' lives or that it undermines the steps which have been taken to address the risk to their lives. Although the plaintiffs' counsel argued that the

right to life is at the heart of this case, no claim could be advanced on the basis of Article 2, or the right to life under the Constitution.

55. The plaintiffs claim that, in addition to the steps which the State has already taken, it must establish a system of registration of births and marriages under which they will be able to obtain new certificates in their new names and that the absence of such a system breaches their constitutional rights. The plaintiffs take care in their submissions to argue that the rights for which they contend are of narrow application and apply to their specific, and highly unusual, circumstances. The defendants contend that the constitution protects rights of general application, and the very specificity of the rights claimed by the plaintiffs tends to undermine their argument that they are guaranteed by the Constitution. The defendants refer to the observations of Denham CJ in **Fleming v Ireland** (at p. 448):

[115] In general, the Constitution guarantees rights of general application for the benefit of every citizen and person entitled to assert such rights. The court accordingly does not accept the submission that there exists a constitutional right for a limited class of persons, which in this case would include the appellant, deducible from their particular personal circumstances. While it is clear that the appellant is in a most tragic situation, a court has to find and protect constitutional rights anchored in the Constitution. The appellant relies understandably on her very distressing situation as giving rise to a right in her very particular situation to have assistance in the termination of her life. That reasoning reverses, however, the process of identification of the extent of rights of general application and risks converting the question of the identification of rights and correlative duties into an ad hoc decision on the individual case. It has not generally been the jurisprudence of the Irish Constitution that rights can be identified for a limited group of persons in particular circumstances no matter how tragic and heartrending they may be.

56. They refer to **Burke v Minister for Education** to similar effect. There is some substance to these objections. It is difficult to see how it could plausibly be argued that a constitutional entitlement to new birth and marriage certificates in the circumstances of the plaintiffs could be regarded as a right of general application. Characterised as

such, it is a right which might apply only to these plaintiffs and no, or very few, other persons. I think, however, that the argument somewhat mischaracterises the plaintiffs' claim. The plaintiffs' assert a constitutional right to new certificates in the specific circumstances of their case. The identification of those specific circumstances, or "essential features", as the plaintiffs describe them, is merely an identification of the specific circumstances which see their constitutional rights engaged. The constitutional rights which they say are engaged are the right to protection of the person consistent with the constitutional value of dignity. The claim of an entitlement to new certificates is merely an aspect of what they claim are more general rights.

57. The plaintiffs provided a supplemental submission which included numerous examples of the court's recognition of the constitutional value of dignity. They refer to **Simpson v The Governor of Mountjoy Prison [2020] 3 IR 113**. In that case, MacMenamin J stated as follows (at p. 146):

"The right to privacy and the value of dignity find their focus point in the right of the plaintiff to be protected as a "person" as defined under Article 40.3 of the Constitution. The words "person" or "personal" not only carry with them the ideas of individual privacy and dignity, but additionally the respect due to each individual by virtue of his or her status as a human being."

58. To similar effect, O'Donnell J (as he then was) explained (at p. 122):

"Privacy obviously has a physical element, but also clearly extends beyond it, and it contains aspects of autonomy. When both rights are read as they must be, which is in the light of the value of dignity espoused in the Preamble to the Constitution, it is not difficult to understand why torture, or inhuman or degrading treatment, or indeed severely substandard prison conditions, can be an infringement of the constitutional rights of the individual. The fundamental rights, including the personal rights contained in Article 40, were adopted "so that the dignity and freedom of the individual may be assured" and must be interpreted in that light.

[12] When the Constitution is viewed as a whole, then it seems clear that the guarantee of protection of the person in Article 40.3.2° must mean that, while the

State may lawfully deprive a citizen of liberty in accordance with law, it may not do so by a means which, far from assuring the dignity of the individual, falls below a standard that could be considered minimally acceptable.”

59. In the plaintiffs’ written submissions, they describe the asserted right as being derived from Articles 40.3.1° and 40.3.2° of the Constitution “*as part of the Plaintiffs’ right to inter alia dignity and protection of their personhood*”. In oral argument, it was referred to as a right to identity and to prove identity, and, in this regard, the plaintiffs relied on the decisions in **Caldaras** and **Habte**.

60. In **Caldaras**, the applicant for judicial review had obtained a birth certificate for her daughter in which she had given her own name as Sofia Cirpaci, which she believed was her correct name. However, she subsequently discovered that her own real name was Maria Caldaras, and she had her own identification documents amended to correct this error. However, when she thereafter had difficulty in obtaining a passport for her daughter, she sought to have her daughter’s birth certificate amended. The respondent refused to make the correction. Kearns P stated:

“Without engaging in an unnecessary trawl through submissions filed in respect of personal rights in the context of correct registration, I am satisfied that both a parent and a child have the right to have the correct identity of the parent recorded in a child’s birth certificate. In terms of the Irish Constitution, the “double construction rule” requires that statutory provisions be given an interpretation which allows for the personal rights of individuals to be respected. Furthermore, s. 2 of the European Convention on Human Rights Act, 2003 provides that in interpreting and applying any statutory provision or rule of law a court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.”

* emphasis added

61. Kearns P referred to the decision in **Foy (No. 2)** and, in particular, to the fact that McKechnie J had been unable to interpret the 2004 Act so as to require an amendment to the register, notwithstanding the infringement of Ms Foy’s Article 8 rights:

“However, the issue in the present case is altogether different from that considered by McKechnie J. in the Foy cases. In those cases the Registrar General was entitled, for the purposes of registering a birth, to treat observable biological characteristics of the newborn as determinative of the “sex” part of the entry on the register. The fact that a person might subsequently in adulthood undergo gender reassignment surgery did not render the initial registration of the sex of the individual an “error of fact”. For that reason, McKechnie J. held that the relevant sections of the Civil Registration Act 2004 did not allow for a retrospective amendment of the entry. No such difficulty exists in the present case. The historic fact that the plaintiff in that case had been born with the characteristics of one gender remained, as a historic fact, unchanged and “correct”, even though the individual subsequently underwent gender reassignment surgery.

This is where I believe the Registrar General has fallen into error in the present case. The applicants do not seek to amend the entry so as to reflect any subsequent change in factual circumstances. There has been no such change. The mother’s true name is, and was at all material times, Maria Caldaras. The name recorded on the birth certificate, Sorina Cirpaci, is incorrect. This is so irrespective of whether the mother, at the time of the registration, thought that her name was Sorina Cirpaci. The mother’s mistaken belief cannot change a fact. It was never a “historical fact” that the mother’s name was Sorina Cirpaci.”

62. The plaintiffs also rely on the decisions of both the High Court and the Court of Appeal in **Habte**. In that case, the applicant for judicial review had innocently provided an incorrect date of birth when obtaining a certificate of naturalisation due to some confusion between the Gregorian calendar and that used in Ethiopia, the country of her birth. The Minister refused to amend the certificate when requested to do so. Instead, apparently, it was proposed to revoke the existing certificate. In answering the question, *“does the applicant have a legal or constitutional right to have her identity details*

correctly reflected in official documentation?”, the High Court (Humphreys J) stated as follows:

“43. The right to registration of birth, and implicitly to an accurate registration, is recognised by art. 24(2) of the International Covenant on Civil and Political Rights and art. 7 of the Convention on the Rights of the Child. The fulfilment of that right is obviously closely related to the enjoyment of a series of socio-economic and other rights, as indeed was noted by the UN Human Rights Council on 17th June, 2014 (see Report of the Office of the United Nations High Commissioner for Human Rights, “Birth registration and the right of everyone to recognition everywhere as a person before the law”). Such a right, including the right to have the details of one’s personal identity correctly recorded, must also arise under art. 8 of the ECHR via the European Convention on Human Rights Act 2003 (see European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to the rights of the child (2015), pp. 63-64). The applicant’s rights therefore are at least to some extent in issue here. She must have a right to have her identity correctly recognised by the State. That is so fundamental that it must be recognised as an unenumerated constitutional right. If I can venture a comment that might displease traditionalists, the tussle between schools of thought that prefer a narrow and restrictive reading of unenumerated rights under the Constitution and those (which I would respectfully favour) that prefer a wide reading, particularly in line with international legal norms, is of limited practical relevance because in most situations an applicant can reformulate a claim by reference to the ECHR, the EU Charter, or other domestic or EU law, in such a way as to simply side-step that whole never-ending clash of perspectives. That being so, one wonders in passing why it is such a problem to have a reading of unenumerated constitutional rights that where possible and appropriate aligns with internationally recognised human rights principles.”

* emphasis added

63. The court found that the Minister had the power to revoke and to provide an amended certificate of naturalisation, so concluded that the relevant statutory provisions were not unconstitutional. The Court of Appeal upheld that decision. In her judgment

(Power J) addressed the constitutional argument. She noted the concessions which had been made by the State in that case:

“Citing the Supreme Court decision in Fleming v. Ireland [2013] 2 I.R. 417, the Minister accepted the ‘general proposition’ that there is an unenumerated constitutional right to have one’s identity accurately recorded. Such rights are necessary to ensure the dignity and freedom of the individual and they inhere in the individual personality which constitutes a vital human component of the social, political and moral order posited by the Constitution. The Minister accepted that this would entail a right to have such State documents as are required to live one’s life with dignity, including, a birth certificate and a passport.”

64. She examined the relevant Irish and Convention case law and concluded as follows:

“I am led to conclude that a person’s date of birth is a significant aspect of his or her personal identity and constitutes an important link to his or her family. The right to have one’s date of birth recognised by the State and recorded accurately must fall within that category of rights which are at what McKechnie J describes as ‘the highest level of our legal order’ (O.R. at para. 393). Consequently, I am satisfied that the trial judge did not err in law in finding that personal identity rights are engaged in the process in issue in this case. He was entitled to come to the view that the applicant’s right to have her identity correctly recognised by the State is so fundamental that it must be recognised as an unenumerated constitutional right. He was further entitled to conclude that there exists an implied constitutional onus on the State, arising from the inherent dignity of the individual referred to in the Preamble and the personal rights of the citizen in Article 40.3 of the Constitution, to ‘accurately record and represent central aspects of personal identity’”

65. As the plaintiffs acknowledge in their submissions, shortly after **Habte** was decided, the Supreme Court, in **Friends of the Irish Environment v Government of Ireland** [2020] 2 ILRM 233 indicated that it would be more appropriate to refer to “derived rights” than “unenumerated rights”:

“It is for that reason that I would consider the term “derived rights” as being more appropriate, for it conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. It may stem, for example, from a constitutional value such as dignity when taken in conjunction with other express rights or obligations. It may stem from the democratic nature of the State whose fundamental structures are set out in the Constitution. It may derive from a combination of rights, values and structure. However, it cannot derive simply from judges looking into their hearts and identifying rights which they think should be in the Constitution. It must derive from judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole.”

66. Accepting, as I must, that the decisions in Caldaras, and in particular Habte, correctly identify a constitutional right to have one’s identity correctly recorded and represented, it is appropriate to query from where in the Constitution the right is derived. Clearly, it is informed by the constitutional value of dignity of the individual, but each of Kearns P, Humphreys J and Power J identified that a right to be correctly identified in official documentation is derived from the personal rights protected by Article 40.3 and, in particular, the State’s duty to vindicate the person of every citizen.

67. Have the plaintiffs established that the failure to provide a mechanism in the 2004 Act whereby they can be provided with new certificates in their new names breaches their rights protected by Article 40.3? In my view, they have not. They have not, therefore, identified any lacuna in the legislation. There is, in my view, a fundamental difference between a right to have one’s identity correctly recorded – which is protected by the Constitution – and a right to have a particular record reflect a change in identity effected after that record was made.

68. Insofar as the plaintiffs assert, as they do, that their birth certificates are “foundational documents” which are “core to their identity”, they seek to make birth certificates into something which they are not. True it may be that a birth certificate is used in Ireland and, apparently, the host country as an important document, relevant to identity, and appears to be required for this purpose in the host country in a variety of circumstances, but in no case is it intended as anything other than a document reflecting

the identity of that person at their birth. A birth certificate is a historical record, not an identity document, albeit that it is clear from the case law that having an *accurate* record is fundamental to one's identity and, therefore, personhood.

69. What distinguishes the plaintiffs is that they can't rely on their birth certificates without undermining their protected status. They do have birth certificates which accurately record the circumstances of their birth. In fact, the evidence was that although they have handed over their original birth certificates to the defendants, there is no mechanism by which they can be stopped from obtaining their original certificates from An t-Ard Chláraitheoir. There is, therefore, an accurate record of their identity.

70. What the plaintiffs assert is an entitlement to an *inaccurate* record. In this regard, their case is, if not the opposite of the situation presenting in **Caldaras** and **Habte**, at least entirely distinguishable. In those cases, the official record did not accurately reflect the applicants' identities and the State failed to correct the inaccuracy. In this case, the official record is accurate, and there is no mechanism to provide an official, albeit inaccurate, record, notwithstanding that, in the particular circumstances of this case, it is agreed that it would be beneficial to do so.

71. The plaintiffs' names have been changed. It appears, therefore, that their current identity documents accurately reflect their new names and identities. A new birth or marriage certificate, however, would – to serve the purpose the plaintiffs wish them to serve – necessarily contain much information which was not accurate. A new certificate would have to include the plaintiffs' new names, even though those weren't the plaintiffs' names at birth. It would also likely have to incorrectly record, at least, the place of birth and the names of the parents of each of the plaintiffs.

72. I cannot see how such a record, no matter how beneficial, could be regarded as necessary to vindicate the plaintiffs' personhood. It seems to me that the plaintiffs main reason for seeking to secure such a record, is not because the absence of such a record in their possession *of itself* undermines their personhood, but because it will enable them to operate more effectively in their host country. They do argue, and it can't be gainsaid, that the absence of such a record causes them hardship in the host country, which undermines their dignity. The second plaintiff gave compelling evidence in this respect regarding how she felt having to lie about the reason for the absence of birth certificates.

One can't but have sympathy for her situation, but the stark reality is that the plaintiffs' participation in the WSP means they must necessarily maintain a fabricated history or "legend", as it was referred to in evidence, which will undoubtedly necessitate having to dissemble from time to time. The evidence is that the absence of certificates has caused the second plaintiff to have to lie in particular circumstances, which is no doubt distressing for her, but that does not in my view, elevate the plaintiffs' desire for new certificates, which might reduce the circumstances in which a lie might be required, to a constitutional imperative that those new certificates be provided.

73. There is no evidence that the absence of certificates causes insuperable problems for any of the plaintiffs, still less that they have been deprived of any essential rights. The problems that have arisen have been overcome. It seems probable that the possibility that the absence of certificates will continue to cause problems will lessen over time as the plaintiffs become more firmly established in the host country and, more particularly, in the host country's administrative systems. There is no reason to believe that the intervention of the host agency will not enable the plaintiffs to overcome any problems which might arise. I cannot see that the requirement to call on the assistance of the host agency if any such problem does arise could be said to infringe any constitutionally protected right. The plaintiffs, understandably, want to live as normal a life as possible and would like to be able to get on with their lives in the same way that any person not in a witness security program would. But the plaintiffs are not in the same position as every other person, they are in WSP due to a continuing risk to their life and safety. The defendants have taken significant steps to address that risk. It is not necessary for the State to address that risk in a way that obviates the possibility of the plaintiffs' facing administrative difficulties or having to request assistance to deal with them, which would not be faced by those who are not participating in such a program.

74. It is worth observing that, insofar as the absence of a particular document causes the plaintiffs difficulty in the future, it is a difficulty which would occur because of the requirement of the host country on possession of a birth certificate for certain purposes. This wasn't a point pressed by the defendants with particular vigour at the hearing, but it seems to me that there is significant force in the argument that if that were to arise, the plaintiffs' complaint would be with the host country's insistence on a particular

historical record which, for good reason, they were not able to provide and not the State's maintenance of those records.

75. In addition to Article 40.3, the plaintiffs relied on Article 42A in respect of the minor plaintiffs, and also Article 40.1. They argued that the court should adopt a harmonious interpretation of the Constitution. The Article 40.1 argument can be disposed of readily. The plaintiffs are treated the same as everyone else. No one is entitled to a birth certificate which does not accurately record the circumstances of their birth. Insofar as the plaintiffs argue that there is discrimination in that they are not treated differently from other persons from whom they, in fact, differ, any purported difference between the plaintiffs and persons not in a witness protection scheme is not a difference based on any aspect of human personality (see **Burke v Minister for Education** at p. 117) and, therefore, not a difference which the constitutional guarantee of equality requires to be catered for in legislation.

76. The plaintiffs called in aid Article 42A without advancing any particular argument by reference thereto. It is fair to say, however, that the case as a whole was advanced with a particular focus on the impact that the absence of new certificates would have on the minor plaintiffs. One of the particularly unfortunate aspects of the plaintiffs' situation is that the minor plaintiffs have had to enter the WSP and have had their identities changed but are likely unaware of that fact. The challenges facing the first and second plaintiffs as parents in years to come may be significant. I accept that new certificates may present the parents with more options in how they decide to address their families' history with the children in future, but that does not, in my view, create an entitlement to such certificates.

77. The foregoing discussion has focussed on the absence of birth certificates in the plaintiffs' new names but applies, if anything with greater force, to the absence of a marriage certificate. As with birth certificates, there is an accurate record of the first and second plaintiffs' marriage, albeit that the plaintiffs cannot, without risking their protected status, obtain copies of that certificate. The plaintiffs did not identify any difficulty which the absence of the certificate might pose for them in the host country. In the circumstances, I do not think that the facts disclose any infringement of their constitutionally protected rights.

78. In the circumstances, I am not satisfied that the plaintiffs have shown that the fact that they cannot obtain new certificates in their new names breaches their constitutional rights or that the 2004 Act, the terms of which do not enable such certificates to be issued, contain a constitutional lacuna.

79. In circumstances where I have concluded that there is no constitutional right which has been engaged, still less breached, it is not, strictly speaking, necessary to consider the question of proportionality. However, lest I am wrong about whether such rights are engaged, I think it is appropriate to address the question of whether any interference by the 2004 Act with constitutional rights is proportionate in the pursuit of a legitimate aim of the State.

80. I accept that the State *could* amend the 2004 Act to introduce a system whereby some form of new certificate could be obtained by persons in the plaintiffs' position. The plaintiffs presented evidence of other jurisdictions in which that state's witness protection scheme had been placed on a legislative basis, which legislation allows for the creation of new entries in that state's register of births. The defendants' expert accepted that best practice guidance is that witness protection schemes should be placed on a statutory basis. It seems to me that some of the difficulties which arose in the plaintiffs' case might have been avoided if the WSP here was on a statutory basis and there was more visibility about what the program involved. The defendants' garda witness accepted that a legislative scheme which allowed for new certificates would be beneficial.

81. The fact that it can be done and that there would be, at least, some benefits to so doing does not, of course, mean that it must be done. The question is whether any interference with the rights of the plaintiffs in not having such a system meets the proportionality test identified in **Heaney v Ireland [1994] 3 IR 593**:

“The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible;

(c) be such that their effects on rights are proportional to the objective ...”

82. The plaintiffs argue that the defendants haven't offered any evidence regarding the need to maintain the system as it is, which could be weighed in the balance against the infringement of their constitutional rights. It is clear from the authorities that a **Heaney**-type assessment does not always require evidence in defence of legislation and that the courts can carry out an assessment based on the legislation itself. In this case, the importance of the registers maintained pursuant to the 2004 Act as historical records has already been identified by the courts in **Foy (No. 1)** in the passage quoted above.

83. Although I accept that the legislation could be framed in a way which accommodated the plaintiffs' situation, this would likely impose a not insignificant administrative burden on the State and would somewhat diminish the status that the registers created under the 2004 Act have as historical documents, a purpose which, for instance, the correction of errors in those records, in fact, serves to reinforce.

84. I am also satisfied that, on the evidence to date, if there were any infringement of the plaintiffs' rights, that infringement could only be regarded as slight. First, any such infringement would have to be seen in its correct context, as arising as a consequence of the very significant steps taken by the State to vindicate the plaintiffs' right to life, which steps inevitably attract certain adverse consequences for the plaintiffs. Moreover, the plaintiffs were not compelled to participate in the WSP. Second, the infringement has not created any insuperable difficulties to date. And third, the State has taken steps, by putting in place a system of cooperation with the host agency to ameliorate any difficulties which have occurred or may occur in the future.

85. Accordingly, I think that even if there were any interference with the plaintiffs' rights, that interference should be regarded as being proportionate to the legitimate aims of the State. Put otherwise, I think that it would be *disproportionate* to insist that the

State amend its system of registration of births and marriages in order to reduce the level of any interference with the plaintiffs' constitutional rights necessitated by their participation in the WSP. That should not be taken as a discouragement to the State to place its witness protection program on a statutory basis, the advantage of which I have already identified. That, however, is not something which these plaintiffs can demand or this court can direct.

European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”)

86. The plaintiffs' legal submissions deal separately with the question of breach of Convention rights. The plaintiffs argue that the State's failure to have a statutory regime capable of delivering an effective new identity to the plaintiffs in the form of new certificates is incompatible with various rights guaranteed by the Convention, in particular, Article 8 of the Convention, the right to respect for private and family life. They seek a declaration pursuant to section 5 of the European Convention on Human Rights Act 2003 (“**the 2003 Act**”). They rely on Convention case law regarding the recognition of transgender persons. It doesn't seem to me that the cases relied on are remotely analogous to the plaintiffs' case, and I am satisfied that the plaintiffs have not established any entitlement to a declaration pursuant to the 2003 Act.

87. In **Goodwin v United Kingdom**, the Court found that the United Kingdom had breached the applicant's Article 8 rights in circumstances where, for a variety of official purposes, she continued to be regarded as male – the sex recorded on her birth certificate – notwithstanding that, she had undergone gender reassignment surgery. The decision in **Goodwin** was pivotal in the High Court's decision in **Foy (No. 2)**, in which the court made a declaration pursuant to section 5 of the 2003 Act that the provisions of the 2004 Act breached Mrs Foy's Article 8 rights. As stated by McKechnie J, in light of **Goodwin**, the applicant's desire to have her acquired gender legally recognised constituted a right under Article 8. The Court concluded that the absence of any provision enabling the acquired identity of the applicant to be legally recognised was in breach of the State's Article 8 obligations. The Court identified that the State enjoyed a significant margin of appreciation as to how to vindicate the applicant's rights.

88. The plaintiffs also refer to *X and Y v Romania*, nos. 2145/16 and 20607/16, 19 January 2021, in which the Court found a breach of Article 8 where the State refused to amend identity papers following gender reassignment, and *Y v Poland*, no. 74131/14, 17 February 2022, where no violation was found despite the State's refusal to amend a birth certificate:

“78. The Court further observes that the applicant later lawfully married K. and continues to live in society as a male person (see paragraphs 7 and 8 above). While the applicant's full birth certificate includes a marginal annotation about the gender reassignment, the short extract of the birth certificate indicates only his new name and reassigned gender. In nearly all everyday situations the applicant is able to establish his identity by means of identification documents or the short extract of the birth certificate (see paragraphs 26, 27 and 66 above). The Court acknowledges the applicant's feelings that the marginal annotation to his birth certificate is demeaning and causes him mental suffering (see paragraph 63 above and compare Christine Goodwin, cited above, § 77). However, it does not appear that in his daily life the applicant is required to reveal these intimate details of his private life and that the inconveniences complained of are sufficiently serious.

79. Furthermore, as is apparent from domestic law and as submitted by the parties, full birth records are not publicly accessible. Only a limited number of persons and entities may access the register of births and obtain full copies of birth certificates (see paragraph 25 above). In addition, the applicant himself would seldom be required to provide a full copy of the birth certificate (in relation to proceedings for adoption, application for citizenship elsewhere, possibly in the context of criminal proceedings; see paragraph 26 above). In this connection, the Court is mindful of the historical nature of the birth record system and that, in view of the public interest, reference to the gender assigned at birth, might, in certain situations, be necessary to prove certain facts predating the sex reassignment, even though this could cause the person concerned to experience some distress.

80. Notwithstanding all the above considerations, the Court finds that the applicant did not demonstrate that he had suffered any sufficiently serious negative consequences or difficulties resulting from the fact that the sex assigned at birth is

still visible in the form of an annotation on his full birth certificate. He failed to provide any details that he had been affected by that situation and to what extent.”

89. Reference was also made to *Ciubotaru v Moldova*, no. 271138/04, 27 April 2010, in which the Court found a breach of Article 8 by reason of the State’s failure to recognise the applicant’s ethnicity. The plaintiffs refer, in particular, to the Court’s observation (at para. 53) that:

“As noted above, along with such aspects as name, gender, religion and sexual orientation, an individual's ethnic identity constitutes an essential aspect of his or her private life and identity.”

90. It seems to me that the rights protected by the Convention under Article 8 closely mirror those identified in Caldaras and Habte as being protected by Article 40.3 of the Constitution. Having concluded that there is no breach of the plaintiffs’ constitutional rights, I am bound to conclude that there is no interference with their Convention rights – where their new identity is recognised by the State in a variety of official records, they have no entitlement to birth or marriage certificates which contain inaccurate information in order for the State to fully respect their private and family lives. The State’s system for recognising the identity of persons who participate within the WSP is well within the State’s margin of appreciation.

Charter of Fundamental Rights of the European Union

91. Although separate pleas were advanced in relation to the Charter, the plaintiffs did not identify any basis for contending that they had rights protected under the Charter other than those said to be protected by the Constitution and the Convention. The plaintiffs rely on Sayn-Wittgenstein, but it is clear that the EU Court was concerned with the protection of the same entitlements – to respect for private and family life:

“52. It must be noted as a preliminary point that a person’s name is a constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the Charter of Fundamental Rights of the European Union and in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Even though Article 8 of that convention does not refer to

it explicitly, a person's name, as a means of personal identification and a link to a family, none the less concerns his or her private and family life (see, inter alia, European Court of Human Rights judgments Burghartz v. Switzerland of 22 February 1994, Series A No 280-B, p. 28, § 24, and Stjerna v. Finland of 25 November 1994, Series A No 299-B, p. 60, § 37)."

92. The claim pursuant to the Charter, therefore, adds nothing to the plaintiffs' case and must be rejected.

Conclusion

93. For the foregoing reasons, I have concluded that there has been no infringement of any constitutional, Convention or Charter right enjoyed by the plaintiffs. In failing to provide a mechanism for the provision of new certificates in the plaintiffs' new names, the Civil Registration Act 2004 does not fail to vindicate the plaintiffs' rights and does not contain any constitutional lacuna.

94. Even if there were any interference with the plaintiffs' rights, having regard to the circumstances in which that interference takes place, of positive steps being taken by the defendants to protect the plaintiffs' lives, and the other steps taken to vindicate their rights to personhood, consistent with the constitutional value of dignity, and having regard to the legitimate aim of the State in maintaining the registers created pursuant to the 2004 as historical records, any such interference would be regarded as proportionate to that aim and would not, therefore, amount to an impermissible interference with constitutional, Convention or Charter rights.

95. I therefore dismiss the plaintiffs' claim.